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A TREATISE  
ON THE LAW OF  
TELEGRAPH AND TELEPHONE  
COMPANIES

INCLUDING ELECTRIC LAW

SECOND EDITION

BY

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## PREFACE TO THE SECOND EDITION

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IN PREPARING this book for a second edition, it has been my purpose to follow out the plan and scope of the original work, and to present an exhaustive treatise of the law upon every point relating to telegraph and telephone companies. Many new sections have been added, some revisions have been made in the original sections, and some minor changes have been made in the arrangement of the latter. The footnotes have been greatly enlarged, and in these all the important cases on the subject have been cited. I have discussed the subject of electric law in so far as the construction and maintenance of electrical wires were concerned, and in so far as the general duties and liabilities of electric companies to the public were applicable and where the same had any connection or relation with or to the main subject of this work. In conclusion, I desire to thank the bench and bar for the favorable approval accorded the first edition. The decisions quoting and citing the original text have been very helpful in the preparation of this second edition.

S. W. J.

MEMPHIS, TENN., OCTOBER, 1916.

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# THE LAW OF TELEGRAPH AND TELEPHONE COMPANIES

SECOND EDITION

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## CHAPTER I

### GENERAL NATURE OF TELEGRAPH AND TELEPHONE COMPANIES

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§ 1. **Definition of telegraph.**—There have been many definitions given for the word, “telegraph,” and the reader must consult his own judgment as to the correctness of each. Some of the writers define it as, “an instrument or apparatus, which by means of iron wires, conducting the electric fluid, conveys intelligence to any given distance with the velocity of lightning,”<sup>1</sup> or, “a machine for communicating intelligence from a distance by various signals or

<sup>1</sup> Webster's Int. Dic.

movements previously agreed on, which signals represent letters, words, and ideas, which can be transmitted from one station to another as far as the signals can be seen,"<sup>2</sup> or, "public vehicles of intelligence."<sup>3</sup> These, and other definitions,<sup>4</sup> seem to contain too much irrelevant matter. For instance, it is not necessary to enumerate the different parts which make up and constitute the machines and apparatus by means of which messages are sent; because there are so many improvements being made daily on these machines that, in the course of time so many additional improvements may be made as not to permit them to fall within the definition now given. A definition of anything should be sufficiently comprehensive to cover the subject for all times to come. We think that the following will meet all of these requirements; not only will it comprehend and cover every part of the different machines which does or shall constitute the entire apparatus, but it will be full enough to take in all the different means by which intelligence is communicated:

*It is an apparatus or process by means of which intelligence is transmitted, either by signals or sounds to points beyond the limit of ordinary audibility.* There are different machines which, put together, constitute this apparatus or means through which communications are made. For instance there is a battery, or other sources of electric power; a line wire or conductor for conveying the electric current from one station to another; the apparatus for transmitting, interrupting, and if necessary, reversing the electric cur-

<sup>2</sup> Webster's Int. Dic.

<sup>3</sup> Fire Insurance Association of England v. Merchants' & Miners' Trans. Co., 66 Md. 339, 7 Atl. 905, 59 Am. Rep. 162. "The word 'telegraph' is now generally understood as referring to the entire system of appliances used in the transmission of telegraphic messages by electricity, consisting of: (1) a battery or other source of electric power; (2) a line wire or conductor for conveying the electric current from one to another; (3) the apparatus for transmitting, interrupting, and, if necessary, reversing, the electric current at pleasure; and (4) the indicator, or signaling instrument." See Imperial Dic.; Hockett v. State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 210; Chesapeake, etc., Tel. Co. v. Baltimore, etc., Tel. Co., 66 Md. 399, 59 Am. Rep. 167, 7 Atl. 809. See, also, Atty. Gen. v. Edison Tel. Co., 6 Q. B. D. 248. Telegraph line or system, as used in ordinary statutes, will not embrace a distinct telegraph system. See Toledo v. West. U. Tel. Co., 107 Fed. 10, 46 C. C. A. 111, 52 L. R. A. 730.

<sup>4</sup> Central Union Tel. Co. v. Falley, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; volume 6, Century Dict. p. 6213; Standard Dict. p. 1850; Webster's Unabridged Dict. p. 1359; 23 Ency. Brittan. (9th Ed.); Davis v. Pac. Tel. & Tel. Co., 127 Cal. 312, 57 Pac. 764, 59 Pac. 698; Chesapeake, etc., Tel., Co. v. Baltimore, etc., Tel. Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; Tel. Co. v. Hill, 163 Ala. 18, 50 South. 248, 23 L. R. A. 648, 19 Ann. Cas. 1058.

rent at pleasure; and the indicator, or signal instrument.<sup>5</sup> There are different means by which intelligence is transmitted; as by telephone; by the telegraph, which may be either by a line wire or without any wire at all<sup>6</sup>—or wireless telegraph; and by means of the speaking tube. The several apparatus may be quite different in their construction but by means of each the same object is accomplished. They all convey intelligence either by signals, by letters or by sounds, or by the voice transmitted beyond the limit of ordinary natural sight or audibility; the last part of this definition may have the tendency to exclude therefrom the speaking tube. While the last-named device is, strictly speaking, a telephone under its generic term, yet it will hardly be so considered in a special way and will not be thus understood under the present discussion; since in the recent improvements in telephonic instruments, the telephone is technically and primarily restricted to an instrument or device which transmits sound by means of electricity and by wires similar to telegraphic wires.<sup>7</sup>

§ 2. **Wireless telegraph defined.**—Progress in the branch of electric telegraphy usually called “wireless” has been so very rapid that many of the technical terms used have not yet had definite meanings attached to them. To begin with, the term “wireless” itself is used vaguely to cover many systems of totally different kinds which have in common only the fact that no insulated conductor joins the sending and receiving stations. The use of the word is no doubt correct, but it leaves undefined the type of apparatus and method of transmission. Generally speaking, the definition of a telegraph given in the last section will embrace a wireless telegraph; but,

<sup>5</sup> *Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 210.

<sup>6</sup> “The result of the definition seems to be that any apparatus for transmitting messages by electric signals is a telegraph, whether a wire is used or not, and that any apparatus of which a wire used for telegraphic communication is an essential part is a telegraph, whether the communication is made by electricity or not. It would include on the one hand electric signals made, if such a thing were possible, from place to place through the earth or air, and, on the other, a set of common bells worked by wires pulled by the hand if they were so arranged as to constitute a code of signals.” *Atty. Gen. v. Edison Tel. Co.*, 6 Q. B. D. 244, 50 L. J. Q. B. 145, 43 L. T. Rep. (N. S.) 697, 29 Wkly. Rep. 428.

<sup>7</sup> See *Davis v. Pac. Tel., etc., Co.*, 127 Cal. 312, 57 Pac. 764, 59 Pac. 698; *Chesapeake, etc., Tel. Co., v. Baltimore, etc., Tel. Co.*, 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; *McLeod v. Pac. Tel. Co.*, 52 Or. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. (N. S.) 810, 18 L. R. A. (N. S.) 954, 16 Am. Cas. 1239; *Com. v. Pennsylvania Tel. Co.*, 18 Phila. (Pa.) 588; *Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 210; *Atty. Gen. v. Edison Tel. Co.*, 6 Q. B. D. 244, 50 L. J. Q. B. 145, 43 L. T. Rep. (N. S.) 697, 29 Wkly. Rep. 428.

considering the subject more specifically, it means the *transmission of signals through space by means of electro-magnetic waves*.<sup>8</sup> Much has been written about the scientific methods or means through which such communications are carried on, which is of little importance so far as the law applicable thereto is concerned, but there has been little, if any, reported judicial decisions on the subject. Therefore that which may be hereinafter said regarding such means of communications shall be based upon almost an entirely new field of legal jurisprudence.

§ 3. **Submarine telegraph or cable defined.**—A submarine telegraph or cable is a telegraph line or wire inclosed in an insulating or protecting material impervious to water, and laid under any body of water for the purpose of connecting stations separated thereby and of establishing telegraphic connections between them.<sup>9</sup>

§ 4. **Telegraphy.**—Telegraphy has been defined as the transaction of business over or through wires.<sup>10</sup> Clearly it seems that this term would embrace such business as may be carried on by the wireless system.

§ 5. **Telegram.**—A telegram is any writing, communication, intelligence, or message transmitted or intended to be transmitted by telegraph,<sup>11</sup> or by telephone,<sup>12</sup> or by wireless telegraph. Telegram, telegraphic dispatch or communication are synonymous terms,<sup>13</sup> and, when either is used in statutes, the others are usually included.

§ 6. **Telegraph stations.**—"Telegraph stations" are the ordinary offices for the business of telegraphy along the lines of telegraph.<sup>14</sup>

§ 7. **Telephone defined.**—In a general sense the definition of "telephone" is embraced in that given for "telegraph";<sup>15</sup> but since the recent discoveries in telephony the name is technically and

<sup>8</sup> "The transmission of signals between points not connected by electrical conductors; specifically, the transmission of signals through space by means of electric waves." Century Dict. For the different systems described, see Nat. Elect. Signaling Co. v. De Forest (C. C.) 140 Fed. 449; Marconi Wireless Tel. Co. v. De Forest Wireless Tel. Co. (C. C.) 138 Fed. 675.

<sup>9</sup> Webster's Unab. Dict. p. 1359; 1 Century Dict. p. 748; Standard Dict. p. 261.

<sup>10</sup> York Tel. Co. v. Keesey, 5 Pa. Dist. 366.

<sup>11</sup> Volume 6, Century Dict. p. 6213; Standard Dict. p. 1850; Web. Unab. p. 1359; Anderson L. Dict.; Black L. Dict.; Tel. Co. v. Hill, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058.

<sup>12</sup> Atty. Gen. v. Edison Tel. Co., 6 Q. B. D. 244, 50 L. J. Q. B. 145, 43 L. T. Rep. (N. S.) 697, 29 Wkly. Rep. 428, construing the English Telegraph Act of 1869, 32 & 33 Vict. c. 73.

<sup>13</sup> Volume 6, Century Dict. p. 6213; Standard Dict. p. 1850.

<sup>14</sup> West. Union Tel. Co. v. Marietta, etc., R. Co., 38 Ohio St. 24.

<sup>15</sup> See § 1.



primarily restricted to an instrument or device which transmits or reproduces sound by means of electricity and wires similar to telegraphic wires.<sup>16</sup> Its exact meaning may vary according to the sense in which it is used,<sup>17</sup> that is it may refer generally to the art of telephony as an institution,<sup>18</sup> or more particularly to the apparatus used in communicating the messages,<sup>19</sup> and in the latter case refer either to a particular instrument,<sup>20</sup> or to the entire system of appliances used in the transmission of telephonic messages.<sup>21</sup>

**§ 8. Telephone exchange.**—A telephone exchange is some central office to which wires of a certain area converge, and there connected to switchboards, thereby enabling the operators to connect individual hirers of telephones within that area with others so that they may converse with each other.<sup>22</sup> Under some late devices the connection of wires in that area is done by some automatic arrangement operated by the hirer himself at his receiver, but, nevertheless, there must be an exchange office for the connection or switching of the wires.

**§ 9. Line.**—The term "line" has been defined as a wire connecting one telegraphic station with another, or the whole system of telegraph wires under one management and name.<sup>23</sup> As applied to telegraph and telephone lines, the term has, however, both a popular and a technical meaning, and in a statute will be construed according to what appears to have been the intention of the legislature.<sup>24</sup>

**§ 10. Wireless telephony.**—The term "Wireless telephony" means the transmission of human speech to great distances without

<sup>16</sup> *Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; *Doty v. American Tel., etc., Co.*, 123 Tenn. 329, 130 S. W. 1053, Ann. Cas. 1912C, 167.

<sup>17</sup> *Charles Simons' Sons Co. v. Maryland Tel., etc., Co.*, 99 Md. 141, 57 Atl. 193, 63 L. R. A. 727.

<sup>18</sup> *Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201.

<sup>19</sup> *Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201.

<sup>20</sup> *Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; *Tel., etc., Co. v. Amarillo (Tex. Civ. App.)* 142 S. W. 638.

<sup>21</sup> *Central Union Tel. Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721; *Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201.

<sup>22</sup> *West. Union Tel. Co. v. American Bell Tel. Co. (C. C.)* 105 Fed. 684.

<sup>23</sup> *Southern Bell Tel., etc., Co. v. D'Alemberte*, 39 Fla. 25, 21 South. 570, quoting Webster Intern. Dict.

<sup>24</sup> *Southern Bell Tel., etc., Co. v. D'Alemberte*, 39 Fla. 25, 21 South. 570, holding that in determining the length of a telephone "line" for the purpose of ascertaining the amount of a license tax, the "line" should be construed as made up of the different wires leading to the instruments of the different individual subscribers, and not in the sense of a line of poles and the wires suspended thereon, without regard to the number of such wires.

the use of a connecting wire between the sending and receiving stations. In the simplest case the air serves as carrier of the sound waves, while the voice of the speaker is the transmitter, and the ear of the hearer the receiver. This is the more specific meaning of the term, but, generally, the definition given for telegraph will embrace the wireless telephone.<sup>25</sup>

**§ 11. Distinction between telegraph and telephone companies—similarities.**—In preparing a work in which two different subjects are to be treated as nearly as possible as being one and the same, it may be proper at the outset to draw and set forth the distinguishing features between the two in order to determine the application of the law to each. Therefore in applying the rule generally it will be our purpose to apply it specifically by attempting to briefly state the similarities and dissimilarities between telephone and telegraph companies as they are being discussed under one title. In almost every respect these companies are very similar, if not identical, with respect to their construction.<sup>26</sup> Each of them must erect its posts or poles and upon the tops of these attach its lines of wires from point to point, when it is not otherwise provided that they are to be placed under the surface. Each must have offices or connecting exchanges with operators or employés thereat. Each must almost necessarily enter upon, along, or across public roads, highways, streams, bodies of water and upon lands of individuals for the purposes mentioned.<sup>27</sup> In this respect they are identical, and the same law—common and statutory—applies to both.

**§ 12. Same continued—dissimilarities.**—While the object of these two companies is to accomplish the same purpose—the transmission of intelligence from place to place by means of electricity<sup>28</sup>—the manner in which this object is accomplished is not the same, and this is wherein they are materially different,<sup>29</sup> and this, too, to

<sup>25</sup> § 1.

<sup>26</sup> *Northwestern Tel. Exch. Co. v. Chicago, etc., R. Co.*, 76 Minn. 334, 79 N. W. 315; *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828; *State v. Central New Jersey Tel. Co.*, 53 N. J. Law, 341, 21 Atl. 460, 11 L. R. A. 664.

<sup>27</sup> *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828.

<sup>28</sup> *Northwestern Tel. Exch. Co. v. Chicago, etc., R. Co.*, 76 Minn. 334, 79 N. W. 315; *State v. Central New Jersey Tel. Co.*, 53 N. J. Law, 341, 21 Atl. 460, 11 L. R. A. 664; *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828; *Com. v. Pennsylvania Tel. Co.*, 18 Phila. (Pa.) 588.

<sup>29</sup> *Central Union Tel. Co. v. State*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; *Home Tel. Co. v. Nashville*, 118 Tenn. 1, 101 S. W. 770, 11 Ann. Cas. 824; *Northwestern Tel. Exch. Co. v. Chicago, etc., R. Co.*, 76 Minn. 334, 79 N. W. 315.

a certain extent with respect to the application of the law to the two. In order to be able to transmit news intelligently over telegraph lines, there must be some one skilled in telegraphy to operate the telegraphic instruments and machines.<sup>30</sup> It requires much time and experience for a person to become familiar with the science and art of telegraphy so as to be able to control successfully and promptly, the amount of news necessarily and naturally carried on by these companies; while, on the other hand, any one without experience can converse with easy understanding over a telephone line where the connections are properly made.<sup>31</sup> There may be instances where the telephone could not take the place of the telegraph, but as a general thing they will be more convenient and of less expense than the latter. Almost all the commercial business, especially in large cities, is carried on over telephone lines. Men of all professions and vocations of life may and do have their offices and business houses supplied with telephone facilities. When they have good connections at the exchanges it is no trouble to transact any kind of business over the telephone lines; but to have the same connections with telegraph lines would necessitate all the patrons having skilled telegraph operators both to receive and transmit their business messages.

**§ 13. Same continued—liabilities of one greater than the other.** It is further true that on account of the different methods by which the communication of intelligence is made, liabilities for the negligent transmission of a message is not so liable to arise in one as in the other. Messages sent by a telegraph company are communicated, not directly by the parties themselves, but by third parties; or, more strictly and correctly speaking, by operators who are presumed to be skilled in their business as employés of the company. On the other hand, all that is required of the operators or employés of a telephone company, is to give proper connection and similar accommodations to all who apply to them. Then, with respect to the accuracy of the message, the parties themselves can hold none save themselves liable. They come in direct contact and can converse with each other with the same distinct and clear understanding as if they were not only together in voice but in per-

<sup>30</sup> Central Union Tel. Co. v. State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; Northwestern Tel. Exch. Co. v. Chicago, etc., R. Co., 76 Minn. 334, 79 N. W. 315.

<sup>31</sup> Northwestern Tel. Exch. Co. v. Chicago, etc., R. Co., 76 Minn. 334, 79 N. W. 315; Central Union Tel. Co. v. State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; Atty. Gen. v. Edison Tel. Co., 6 Q. B. D. 244, 50 L. J. Q. B. 145, 43 L. T. Rep. (N. S.) 697, 29 Wkly. Rep. 428.



son; and errors out of which actions might otherwise arise, should it have been made in a telegram, may be easily corrected by the parties themselves. To this extent telephone companies are not subjected to the same liabilities with which telegraph companies are most often confronted. It is true that the telephone companies stand in the same relation to those who are carrying on communications over their lines as that of telegraph companies, and the same law is applicable to both, but the distinction desired to be drawn and the apparent difference and misunderstanding of the law applicable thereto arises from the two methods by which the communications are made. While in one the liability of the company which would be caused by the negligence of the employé in the transmission of the message might be avoided by the other on the ground that the negligence was not that of the company but the patrons themselves.

§ 13a. **Telegraph in statutes—embrace telephone.**—The science of telegraphy was very generally used long prior to the invention of the telephone. Statutes had been enacted in which certain rights and privileges had been granted and duties and obligations imposed on these companies without any reference to any other mode of communication of intelligence by means of electricity, save that by telegraph. To be sure, it would have been impossible to have made references to something which was not in existence. This being the case, the question which puzzled the courts at the time when telephones first began to be used to any extent was, How such statutes should be construed? Could such statutes which mentioned only the name “telegraph” embrace and have reference to “telephones”? By determining this question, by reason of which the proper construction may have been placed on these statutes, the definition of telephone would and should have taken a conspicuous part. Under our definition, it would most assuredly have been comprehended and embraced under the name of telegraph; which, as Mr. Anderson very wisely says, includes any apparatus for transmitting messages or other communications by means of electrical signals,<sup>32</sup> although such companies are not specifically mentioned therein,<sup>33</sup> or known at the time the act was passed.<sup>34</sup>

<sup>32</sup> Anderson's Law Dictionary.

<sup>33</sup> *Roberts v. Wisconsin Tel. Co.*, 77 Wis. 589, 46 N. W. 800, 20 Am. St.

<sup>34</sup> *New Orleans, etc., R. Co. v. Southern, etc., Tel. Co.*, 53 Ala. 211; *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278n; *Atty. Gen. v. Edison Tel. Co.*, 6 Q. B. D. 244, 20 Moak, 602. Compare *Richmond v. Southern Bell Tel., etc., Co.*, 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162.

§ 14. **Same continued—reason.**—It has been held by most of the courts, if not all, that where a statute imposes certain rights, duties, and obligations on telegraph companies—expressly mentioning these companies without reference to any other mode of communication—the same embraces telephone companies as well,<sup>35</sup> unless there are other special controlling conditions which would produce a different result.<sup>36</sup> It is true that the methods by which the intelligence is transmitted by the telegraph and telephone companies are somewhat different, yet there is quite a similarity between the two. For instance it is necessary for them both to have wires over which the transmission is to be made, and which are similarly supported; they both use batteries for the production of electric currents necessary for conveying the signals and sounds; and they both exercise the right of eminent domain for the purpose of constructing their line of wires, along which the similarities of the two are identical, and if it were not for the fact that we could examine the terminals of the two lines, we could not distinguish one from the other. They are performing the same duties toward the public; and, while the one was not mentioned nor even contemplated at the time these statutes were enacted, yet this is no reason why the lawmakers did not then intend to incorporate and comprehend therein all the improved methods which might thereafter be made for transmitting

Rep. 144; *Wis. Tel. Co. v. City of Oshkosh*, 62 Wis. 32, 21 N. W. 828; *Cumberland Tel., etc., Co. v. United Electric Co. (C. C.)* 42 Fed. 273, 12 L. R. A. 544; *Davis v. Pacific Tel., etc., Co.*, 127 Cal. 312, 57 Pac. 764, 59 Pac. 698; *Chesapeake, etc., Tel. Co. v. Baltimore, etc., Tel. Co.*, 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278n; *Roake v. American Tel., etc., Co.*, 41 N. J. Eq. 35, 2 Atl. 619; *Duke v. Central New Jersey Tel. Co.*, 53 N. J. Law, 341, 21 Atl. 460, 11 L. R. A. 664; *New York, etc., Tel. Co. v. Bound Brook*, 66 N. J. Law, 168, 48 Atl. 1022; *Bell Tel. Co. v. Com. (Pa.)* 3 Atl. 825; *Taggart v. Interstate Tel. Co.*, 16 Montg. Co. Law Repr. (Pa.) 155.

<sup>35</sup> *Davis v. Pacific Tel., etc., Co.*, 127 Cal. 312, 57 Pac. 764, 59 Pac. 698; *Cincinnati Inclined Plane R. Co. v. Telegraph Ass'n*, 48 Ohio St. 390, 27 N. E. 890, 29 Am. St. Rep. 559, 12 L. R. A. 534; *San Antonio, etc., R. Co. v. Southwestern Tel., etc., Co.*, 93 Tex. 313, 55 S. W. 117, 77 Am. St. Rep. 884, 49 L. R. A. 459; *Texarkana v. Southwestern Tel., etc., Co.*, 48 Tex. Civ. App. 16, 106 S. W. 915; *Wray v. Mott*, 83 N. J. Law, 110, 83 Atl. 866; *Southwestern Tel., etc., Co. v. Gulf, etc., R. Co. (Tex. Civ. App.)* 52 S. W. 106; *Gulf, etc., R. Co. v. Southwestern Tel., etc., Co.*, 18 Tex. Civ. App. 500, 45 S. W. 151; *Atty. Gen. v. Edison Tel. Co.*, 6 Q. B. D. 244, 50 L. J. Q. B. 145, 43 L. T. Rep. (N. S.) 697, 29 Wkly. Rep. 428; *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828.

<sup>36</sup> *Northwestern Tel. Exch. Co. v. Chicago, etc., R. Co.*, 76 Minn. 334, 79 N. W. 315.



messages over telegraph lines.<sup>37</sup> The telephone is but a novel method to accomplish the object for which the telegraph was used. It is the introduction of a new device, recently discovered, by means of which an improvement has been made in the transmission of sound—an improvement in the apparatus so as to change the transmission of the signals or sounds to that of the voice, by causing electrical undulations similar in form to the vibration of air accompanying the vocal sounds. It is not presumed that it was the purpose of the body of lawmakers to enact laws which should apply altogether to the operation of any business institution as it was carried on at the time of the adoption of the act. If any presumption is to be indulged in, it is that general legislative enactments are mindful of the growth and increasing needs of society, and they should be so construed as to encourage rather than to embarrass the inventive and progressive tendency of the people.<sup>38</sup> We live in a land of progress and advancement and as the world grows older the wiser man becomes. Inventions and improvements of a few years back and which at the time seemed to be complete in construction in every respect have become innovated and developed beyond the greatest expectation of the inventor. This is not a new fact, not a new idea; for such has been the case since the dawn of creation and will continue until man shall have discovered and mastered the hidden and unseen mysteries of the universe, and when there will be nothing left to which he may devote his mind for the upbuilding of his fellowman.

**§ 15. Same continued—reasons as compared to improvements on other corporations.**—The improvements, indeed the revolution, in the method of transacting the business of each of the great corporations, have never given rise to a suspicion that these additional methods for accomplishing the same purpose were inconsistent with the original powers granted to them in their constituting instruments. Railroad corporations which were created even before the invention of the telegraph have since constructed these lines along their rights of way for purposes of convenience in carrying out the business enterprises for which they were created; and it is a settled fact that they are not an additional servitude to the roadway and one different from that for which it was acquired and for which further consideration would be necessary. Street car corporations

<sup>37</sup> "In these days there ought to be no one to question the statement that a telephone is simply an improved telegraph." *Northwestern Tel. Exch. Co. v. Chicago, etc., R. Co.*, 76 Minn. 334, 79 N. W. 315.

<sup>38</sup> *Hudson River Tel. Co. v. Railway Co.*, 135 N. Y. 393, 32 N. E. 148, 31 Am. St. Rep. 838, 17 L. R. A. 679.

which were created at a time when the method of propelling their vehicles was by the means of the horse power have, since the discovery and development of the electric or motor system, adopted this ingenious means for the purpose of running their cars, without any change of the old charter.<sup>39</sup> The purpose for which these corporations were originally created was for the convenience of public travel along and upon the streets and highways. By the adoption of this new improved method of motor power, their purposes have been changed only for the betterment of their enterprises and for convenience to the public. The same rule should and does apply to the improvements of the telegraph with respect to the newly-discovered method of transmitting intelligence by means of the telephone.

§ 16. **Same continued—under statutes.**—Mr. Freeman has made a very thorough discussion of this subject on the law of the telephone and it will be our pleasure to here quote what he says in regard to this particular subject: "In considering such questions as have been presented to them the courts have almost uniformly regarded the telephone and the public and private rights and duties growing out of it as similar in character and extent to the telegraph, and the public and private rights growing out of the invention and general use. Thus, in England the term 'telegram' has been adjudged to include a conversation by means of telephone, and the telephone business to be within the statute giving to the postmaster general the exclusive control of the transmission of messages by telegraph.<sup>40</sup> In Iowa telephone companies are classed with telegraph companies, for the purpose of determining the jurisdiction of the justice of the peace over them,<sup>41</sup> and deciding where and how they and their property shall be assessed.<sup>42</sup> So, in discussing whether telephone corporations were entitled to use the public streets, or to exercise the right of eminent domain, and whether they were subject to legislative control for the purpose of preventing unreasonable discriminations and the imposition of exorbitant charges, the courts have generally proceeded upon the assumption that the rights, duties, and obligations of such corporations are analogous to those formed for the purpose of carrying on the business of trans-

<sup>39</sup> *Hudson River Tel. Co. v. Railway*, 135 N. Y. 393, 32 N. E. 148, 17 L. R. A. 679, 31 Am. St. Rep. 838; *Cincinnati Inclined Plane Ry. Co. v. City and Suburban Tel. Ass'n*, 29 Am. St. Rep. 559, 48 Ohio St. 390, 27 N. E. 890, 12 L. R. A. 534.

<sup>40</sup> *Atty. Gen. v. Edison Tel. Co.*, L. R. 6, Q. B. D. 244.

<sup>41</sup> *Franklin v. N. W. Tel.*, 69 Iowa, 97, 28 N. W. 461.

<sup>42</sup> *Iowa Union Tel. Co. v. Board of Equalization*, 67 Iowa, 250, 25 N. W. 155.

mitting messages and news by the use of the telegraph. In Wisconsin the statute regarding the corporations provided, among other things, that corporations might be formed 'to build and operate telegraph lines and conduct the business of telegraphing, and to conduct and maintain their lines with all necessary appurtenances.' It was held that this statute authorized the incorporation of a telephone company.<sup>43</sup> The statute of Pennsylvania controlling telegraphic corporations enacted that 'the said telegraphic corporation shall receive dispatches from and for other telegraph lines and corporations, and from and for individuals, and on payment of their usual charges to individuals for transmitting dispatches as established by the rates and regulations of such telegraph lines, transmit the same with impartiality and good faith, under penalty of one hundred dollars for every neglect or refusal so to do.' On an application being made to the court of common pleas of the city of Philadelphia by the commonwealth on the relation of the Baltimore & Ohio Telegraph Company for a writ of mandate to compel the Bell Telephone Company to give the relator a telephone and the necessary wires, the court determined that telephone companies were controlled by the provisions of its statute, and therefore could not withhold from one person or corporation the privileges which it conceded to another."<sup>44</sup>

§ 17. **Same continued—construction of statutes.**—In the discussion of this subject, it will be our purpose to mention the nature of some of the different statutes of the various states which have

<sup>43</sup> The court in considering the question said: "It is urged that the power thus expressly given to form and organize corporations for the purpose of building and operating telegraph lines, or conducting the business of telegraphing in any way, includes the power of forming and organizing corporations for the purpose of building and operating telephone lines, or conducting the business of telephoning in any way. \* \* \* In that case (*Atty. Gen. v. Edison Telephone Company*) the court concluded that Edison's telephone was a telegraph within the meaning of the telegraph acts, although the telephone was not invented nor contemplated when those acts were passed. It is thus said, in effect, that the mere fact that sound itself is transmitted by the telephone established no material distinction between telephonic and telegraphic communications, as the transmission if it takes place, is performed by a wire acted on by electricity. It is there further said that, of course, no one supposes that the legislature intended to refer specifically to telephones many years before they were invented, but it is highly probable that they would, and it seems to us also that they actually did, use language embracing further discoveries as to the use of electricity for the purpose of conveying intelligence." *Wisconsin Tel. Co. v. City of Oshkosh*, 62 Wis. 36, 21 N. W. 828.

<sup>44</sup> *Bell Tel. Co. v. Com. ex rel. Baltimore and O. Tel. Co. (Pa.)* 3 Atl. 825, 59 Am. Rep. 172.



bearing on this point at issue and how the same have been interpreted by the courts therein. It is true that this is no longer much of a controverted question as most of the states have, since the invention and development of the telephone, become so well versed in the nature, use, and convenience of it that a greater portion of the statutes therein now mention the "telephone" in connection with the "telegraph." But there is a rule of law in the interpretation of a statute which has been amended by a material change of its language, that this fact indicates an intent to change the meaning of the statute.<sup>45</sup> So the result of the rule is that, where a statute originally contained the name "telegraph" and was afterwards amended so as to mention also the name "telephone," the law flowing therefrom was materially changed and the rights and privileges exercised by the telegraph company under the unamended statutes could not be enjoyed by the telephone companies, if such was the intent of the legislature.<sup>46</sup>

§ 18. **Same continued—illustrated.**—This question was settled in a case in Texas which arose in a suit instituted by a telephone company to condemn certain property for its right of way. There were in the general incorporation laws of this state a statute<sup>47</sup> which granted to telegraph companies the right to condemn property for rights of way. In another division of the original act, corporations might be formed for "the constructing and maintenance of a telegraph line," no mention being made of the telephone. The first-mentioned statutes have remained in force since their enactment as part of the general incorporation law, but the provision for incorporating a telephone company was afterwards amended so as to read, "the construction and maintenance of a telegraph or a telephone line," which was later changed so as now to be "the construction and maintenance of a telegraph and telephone line." It will be seen that in the different changes of these statutes whereby the telephone became an important factor, to enjoy some of the rights and privileges which were and are enjoyed by the telegraph, there is nothing said in any of these amended or unamended statutes which gives the telephone the right to exercise the power of eminent domain. The foremost and most important question in this case was whether or not the statutes that relate to the exercise of the right of eminent domain in condemnation proceedings by telegraph companies apply to telephone companies and authorize a like

<sup>45</sup> *James v. Patten*, 6 N. Y. (2 Selden) 9, 55 Am. Dec. 376.

<sup>46</sup> *San Antonio, etc., R. Co. v. Southwestern Tel., etc., Co.*, 93 Tex. 313, 77 Am. St. Rep. 884, 55 S. W. 117, 49 L. R. A. 459.

<sup>47</sup> Rev. St. 1895, arts. 698, 699; Laws 12th Leg., 2d Sess., c. 80, §§ 53, 54.

procedure by the latter. The court held in this case that the phrases "magnetic telegraph lines," and "any telegraph lines" found in a statute are broad enough to include the "telephone," which is merely another method of communication by means of electricity, and where another statute confers upon the former the right of eminent domain in condemnation proceedings, the same will apply to telephone companies.<sup>48</sup>

§ 19. **Same continued.**—In New Jersey the question arose as to the validity of the incorporation of a telephone company to be incorporated under the general law which authorized the organization of telegraph companies without mentioning the term "telephone" and the right to condemn property. The original act to incorporate telegraph companies had been amended similarly to the Texas statutes mentioned above, whereby and wherein the telephone was mentioned in connection with the telegraph, but no changes had been made in the original statute with respect to the right to exercise the power of eminent domain. The court held in that case that the term "telegraph" as used in the statute included "telephone," and that the charter granted to a telephone company, under the general law authorizing the incorporation of telegraph companies, was valid.<sup>49</sup> The court said in its able opinion: "Its application to the purposes of speedy transmission of intelligence was but a change in detail, but not in substance, of the business for which these companies were clothed with corporate privileges. They are both services of a public nature which would permit the legislature to confer the power to condemn for each use. They are both designed to convey intelligence between distant places. So far as the owner over whose land their tracks or routes lie, they each are operated with the same appliances. Poles and wires placed alike impose exactly the same servitude upon the land. With the change in the apparatus at the termini telegraphy becomes telephony. The former makes the distant message intelligible by words, marks, or sounds; the latter by sounds alone. The same electric fluid is the medium of transmission, and all the internal structure is the same in both. The corporation employing either means of communication is executing substantially the same public function in substantially the same way. The business conducted in either way is within the purpose for which the statute was enacted."

<sup>48</sup> *San Antonio, etc., R. Co. v. Southwestern Tel. Co.*, 93 Tex., 313, 77 Am. St. Rep. 884, 55 S. W. 117, 49 L. R. A. 459.

<sup>49</sup> *State v. Central New Jersey Tel. Co.*, 53 N. J. Law, 341, 21 Atl. 460, 11 L. R. A. 664.



§ 20. **Same continued.**—The charter of the City of St. Louis gave the mayor and the board of aldermen the power to license, tax, and regulate telegraph companies or corporations, and all other businesses, trades, avocations, or professions whatsoever. The question was settled there in a case in which a telephone company was being prosecuted for violating a certain city ordinance which attempted to regulate the charges of the company. The court held in this case that telephone companies were *ejusdem generis* with telegraph companies, though the former were not in existence at the date the charter was granted.<sup>50</sup> There are many other statutes and cases both state and federal<sup>51</sup> to which we could refer the reader in verifying the fact that the term "telegraph" in statutes means and includes any apparatus or adjustment of instruments for transmitting messages or other communications by means of electric currents and signals and that it is comprehensive enough to embrace the telephone,<sup>52</sup> but we deem that enough has already been said on the subject.

§ 21. **Same continued—when applied.**—There have been different cases in which the above question has been tested in order to ascertain the different ways in which the rule might be applied.<sup>53</sup> For instance, as we said above, statutes authorizing telegraph companies to exercise the right of eminent domain or to occupy highways apply to telephone companies.<sup>54</sup> It has been held that the

<sup>50</sup> *City of St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S. W. 197, 2 L. R. A. 278, 9 Am. St. Rep. 370.

<sup>51</sup> *Cumberland Tel. Co. v. United Electric Co. (C. C.)* 42 Fed. 273, 12 L. R. A. 544.

<sup>52</sup> See section following.

<sup>53</sup> *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278, power to fix rates; statutes authorizing construction along public roads, streets, etc., *Cincinnati Inclined Plane R. Co. v. City, etc., Tel. Ass'n*, 48 Ohio St. 390, 27 N. E. 890, 29 Am. St. Rep. 559, 12 L. R. A. 534; *People's Tel., etc., Co. v. Berks, etc., Turnpike Road*, 199 Pa. 411, 49 Atl. 284; *Texarkana v. Southwestern Tel., etc., Co.*, 48 Tex. Civ. App. 16, 106 S. W. 915; *Roberts v. Wisconsin Tel. Co.*, 77 Wis. 589, 46 N. W. 800, 20 Am. St. Rep. 143; *Atty. Gen. v. Edison Tel. Co.*, 6 Q. B. D. 244, 50 L. J. Q. B. 145, 43 L. T. Rep. (N. S.) 697, 29 Wkly. Rep. 428; English statute of 1863 relating to exclusive privilege of postmaster general as to transmission of telegrams, *National Tel. Co. v. Baker* (1893) 2 Ch. 186, 57 J. P. 373, 62 L. J. Ch. 699, 68 L. T. Rep. (N. S.) 283, 3 Reports, 318, 4 Am. Elec. Cas. 320.

<sup>54</sup> *Northwestern Tel. Exch. Co. v. Chicago, etc., R. Co.*, 76 Minn. 834, 79 N. W. 315; *State v. Central New Jersey Tel. Co.*, 53 N. J. Law, 341, 21 Atl. 460, 11 L. R. A. 664; *Pennsylvania Tel. Co. v. Hoover*, 11 Pa. Dist. R. 708; *San Antonio, etc., R. Co. v. Southwestern Tel., etc., Co.*, 93 Tex. 313, 55 S. W.

same rule applied to statutes forbidding discrimination; as where a statute provided that telegraph companies shall receive dispatches from and for other telegraph lines, and from and for individuals, and transmit them impartially and in good faith. Under these statutes a contract made between a telephone company and the owner of the telephone instruments providing that the company in the use of the instrument shall discriminate as between telegraph companies is void as against public policy.<sup>55</sup> The same rule applies to statutes relating to taxation,<sup>56</sup> and to constitutional or statutory provisions relating to the incorporation of such companies, and to the construction, maintenance, and regulation thereof,<sup>57</sup> and to statutes fixing the locality of suits against telegraph companies.<sup>58</sup> An act "relative to the incorporation and powers of telegraph companies for the use of individuals, firms, and corporations, and for fire-alarm, police, and messenger business," includes telephone companies. Especially so where the first section of said act provides "for the transaction of any business in which electricity over or through wires may be applied to any useful purpose."<sup>59</sup> A statute regulating "magnetic telegraph companies," and providing for the construction of telegraph lines, also includes telephone companies;<sup>60</sup> and a right given "magnetic telegraph" companies to appropriate lands for the erection of poles includes telephone com-

117, 77 Am. St. Rep. 884, 49 L. R. A. 459; *Southwestern Tel., etc., Co. v. Gulf, etc., R. Co.* (Tex. Civ. App. 1899) 52 S. W. 106.

*In Mississippi* telegraph and telephone companies are recognized by statute as separate and distinct, and a telephone company cannot exercise the right of eminent domain under the statute relating to telegraph companies. *Alabama, etc., R. Co. v. Cumberland Tel., etc., Co.*, 88 Miss. 438, 41 South. 258.

<sup>55</sup> *State v. Bell Tel. Co.*, 36 Ohio St. 296, 38 Am. Rep. 583; *Bell Tel. Co. v. Com.*, 3 Atl. 825, 17 Wkly. Notes Cas. 505, 2 Am. Elec. Cas. 407.

<sup>56</sup> *Iowa Union Tel. Co. v. Board of Equalization*, 67 Iowa, 250, 25 N. W. 155; *Com. v. Pennsylvania Tel. Co.*, 18 Phila. (Pa.) 588.

<sup>57</sup> *Chesapeake, etc., Tel. Co. v. Baltimore, etc., Tel. Co.*, 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; *State v. Central New Jersey Tel. Co.*, 53 N. J. Law, 341, 21 Atl. 460, 11 L. R. A. 664; *Hudson River Tel. Co. v. Watervliet Turnpike, etc., Co.*, 135 N. Y. 393, 32 N. E. 148, 31 Am. St. Rep. 838, 17 L. R. A. 674; *York Tel. Co. v. Keesey*, 5 Pa. Dist. 366; *Central Pennsylvania Tel., etc., Co. v. Wilkes Barre, etc., R. Co.*, 11 Pa. Co. Ct. 417; *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828; *Cumberland Tel., etc., Co. v. United Electric R. Co. (C. C.)* 42 Fed. 273, 12 L. R. A. 544.

<sup>58</sup> *Franklin v. Northwestern Tel. Co.*, 69 Iowa, 97, 28 N. W. 461.

<sup>59</sup> *York Tel. Co. v. Keesey*, 5 Pa. Dist. R. 366.

<sup>60</sup> *Cincinnati Inclined Plane R. Co. v. City, etc., Tel. Ass'n*, 48 Ohio St. 390, 27 N. E. 890, 29 Am. St. Rep. 559, 12 L. R. A. 534.

panies.<sup>61</sup> Again, a telegraph company, acting under a statutory right to construct and operate telegraphs is empowered to establish a telephone service.<sup>62</sup> It has been decided that the telephone is included in the operation of a statute providing that a criminal prosecution will lie for the illegal obstruction or destruction of any line of telegraph or any part thereof.<sup>63</sup> So far, there has been no adjudication on the subject whether these various statutes include wireless telegraph and telephones, but it seems the same reasons for including telephone companies in these statutes should be applicable for holding that wireless telegraphic companies should also be included.

§ 22. **When different rule obtains—intent of lawmakers.**—The rule that the term “telegraph” in statutes includes and embraces “telephone” is not general, but in order to determine this fact the minds of the lawmakers must be consulted. The term “telegraph” in statutes does not always or necessarily include the telephone, particularly where there is separate legislation relating specifically to telephone.<sup>64</sup> And while, as it has been said, the state courts hold that the word telegraph as used in a state statute embraces the telephone also, and though it might seem that a similar con-

<sup>61</sup> *San Antonio, etc., R. Co. v. Southwestern Tel., etc., Co.*, 93 Tex. 313, 55 S. W. 117, 77 Am. St. Rep. 884, 49 L. R. A. 459; *Southwestern Tel., etc., Co. v. Gulf, etc., R. Co.* (Tex. Civ. App.) 52 S. W. 106.

<sup>62</sup> *Cumberland Tel., etc., Co. v. United Electric R. Co.* (C. C.) 42 Fed. 273, 12 L. R. A. 544; *State v. Central New Jersey Tel. Co.*, 53 N. J. Law, 341, 21 Atl. 460, 11 L. R. A. 664; *Chesapeake, etc., Tel. Co. v. Baltimore, etc., Tel. Co.*, 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167.

<sup>63</sup> *Davis v. Pacific Tel., etc., Co.*, 127 Cal. 312, 57 Pac. 764, 59 Pac. 698. It was said in this case: “The term telegraph means any apparatus for transmitting messages by means of electric currents and signals, and embraces within its meaning the narrower word ‘telephone.’ But is this construction justifiable in the case of the penal statute? Section 4 of our Penal Code provides that ‘the rule of the common law that penal statutes are to be strictly construed has no application to this Code. All its provisions are to be construed according to the fair import of their terms with a view to effect its object and to promote justice.’ In contemplation of this section, in recognition of the fact that a substantial identity exists between the two words, we think no hesitation need be expressed in declaring that under section 591 of the Penal Code a criminal prosecution will lie for the illegal destruction of a telephone wire.”

<sup>64</sup> *Alabama, etc., R. Co. v. Cumberland Tel., etc., Co.*, 88 Miss. 438, 41 South. 258; *Home Tel. Co. v. Nashville*, 118 Tenn. 1, 101 S. W. 770, 11 Ann. Cas. 824; *Southern Tel. Co. v. King*, 103 Ark. 160, 146 S. W. 489, 39 L. R. A. (N. S.) 402, Ann. Cas. 1914B, 780; *Tel., etc., Co. v. Pasadena*, 161 Cal. 265, 118 Pac. 796.

struction would apply to the Post Roads Act, as has been held in Minnesota,<sup>65</sup> yet the United States Supreme Court has held that the provisions of this act do not extend to telephone companies.<sup>66</sup>

<sup>65</sup> *Northwestern Tel. Exch. Co. v. Chicago, etc., R. Co.*, 76 Minn. 334, 79 N. W. 315.

<sup>66</sup> *Richmond v. Southern Bell Tel., etc., Co.*, 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162, reversing in part 85 Fed. 19, 28 C. C. A. 659; *Sunset Tel., etc., Co. v. Pomona (C. C.)* 164 Fed. 561; *Pomona v. Tel. Co.*, 224 U. S. 330, 32 Sup. Ct. 477, 56 L. Ed. 788.



## CHAPTER II

## LEGAL STATUS OF TELEGRAPH, TELEPHONE, AND ELECTRIC COMPANIES

- § 23. As to public use—in general.
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§ 23. As to public use—in general.—Transportation companies with all the uses to which they may be applied in transporting goods, wares, merchandise and other kinds of property, and for furnishing suitable and proper accommodations, not to be surpassed, to any who desire to travel are no more convenient and indispensable to the commercial business of the world than those which furnish means for transmitting intelligence by electricity. At first these instruments for communication could only be used for short distances, but improvements were made from time to time on them until the signal or voice could be sounded as far as wires could be strung. Up until the laying of the great Atlantic Cable, these means of communication were confined to each of the continental countries, but after this very eventful epoch of scientific development of these institutions, and other similar ones, the world has been joined together as if by one great speaking tube, and news of all kind can be transmitted over them as rapidly, as quickly, and as accurately as that sent through the first speaking tubes used by the individual business houses. Not only does this apply to news arising on land, but since the great ingenious inventors of the wireless telegraph and telephone the heretofore unknown and secret



occurrences upon the seas and oceans may be as easily revealed. Therefore telegraph and telephone companies are not only an indispensable necessity, both commercially and socially, to any one nation, but they have assumed a business of an international character, and must be treated as such in the laws of nations. It may therefore easily be said that these companies are quasi-public corporations,<sup>1</sup> or servants,<sup>2</sup> conducting a quasi-public business,<sup>3</sup> similar in many respects to that of a common carrier.<sup>4</sup> So the instruments and apparatus of these companies are therefore devoted to a public use.<sup>5</sup> They receive various valuable rights and franchises from the public,<sup>6</sup> such as the right of exercising the power of eminent domain,<sup>7</sup> and as a result of which they are subject to certain duties and obligations to the public,<sup>8</sup> such as to serve the public generally,<sup>9</sup> without discrimination,<sup>10</sup> and to conduct their business

<sup>1</sup> *York Tel. Co. v. Keeseey*, 5 Pa. Dist. R. 366; *Jones v. Western Union Tel. Co.*, 101 Tenn. 442, 47 S. W. 699; *Marr v. Western Union Tel. Co.*, 85 Tenn. 529, 3 S. W. 496; *Cumberland Tel., etc., Co. v. Evansville (C. C.)* 127 Fed. 187, affirmed in 143 Fed. 238, 74 C. C. A. 368; *Tel., etc., Co. v. Beach*, 8 Ga. App. 720, 70 S. E. 137.

<sup>2</sup> *Ayer v. Western Union Tel. Co.*, 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353; *State v. Nebraska Tel. Co.*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404; *Tel. Co. v. Frith*, 105 Tenn. 167, 58 S. W. 118; *Dunn v. Western Union Tel. Co.*, 2 Ga. App. 845, 59 S. E. 189.

<sup>3</sup> *Central Union Tel. Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721; *Ayer v. Western Union Tel. Co.*, 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353; *State v. Kinloch Tel. Co.*, 93 Mo. App. 349, 67 S. W. 684; *Cumberland Tel., etc., Co. v. Evansville (C. C.)* 127 Fed. 187. See *Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238, 22 Sup. Ct. 881, 46 L. Ed. 1144; *Weld v. Cable Co.*, 199 N. Y. 88, 92 N. E. 415; *West. U. Tel. Co. v. Flannagan*, 113 Ark. 9, 167 S. W. 701; *Gainesboro Tel. Co. v. Ruckner*, 160 Ky. 604, 169 S. W. 1000, common carrier.

<sup>4</sup> See following sections.

<sup>5</sup> *Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201.

<sup>6</sup> *Ayer v. Western Union Tel. Co.*, 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353.

<sup>7</sup> See chapter IV.

<sup>8</sup> *Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; *Ayer v. Western Union Tel. Co.*, 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353; *State v. Nebraska Tel. Co.*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404.

<sup>9</sup> *Central Union Tel. Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721; *State v. Kinloch Tel. Co.*, 93 Mo. App. 349, 67 S. W. 684; *Tel., etc., Co. v. Beach*, 8 Ga. App. 720, 70 S. E. 137.

<sup>10</sup> *Central Union Tel. Co. v. State*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; *Central Union Tel. Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721; *State v. Kinloch Tel. Co.*, 93 Mo. App. 349, 67 S. W. 684; *State v. Nebraska Tel. Co.*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404; *State v. Delaware, etc., Tel. Co. (C. C.)* 47 Fed. 633; *Tel., etc., Co. v. Beach*, 8 Ga. App. 720, 70 S. E. 137.

in a manner conducive to the benefit of the public.<sup>11</sup> They are engaged in an enterprise affected with a public interest within the principle which authorizes the state to control and regulate the charges of companies carrying on such a business.<sup>12</sup> While the franchise for conducting a telegraph or telephone business may be exercised by an individual,<sup>13</sup> yet the fact that it is so exercised does not affect the public character of the business,<sup>14</sup> or its obligation to the public,<sup>15</sup> or its liability to be regulated and controlled by the state.<sup>16</sup> These same principles apply to electric lighting, heating, and power companies which are doing a quasi-public business.<sup>17</sup>

§ 24. **As to character of property.**—Not a little difficulty has been experienced by the courts in determining whether telegraph, telephone, and electric lines and appliances are real or personal property. The numerous decisions on the subject cannot be entirely reconciled. The different conclusions thus reached may be partially explained by the permanency with which the appliances were annexed to the freehold in the particular case. Different statutes on the subject and the different constructions placed thereon may also account for apparent contradictory conclusions. So no general rule can be promulgated which will be of material assistance and yet be said to be supported by the weight of authority. A telegraph or telephone line on a railroad right of way is not necessarily real estate in the sense that upon the termination of the contract under which it was constructed the line shall belong to the railroad company as a fixture on the real estate, and the evident intent that such should not be the result will govern. So after the termination of the contract the owner of the line has the right to remove it.<sup>18</sup> A

<sup>11</sup> *Central Union Tel. Co. v. State*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114.

<sup>12</sup> *Central Union Tel. Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721; *Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; *State v. Kinloch Tel. Co.*, 93 Mo. App. 349, 67 S. W. 684.

<sup>13</sup> See §§ 85, 266.

<sup>14</sup> *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; *Lowther v. Bridgeman*, 57 W. Va. 306, 50 S. E. 410.

<sup>15</sup> *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319.

<sup>16</sup> *Lowther v. Bridgeman*, 57 W. Va. 306, 50 S. E. 410.

<sup>17</sup> *Gainesville v. Gainesville Gas, etc., Co.*, 65 Fla. 404, 62 South. 919, 46 L. R. A. (N. S.) 1119; *State v. Cons. Power Co.*, 119 Minn. 225, 137 N. W. 1104, 41 L. R. A. (N. S.) 1181, Ann. Cas. 1914B, 19; *People v. Willox*, 207 N. Y. 86, 100 N. E. 705, 45 L. R. A. (N. S.) 629.

<sup>18</sup> *St. Paul, etc., R. Co. v. West. U. Tel. Co.*, 118 Fed. 497, 55 C. C. A. 263, reaffirmed in *Great Northern Ry. v. West. U. Tel. Co.*, 174 Fed. 321, 98 C. C. A. 193. Upon the foreclosure of a mortgage on a railroad the right of a telegraph company to continue its telegraph line upon the railroad right of

question somewhat similar is involved where a contract between a railroad and a telegraph company is declared void on account of its containing an illegal exclusive provision, wherein arises a difficulty in determining whether the railroad or the telegraph company owns the poles and wires that have been erected under the contract. The question depends very largely upon the nature of the contract, and the interest each company has in the telegraph line.<sup>19</sup> Wires strung across other private property do not change their character by being attached to poles so as to become part of the realty and

way ceases. *West. U. Tel. Co. v. Ann Arbor R. R.*, 90 Fed. 379, 33 C. C. A. 113. In this case, under a contract by which the railroad company had furnished the material and the telegraph company the instruments, the court in the foreclosure proceedings allowed the telegraph company to remove such instruments. Where by contract a telegraph company constructed its line on a railroad right of way, and agreed that its rights therein should not be assignable, and that if it was dissolved or suspended operations the railroad might take charge, it was held that the railroad took title upon a new company succeeding to the rights and property of the old company. *Latrobe v. West. U. Tel. Co.*, 74 Md. 232, 21 Atl. 788. In *New York, etc., R. Co. v. West. U. Tel. Co.*, 36 Hun (N. Y.) 205, it was held that a railroad mortgage covered a telegraph line built by the railroad and also a wire placed thereon by a telegraph company under a contract by which the railroad had a right to buy such wire. A telegraph company is liable for cutting and carrying away without notice electric power wires strung on the telephone fixtures on house tops. *Electric Power Co. v. Metropolitan Tel., etc., Co.*, 75 Hun, 68, 27 N. Y. Supp. 93, affirmed 148 N. Y. 746, 43 N. E. 986. Even a railroad acquires its right of way from the mortgagor, and the mortgage is afterwards foreclosed, yet the purchaser at such foreclosure sale does not acquire title to the rails, ties, fish plates, etc., constituting a railroad. *Skinner v. Ft. Wayne, etc., R. Co.* (C. C.) 99 Fed. 465. A mortgage of an electric company covering after-acquired property covers poles and wires erected on railroad property, as against a claim of the railroad company based on an agreement of the mortgagor. *Monmouth, etc., Co. v. Central R. R., etc.* (N. J. Ch.) 54 Atl. 140.

<sup>19</sup> Where a telegraph company furnishes the materials and a railroad company the labor to build a telegraph line, they thereby become joint owners of the line unless the contract provides otherwise; but where the telegraph company furnishes both labor and material, and the railroad company merely transports the material and labor free of charge, the telegraph line belongs to the telegraph company, subject to a reasonable payment to the railroad for such transportation. *St. Paul, etc., R. Co. v. West. U. Tel. Co.*, 118 Fed. 497, 55 C. C. A. 263, reaffirmed in *Great Northern Ry. v. West. U. Tel. Co.*, 174 Fed. 321, 98 C. C. A. 193. In *West. U. Tel. Co. v. Burlington, etc., Ry.* (C. C.) 11 Fed. 1, the court said: "The railroad company furnished the poles and all the labor, except a foreman, to construct the line; the telegraph company furnished a foreman to superintend the work, and also furnished the wire and insulators. This certainly constituted the two companies joint owners of the property." In this case, however, the court held that only the exclusive feature of the contract was invalid. In *West.*



become covered by a pre-existing mortgage when it was the intention of the parties that they might be removed after a certain time.<sup>20</sup> As between a debtor company and its creditor, poles, wires, insulators, and such appliances will be considered personal property so as to permit the latter who has obtained a judgment to seize and sell the same under execution.<sup>21</sup> And, reaching the same beneficial, but somewhat inconsistent, conclusion, it will be held that these appliances partake of the nature of realty to the extent that they may be subject to a mechanic's lien.<sup>22</sup> But a statute creating such a lien does not necessarily classify the property as being real or personal property. It has been held that chandeliers, annunciators, switch-

*U. Tel. Co. v. Union Pacific Ry. Co.* (C. C.) 3 Fed. 1, the court held that an invalid free-pass provision invalidated the whole contract. The court refused to enjoin the railroad company from cutting the wires, etc., and said it would leave the parties where it found them, the whole contract being void. See, also, *Central, etc., R. R. v. West. U. Tel. Co.* (C. C.) 3 Fed. 417. In the case quoted an injunction was, however, granted. Where the railroad attempts to seize the telegraph line on the ground that the contract is void, the court will enjoin such seizure and will decree a full and fair accounting as to the property and rights. *West. U. Tel. Co. v. St. Joseph, etc., R. Co.* (C. C.) 3 Fed. 430; *West. U. Tel. Co. v. Union Pacific Ry.* (C. C.) 3 Fed. 423; *Atlantic, etc., Tel. Co. v. Union Pacific Ry.* (C. C.) 1 Fed. 745; *West. U. Tel. Co. v. Kansas Pacific R. R.* (D. C.) 4 Fed. 284.

<sup>20</sup> *Boston Safe Deposit Co. v. Bankers', etc., Tel. Co.* (C. C.) 36 Fed. 288. But see *Keating Imp. Co. v. Marshall Elec. L., etc., Co.*, 74 Tex. 605, 12 S. W. 489.

<sup>21</sup> *Readfield, etc., Tel. Co. v. Cyr*, 95 Me. 287, 49 Atl. 1047; *Campbell v. Western Electric Co.*, 113 Mich. 333, 71 N. W. 644.

<sup>22</sup> *Badger Lumber Co. v. Marion Water Supply, etc., Co.*, 48 Kan. 182, 29 Pac. 476, 30 Am. St. Rep. 301, 15 L. R. A. 652, appurtenance to power house as to entitle the vendor thereof for vendor's lien; *Hughes v. Lambertville Elec., etc., Co.*, 53 N. J. Eq. 435, 32 Atl. 69, approved in *Bates Mach. Co. v. Trenton & N. B. R. Co.*, 70 N. J. Law, 684, 58 Atl. 935, 103 Am. St. Rep. 811, lines of electric company; *Southern Elec. S. Co. v. Rolla Elec. L., etc., Co.*, 75 Mo. App. 622; *Fechet v. Drake*, 2 Ariz. 239, 12 Pac. 694. See, also, *Farnsworth v. West. U. Tel. Co.*, 53 Hun, 636, 25 N. Y. St. Rep. 393, 6 N. Y. Supp. 735; *West. U. Tel. Co. v. Burlington (C. C.)* 3 McCrary, 130, 11 Fed. 1; *Bell Tel. Co. v. Ascot Twp. Rap. Jud. Quebec*, 16 C. S. 436, taxable as real property; *Elec. Tel. Co. v. Salford Tp.*, 11 Exch. 181, 24 L. J. Mag. Cas. (N. S.) 146, 1 Jur. N. S. 733, 3 Week. Rep. 518; *Lancashire, etc., Tel. Ex. Co. v. Manchester (C. A.)* 54 L. J. Mag. Cas. N. S. 63, L. R. 14 Q. B. Div. 267, 52 L. T. N. S. 793, 33 Week. Rep. 203, 49 J. P. 724; *West. U. Tel. Co. v. Tennessee*, 9 Baxt. (Tenn.) 509, 40 Am. Rep. 99; *Herkimer County L., etc., Co. v. Johnson*, 37 App. Div. 257, 55 N. Y. Supp. 924, taxable as other real property; to same effect, *Shelbyville Water Co. v. People*, 140 Ill. 545, 30 N. E. 678, 16 L. R. A. 505. See, *Newport Ill. Co. v. Tax Ass'r*, 19 R. I. 632, 36 Atl. 426, 36 L. R. A. 266. See, also, § 658, and cases in note thereunder, where lines are considered realty for purpose of taxation. See *Grants Pass, etc., Co. v.*



boards, electric signs and like devices which can be removed without injury to the building are to be regarded as chattels and not fixtures.<sup>23</sup>

§ 25. **As to common carriers—in general.**—Many theories have been advanced as to the legal status of telegraph and telephone companies, and as to their analogy to common carriers in order to determine whether or not they were insurers of correct transmission of intelligence, and whether they must accommodate all, impartially, who apply to them to perform such duties as fall within the scope of their work after making or offering to make compensation for said services. In considering this subject, we shall discuss: First, whether or not they are insurers of an accurate and correct transmission of messages; and, second, whether or not they must serve all alike who apply to them after offering to comply with their reasonable regulations. And under the first of the above divisions of the subject—whether or not they are insurers of correct transmission of intelligence—we shall first discuss the common-law theory and then the statutory.

§ 26. **Common-law theories.**—The weight of authority is almost unanimous that telegraph and telephone companies, under the common law, are not common carriers, and therefore insurers of a cor-

Mining Co., 58 Or. 174, 113 Pac. 859, 34 L. R. A. (N. S.) 395, burden on defendant to show electricity was not supplied.

*Electricity as property.*—Although invisible, electricity is considered in law as personal property (Terrace Water Co. v. San Antonio, etc., Co., 1 Cal. App. 511, 82 Pac. 562; Fickeisen v. Wheeling Elec. Co., 67 W. Va. 335, 67 S. E. 788, 27 L. R. A. [N. S.] 893), subject to ownership, sale, and disposal as inanimate objects (Hill v. Pacific, etc., Elec. Co., 22 Cal. App. 788, 136 Pac. 492; Fickeisen v. Wheeling Elec. Co., supra). It has a substance which may be measured (Fickeisen v. Wheeling Elec. Co., supra) and, having the ownership and possession of an electric wire, may properly be said to have possession of the electricity with which the wire is charged (Fickeisen v. Wheeling Elec. Co., supra). It may be the subject of larceny. Gas, which is but slightly, if any, more tangible, has been held to be subject of larceny. Woods v. People, 222 Ill. 293, 78 N. E. 607, 7 L. R. A. (N. S.) 520, 113 Am. St. Rep. 415, 6 Ann. Cas. 736.

*Warranty deed* of a farm and its appurtenances does not carry the right of the grantor as a member of a telephone company to the use of telephone service. Cantril Tel. Co. v. Fisher, 157 Iowa, 203, 138 N. W. 436, 42 L. R. A. (N. S.) 1021.

<sup>23</sup> New York, etc., Ins. Co. v. Allison, 107 Fed. 179, 46 C. C. A. 229. See Gen. Electric Co. v. Transit, etc., Co., 57 N. J. Eq. 460, 42 Atl. 101; Raymond v. Strickland, 124 Ga. 504, 52 S. E. 619, 3 L. R. A. (N. S.) 69. Compare Gunderson v. Swarthout, 104 Wis. 186, 80 N. W. 465, 76 Am. St. Rep. 860. But see Lindsay Bro. v. Curtis Pub. Co., 236 Pa. 229, 84 Atl. 783, 42 L. R. A. (N. S.) 546; Hickman v. Booth, 131 Tenn. 32, 173 S. W. 438.

rect transmission of messages.<sup>24</sup> There are a few opinions holding differently to the general rule,<sup>25</sup> but they were decided at a time

<sup>24</sup> *West. U. Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744; *Coit v. West. U. Tel. Co.*, 130 Cal. 657, 63 Pac. 83, 80 Am. St. Rep. 153, 53 L. R. A. 678; *Hart v. West. U. Tel. Co.*, 66 Cal. 579, 6 Pac. 637, 56 Am. Rep. 119, 1 Am. Elect. Cas. 734; *Stamey v. West. U. Tel. Co.*, 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95; *West. U. Tel. Co. v. Fontaine*, 58 Ga. 433; *West. U. Tel. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279; *West. U. Tel. Co. v. Meredith*, 95 Ind. 93; *Central U. Tel. Co. v. Swoveland*, 14 Ind. App. 341, 42 N. E. 1035; *Sweatland v. Illinois, etc., Tel. Co.*, 27 Iowa, 433, 1 Am. Rep. 285; *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126; *Camp v. West. U. Tel. Co.*, 1 Metc. (Ky.) 164, 71 Am. Dec. 461; *Fowler v. West. U. Tel. Co.*, 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211; *Bartlett v. West. U. Tel. Co.*, 62 Me. 209, 16 Am. Rep. 437; *Birney v. New York, etc., Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607; *Grinnell v. West. U. Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485; *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226; *Jacob v. West. U. Tel. Co.*, 135 Mich. 600, 98 N. W. 402; *Birkett v. West. U. Tel. Co.*, 103 Mich. 361, 61 N. W. 645, 50 Am. St. Rep. 374, 33 L. R. A. 404; *West. U. Tel. Co. v. Carew*, 15 Mich. 525; *State v. St. Louis*, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113; *Reed v. West. U. Tel. Co.*, 56 Mo. App. 168; *Becker v. West. U. Tel. Co.*, 11 Neb. 87, 7 N. W. 868, 38 Am. Rep. 356; *Kiley v. West. U. Tel. Co.*, 109 N. Y. 231, 16 N. E. 75; *Elwood v. West. U. Tel. Co.*, 45 N. Y. 549, 6 Am. Rep. 140; *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *Hirsch v. American Dist. Tel. Co.*, 112 App. Div. 265, 98 N. Y. Supp. 371, reversing 48 Misc. Rep. 370, 95 N. Y. Supp. 562; *Wolfskehl v. West. U. Tel.*

<sup>25</sup> The leading case in support of this view is that of *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589, decided in 1859. See, also, *Central U. Tel. Co. v. State*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; *West. U. Tel. Co. v. Meek*, 49 Ind. 53; *Manville v. West. U. Tel. Co.*, 37 Iowa, 214, 18 Am. Rep. 8; *West. U. Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 18 Ky. Law Rep. 995, 66 Am. St. Rep. 361, 36 L. R. A. 711; *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *West. U. Tel. Co. v. Call Pub. Co.*, 44 Neb. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 27 L. R. A. 622; *Pacific Tel. Co. v. Underwood*, 37 Neb. 315, 55 N. W. 1057, 40 Am. St. Rep. 490; *Kemp v. West. U. Tel. Co.*, 28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363; *Daily v. State*, 51 Ohio St. 348, 37 N. E. 710, 46 Am. St. Rep. 578, 24 L. R. A. 724; *Muskogee Nat. Tel. Co. v. Hall*, 118 Fed. 382, 55 C. C. A. 208; *State v. Delaware, etc., Tel. Co. (C. C.)* 47 Fed. 633, affirmed in 50 Fed. 677, 2 C. C. A. 1; *State v. Bell Tel. Co. (C. C.)* 23 Fed. 539; *MacAndrew v. Electric Tel. Co.*, 17 C. B. 3, 1 Jur. N. S. 1073, 25 L. J. C. P. 26, 4 Wkly. Rep. 7, 84 E. C. L. 3, 3 Allen Tel. Cas. 38; *Bell Tel. Co. v. Montreal St. R. Co.*, 10 Quebec Ct. 162; *Bryant v. American Tel. Co.*, 1 Daly (N. Y.) 575; *West. U. Tel. Co. v. Buchanan*, 35 Ind. 440, 9 Am. Rep. 744; *West. U. Tel. Co. v. Fontaine*, 58 Ga. 433.

The rule established in California by the *Parks* Case, *supra*, has been changed by special statutory provisions, and the authority of the other cases is weakened by the fact that in most of them what was said about such companies being insurers was unnecessary to the decision of the case. See *Gainesboro Tel. Co. v. Buckner*, 160 Ky. 604, 169 S. W. 1000.

when there were few decisions on the subject, and when the same attention and thought was not devoted to the matter as was afterwards given to it. In one of the earliest courts of our country, of which we have any knowledge, holding them to be common carriers, the presiding judge said: "The rules of law which govern the liabilities of telegraph companies are not new. They are old rules applied to new circumstances. Such companies hold themselves out to the public as engaged in a particular branch of business in which the interests of the public are deeply concerned. They propose to do a certain service for a given price. There is no difference in the general nature of the legal obligations of the contract between carrying a message along a wire and carrying goods or a package along a route. The physical agency may be different, but the essential nature of the contract is the same. The breach of contract in one case or the other is or may be attended with the same consequences; and the obligations to perform the stipulated duty is the same in both cases, the importance of discharge of it in both respects is the same. In both cases the contract is binding, and the responsibility of the parties for the breach of duty is governed by

Co., 46 Hun (N. Y.) 542; *Schwartz v. Atlantic Tel. Co.*, 18 Hun (N. Y.) 157; *Breese v. U. S. Tel. Co.*, 45 Barb. (N. Y.) 274; 31 How. Prac. (N. Y.) 86, affirmed in 48 N. Y. 132, 8 Am. Rep. 526; *MacPherson v. West. U. Tel. Co.*, 52 N. Y. Super. Ct. 232; *De Rutte v. New York, etc., Tel. Co.*, 1 Daly (N. Y.) 547; 30 How. Prac. (N. Y.) 403; *Lassiter v. West. U. Tel. Co.*, 89 N. C. 334; *West. U. Tel. Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500; *Passmore v. West. U. Tel. Co.*, 78 Pa. 238; *New York, etc., Tel. Co. v. Dryburg*, 35 Pa. 298, 78 Am. Dec. 338; *Pinckney v. West. U. Tel. Co.*, 19 S. C. 71, 45 Am. Rep. 765; *Aiken v. West. U. Tel. Co.*, 5 S. C. 358; *West. U. Tel. Co. v. Mellon*, 96 Tenn. 66, 33 S. W. 725; *West. U. Tel. Co. v. Munford*, 87 Tenn. 190, 10 S. W. 318, 10 Am. St. Rep. 630, 2 L. R. A. 601; *Marr v. West. U. Tel. Co.*, 85 Tenn. 529, 3 S. W. 496; *West. U. Tel. Co. v. Hearne*, 77 Tex. 83, 13 S. W. 970; *West. U. Tel. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *Wertz v. West. U. Tel. Co.*, 7 Utah, 446, 27 Pac. 172, 13 L. R. A. 510; *Gillis v. West. U. Tel. Co.*, 61 Vt. 461, 17 Atl. 736, 15 Am. St. Rep. 917, 4 L. R. A. 611; *West. U. Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715; *Thompson v. West. U. Tel. Co.*, 64 Wis. 531, 25 N. W. 789, 54 Am. Rep. 644; *Hibbard v. West. U. Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 775; *Primrose v. West. U. Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; *West. U. Tel. Co. v. Coggin*, 68 Fed. 137, 15 C. C. A. 231; *West. U. Tel. Co. v. Cook*, 61 Fed. 624, 9 C. C. A. 680; *Abraham v. West. U. Tel. Co. (C. C.)* 23 Fed. 315; *Playford v. United Kingdom Electric Tel. Co.*, L. R. 4 Q. B. 706, 10 B. & S. 759, 38 L. J. Q. B. 249, 21 L. T. Rep. N. S. 21, 17 Wkly. Rep. 968; *Dickson v. Reuter's Tel. Co.*, 3 C. P. D. 1, 47 L. J. C. P. 1, 37 L. T. Rep. N. S. 370, 26 Wkly. Rep. 23; *Baxter v. Dominion Tel. Co.*, 37 U. C. Q. B. 470.

An ordinance declaring a telegraph company to be a common carrier does not make it so. *State v. St. Louis*, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113.



the same general rules.”<sup>26</sup> There was only one English case decided before the above, which, only by implication, can be said to be authority for holding them to the liability of insurers.<sup>27</sup>

§ 27. **Same continued—decision criticised.**—Some weight might have been attached to the case above quoted, had it been decided at a time when the facilities for transmitting intelligence by means of electricity had been developed to its present state, when messages can be sent without so much risk of incorrect transmission. This state of perfection is now almost complete. As was very ably said by Judge Bruse, while discussing the perfection to which the science of telegraphy had attained: “In the ordinary course of business, the newspapers inform us, and we have no reason to doubt the truth of the statement, telegrams are sent from New York to London, and answers received, in about thirty-three minutes, they having passed through thirty-six different hands, and traveled over seven thousand miles. This is done every day, such is the perfection to which the art is brought. Does an instrumentality which can perform such feats require the fostering care of courts? Is it an infant yet in its swaddling clothes? No, but a giant power, under the control of man, whose daily exploits, guided by care and skill, throw those of the fabled Mercury deep into the shade and far in the rear.”<sup>28</sup> With the skilled operator and the improved machinery which we now have, it is almost impossible, without the company’s negligence, to fail in transmitting messages correctly. But during the time of this decision the science of telegraphy was not perfect by any means. The scientist had not learned how to guard against the atmospheric disturbances, the apparatus necessary to transmit intelligence were crude and imperfect, and the operators were very unskilled in the management of the machines.

§ 28. **Common-law theory continued—distinction between these and common carriers—reasons.**—The telegraph and telephone companies are not common carriers and so insurers of a correct transmission of messages,<sup>29</sup> yet they are liable for failure to exercise due care in making such transmissions.<sup>30</sup> The public is interested in them and must control the way in which they carry on their business to the extent of seeing that the confidence reposed in them by the public is exercised impartially with the same care and diligence

<sup>26</sup> *Parks v. Atla California Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589.

<sup>27</sup> *MacAndrews v. Electric Tel. Co.*, 17 C. B. 3, 1 Jur. N. S. 1073, 25 L. J. C. P. 26, 4 Wkly. Rep. 7, 84 E. C. L. 3, 3 Allen Tel. Cas. 38.

<sup>28</sup> *West. U. Tel. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279.

<sup>29</sup> See cases in note 24, *supra*.

<sup>30</sup> § 30.



which any one would use under like circumstances. While they are not common carriers, in the strict sense of the term, they are engaged in a business, almost if not quite, as important to the public as that of carriers.<sup>31</sup> Messages which are transmitted by means of electricity are sometimes as valuable to the sender as the goods which he transports by the common carrier, but the chances which the latter has over the former in caring for the goods during transit are far superior to that of the former in controlling the messages. The common carrier has an opportunity of seeing what happens to the goods in his charge at the moment it happens. But a telegraph company, owing to innumerable causes, which may disturb the security of the lines, would be as often open to liability because of the acts of providence, unknown to it, as for any other reason. The common carrier has the tangible property and is more capable of insuring its protection while in its care than the telegraph and telephone companies have of insuring the safety and correctness of the intangible property of a message which is being transmitted over their wires and almost constantly coming in contact with atmospheric hindrances.<sup>32</sup> For this reason, the common law does not hold the telegraph companies to the same strictness of insurers over the correct transmission of messages which it places on common carriers over the goods intrusted to the latter's care. The one is liable only when it fails to exercise due care, or when it becomes negligent; while the other is always liable for the loss of all or any part of the goods, unless the same has been caused by act of the parties, of the public enemy, or by the act of God.<sup>33</sup>

**§ 29. Common-law theory continued—analogy to common carriers of goods and passengers.**—The true rule is that the status of telegraph and telephone companies is analogous to common carriers in regard to their quasi-public character,<sup>34</sup> in their duty to

<sup>31</sup> *Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; *West. U. Tel. Co. v. Pendleton*, 95 Ind. 12, 48 Am. Rep. 692.

<sup>32</sup> *Gillis v. West. U. Tel. Co.*, 61 Vt. 461, 17 Atl. 736, 15 Am. St. Rep. 917, 4 L. R. A. 611, note; *West. U. Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715; *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226.

A constitutional provision that telegraph companies shall be common carriers does not affect the rule that they are not liable in the same manner and to the same extent as common carriers. *Poteet v. West. U. Tel. Co.*, 74 S. C. 491, 55 S. E. 113.

<sup>33</sup> *Stamey v. West. U. Tel. Co.*, 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95; *West. U. Tel. Co. v. Fontaine*, 58 Ga. 433; *West. U. Tel. Co. v. Carew*, 15 Mich. 525; *Pinckney v. West. U. Tel. Co.*, 19 S. C. 71, 45 Am. Rep. 765; *Marr v. West. U. Tel. Co.*, 85 Tenn. 529, 3 S. W. 496.

<sup>34</sup> *Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; *Central U. Tel. Co. v. Swoveland*, 14 Ind. App. 341, 42 N. E. 1035; *True v. International*

serve the public generally in good faith and impartially and without discrimination,<sup>35</sup> and in being subject to legislative regulation and control.<sup>36</sup> But they are not insurers of a correct transmission of messages turned over to them, as carriers are for property intrusted to them for carriage.<sup>37</sup> This, then, is the analogy between common carriers of goods and telegraph companies. The one is an insurer of goods intrusted to it under all circumstances, except such losses as may be caused by the act of God or the public enemy; while the telegraph companies, in the absence of a contract or regulations modifying their liability, do not insure absolutely the safe and accurate transmission of messages, but are only required to exercise due care and diligence in all their work, and will be liable only for the negligence of their agents.<sup>38</sup> It seems to us that the analogy between common carriers of passengers for hire and telegraph com-

Tel. Co., 60 Me. 9, 11 Am. Rep. 156; *State v. Nebraska Tel. Co.*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404; *Ins. Co. v. Tel. Co.*, 247 Ill. 84, 93 N. E. 134, 30 L. R. A. (N. S.) 1170, 139 Am. St. Rep. 314; *Vermilye v. Cable Co.*, 205 Mass. 598, 91 N. E. 904, 30 L. R. A. (N. S.) 472; *Vaught v. East Tenn. Tel. Co.*, 123 Tenn. 318, 130 S. W. 1050, 31 L. R. A. (N. S.) 315, Ann. Cas. 1912C, 132; *Providence-Washington Ins. Co. v. West. U. Tel. Co.*, 247 Ill. 84, 93 N. E. 134, 30 L. R. A. (N. S.) 1170, 139 Am. St. Rep. 314.

<sup>35</sup> *Central U. Tel. Co. v. State*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; *Central U. Tel. Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721; *State v. Kinloch Tel. Co.*, 93 Mo. App. 349, 67 S. W. 684; *State v. Nebraska Tel. Co.*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404; *State v. Delaware, etc., Tel. Co. (C. C.)* 47 Fed. 633, affirmed in 50 Fed. 677, 2 C. C. A. 1; *Tel., etc., Co. v. Beach*, 8 Ga. App. 720, 70 S. E. 137; *Vaught v. East Tenn. Tel. Co.*, supra.

<sup>36</sup> *Central U. Tel. Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721; *Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; *State v. Kinloch Tel. Co.*, 93 Mo. App. 349, 67 S. W. 684. See *Tel., etc., Co. v. State*, 99 Miss. 1, 54 South. 446.

<sup>37</sup> *West. U. Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744; *Little Rock, etc., Tel. Co. v. Davis*, 41 Ark. 79; *Fowler v. West. U. Tel. Co.*, 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211; *West. U. Tel. Co. v. Fontaine*, 58 Ga. 433; *Birney v. New York, etc., Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607; *Tyler v. West. U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *West. U. Tel. Co. v. Carew*, 15 Mich. 525; *Breese v. U. S. Tel. Co.*, 48 N. Y. 132, 8 Am. Rep. 526; *De Rutte v. New York, etc., Electro, etc., Tel. Co.*, 1 Daly (N. Y.) 547, 30 How. Prac. (N. Y.) 403; *Pineckney v. West. U. Tel. Co.*, 19 S. C. 71, 45 Am. Rep. 765; *West. U. Tel. Co. v. Edsall*, 63 Tex. 668; *West. U. Tel. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *West. U. Tel. Co. v. Munford*, 87 Tenn. 190, 10 S. W. 318, 10 Am. St. Rep. 630, 2 L. R. A. 601; *Marr v. West. U. Tel. Co.*, 85 Tenn. 529, 3 S. W. 496; *Gillis v. West. U. Tel. Co.*, 61 Vt. 461, 17 Atl. 736, 15 Am. St. Rep. 917, 4 L. R. A. 611; *Primrose v. West. U. Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; *West. U. Tel. Co. v. Schriver*, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678; *Abraham v. West. U. Tel. Co. (C. C.)* 23 Fed. 315; *White v. West. U. Tel. Co. (C. C.)* 14 Fed. 710, 5 McCrary, 103.

<sup>38</sup> See cases in note 37, supra.

panies is stronger than that between the latter and common carriers of goods.<sup>39</sup> Carriers of passengers are not insurers of the safety of their passengers; nor are they liable for injuries to their passengers resulting from such defects in their buildings or means of transportation as could not have been guarded against by the exercise of care on their part; nor for injuries caused by an act of God, without negligence on the carrier's part. But when the carrier has been in any respect negligent, the concurrence of an act of God in causing the injury will not relieve the carrier from responsibility. Nor are carriers to be held liable for injuries caused without fault on their part by an act of the public enemy; nor to injuries caused by inevitable accident, not due in any way to negligence on the part of the carrier and such as no human foresight on his part could avert. The same rule applies to telegraph companies. They are both engaged in a business of a public nature, both must serve all who come—neither are insurers nor liable as such, but both are liable for negligence.<sup>40</sup>

§ 30. **Common-law theory continued—degree of care.**—As telegraph companies are liable only for failure to exercise due care in transmitting intelligence, it might be proper to examine the true meaning of the phrase "due care"; and in doing so it gives us very much pleasure to refer the reader to the very learned and able opinion of Judge Danforth on this question, when he said that: "To require a degree of care and skill commensurate with the importance of the trust reposed is in accordance with the principles of law applicable to all undertakings of whatever kind, whether professional, mechanical, or that of common labor. There is no reason why the business of sending messages by telegraph should be made an exception to the general rule. This requires skill as well as care. If the work is difficult, greater skill is required. It is often necessary to intrust to this mode of communication, matters of great moment, and therefore the law requires great care. It is necessary to use instruments of a somewhat delicate nature and accurate adjustment, and therefore they must be so made as to be reasonably sufficient for the purpose. The company holding itself out to the public as ready and willing to transmit messages by this means pledges to that public the use of instruments proper for the purpose and that degree of skill and care adequate to accomplish the object proposed.

<sup>39</sup> *Gillis v. West. U. Tel. Co.*, 61 Vt. 461, 17 Atl. 736, 4 L. R. A. 611, 15 Am. St. Rep. 917; *Fowler v. West. U. Tel. Co.*, 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211; *West. U. Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 722.

<sup>40</sup> See cases in note 39, *supra*.



In case of failure in any of these respects the company would undoubtedly be liable for the damage resulting. This would not impose any liability for the want of skill or knowledge not reasonably attainable in the present state of the art, nor for errors resulting from the peculiar and unknown condition of the atmosphere or any agency from whatever source, which the degree of skill and care spoken of is insufficient to guard against or avoid."<sup>41</sup>

§ 31. **Common-law theory continued—bailees for hire—analogy.**—There are some few cases which have assigned telegraph companies to the category of bailees for hire.<sup>42</sup> The argument is that, as the ground of their liability is the same as that of bailees, the legal status of the two must be the same. But this doctrine is justly criticized, because telegraph companies are engaged in a business of a public nature and are precluded by rights and duties incident thereto from occupying the legal status of an ordinary bailee for hire, whose rights and duties arise wholly from the contract of employment.<sup>43</sup> A bailee for hire is any one who has the absolute right to contract with any one with whom he may see fit and to be controlled by the contract made with such party.<sup>44</sup> The compensation under the contract of bailment for hire may not be the same at all times, nor the same made with all persons. The bailor is not a public servant nor controlled by the public. While, on the other hand, telegraph companies are engaged in a business of a public nature and must serve all who apply to them after the former have complied with their reasonable rules and regulations. They are controlled by the public and are liable to the sender of the message on account of any special contract which may have been made with him, but are only liable for negligence or undue care in transmitting the message.

<sup>41</sup> *Bartwell v. West. U. Tel. Co.*, 62 Me. 209, 16 Am. Rep. 447.

<sup>42</sup> *Birney v. New York, etc., Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607; *Smithson v. U. S. Tel. Co.*, 29 Md. 162; *Pinckney v. West. U. Tel. Co.*, 19 S. C. 71, 45 Am. Rep. 765; *West. U. Tel. Co. v. Fontaine*, 58 Ga. 433.

<sup>43</sup> *Gillis v. West. U. Tel. Co.*, 61 Vt. 461, 17 Atl. 736, 4 L. R. A. 611, 15 Am. St. Rep. 917; *West. U. Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480.

<sup>44</sup> *White v. Phelps*, 14 Minn. 27 (Gil. 21), 100 Am. Dec. 190; *Butler v. Greene*, 49 Neb. 280, 68 N. W. 496; *Harris v. Howard*, 56 Vt. 695; *Walker v. York, etc., R. Co.*, 2 C. L. R. 237, 2 E. & B. 750, 18 Jur. 143, 23 L. J. Q. B. 73, 2 Wkly. Rep. 11, 75 E. C. L. 750; *Van Toll v. Southeastern R. Co.*, 12 C. B. N. S. 75, 8 Jur. N. S. 1213, 31 L. J. C. P. 241, 6 L. T. Rep. N. S. 244, 10 Wkly. Rep. 578, 104 E. C. L. 75. A special contract prevails against general principles of law applicable in the absence of express agreements. *Butler v. Greene*, above cited.



§ 32. Common-law theory continued—quasi-common carrier of news.—There are decisions holding that telegraph and telephone companies are quasi-common carriers of news and, as such, bound to supply all, who are in like circumstances, alike with similar facilities, under reasonable limitations and without any discrimination.<sup>45</sup> In our opinion this is the closest relation they have to common carriers, and in this they are not, strictly speaking, common carriers in that they are not insurers; but the care required of them in the transmission of news becomes more closely guarded. As time advances, improvements on electrical transmission of news are being rapidly made. We are approaching perfection in the art of telegraphy as the days pass, and it will only be a short time until the facilities for transmitting news will be even better and safer than for the transportation of goods by common carrier.<sup>46</sup> When this time comes—if it should ever—there is no reason why the same stringent laws which are applicable to common carriers should not be applied with equal force and in every particular to these companies; and when they are, of course they will then fall under the head of common carriers. The constitution and statutes of some of the states are now declaring them common carriers, but if such improvements are made on them as mentioned above, it will not be necessary for such laws to be enacted by the states, for they will be considered common carriers without such laws. We do not desire the readers to understand us as saying that they are common carriers, or ever will be, in the absence of a statute declaring them to be such; but we do say that if the improvements in the methods of transmitting intelligence continue to develop for the next thirty years as they have during the last ten, they will be at such a state of perfection as will induce the courts to throw around them the same stringent and rigid rules in the enforcement of that degree of

<sup>45</sup> State v. Citizens' Tel. Co., 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139; Marr v. West. U. Tel. Co., 85 Tenn. 529, 3 S. W. 496; West. U. Tel. Co. v. Allen, 66 Miss. 549, 6 South. 461; Nebraska Tel. Co. v. State, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113.

<sup>46</sup> Judge Bruce very ably said: "The undertaking of the company is *prima facie*, to send it correctly, and if their wires and instruments are in proper order and their operators skillful and careful, it will traverse the wires precisely in the words and figures which composed it when placed upon the wire and is sure in that shape and form to reach its destination, no atmospheric causes intervening to prevent. The very fact that but for cases of negligence have been brought against these companies is strong proof they do, in almost all cases, transmit messages correctly, and they can always do it, if they take proper care to have requisite skill and use proper instruments." West. U. Tel. Co. v. Tyler, 74 Ill. 168, 24 Am. Rep. 280.

care in the transmission of intelligence as are now applicable to common carriers, thereby causing them to be insurers to a certain degree, and therefore making them nothing less than common carriers.

§ 33. **Common carriers continued—law applicable to both telegraph and telephone companies.**—The same law which has been discussed in regard to common carriers is equally applicable to both telegraph and telephone companies. The fact that different means are used in the transmission of intelligence over telegraph and telephone companies does not make them different in nature. In both instances, the intelligence or message is actually transmitted by the use of agencies and instrumentalities furnished either by the telegraph or the telephone company, for which they are entitled to receive proper compensation; and one is just as much engaged in the business of transmitting intelligence for hire as the other. Both are devices by which one person is enabled to communicate with another beyond the reach of the human voice, unaided by some artificial appliance; and, although there are some differences in the mode of transmitting intelligence, yet the end sought and attained by each is substantially the same.<sup>47</sup> The rule is not changed by reason of the fact that the agent of one company occupies a position in which he may more often be apprised of the contents of the message than the agent for the other; for in either case the agents may be, and are very often, deprived of a means of ascertaining the contents of a message.<sup>48</sup>

§ 34. **Statutory theory.**—Having discussed at some length the analogy of telegraph and telephone companies to common carriers, as considered under the common law, it shall now be our purpose to say something of the changes which the statutes of some of the states have made with respect to this subject; and in doing so we shall endeavor to make the discussion more brief than under the former head, or the common-law theory. In fact the most that is said under this title is the result of such thoughts as may be advanced by the writer, on account of the statutory changes of the common-law theory being mostly of recent enactment, and, for which reason few cases in which the question is considered are found in the reports. It is held by almost a unanimity of decisions that telegraph and telephone companies are common carriers and

<sup>47</sup> *State v. Citizens' Tel. Co.*, 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139.

<sup>48</sup> *Id.*

liable as such only under statutes in which they are so declared.<sup>49</sup> And it is a pleasure to note the fact that some of the states have or are enacting statutes which declare them common carriers;<sup>50</sup> and yet we could not have made this statement several years ago when the science of telegraphy was in its infancy, but after these many years of improvement and development of the art we feel prone to change with the times and conditions respecting same.<sup>51</sup> While the general rule, practiced by the courts of our country in passing on issues of law presented to them for their consideration, is, that they are to be controlled to a great extent by former decisions, customs and usages, yet we do not feel constrained to follow this rule in every particular. However, it is very unsafe and improper to depart from these old usages whenever the time to do so will not permit, but in an era of progress, as we now live in, there must be changes in these laws to meet the needs and conditions of the times, and yet this is seldom done, except by legislation. A law, either common or statutory, which was sufficient to meet all the demands of a good government twenty, or maybe not so many years since, may be wholly inadequate for the general welfare of society now and should therefore be changed accordingly. There has been such an improvement in the method of transmitting messages by electricity that the common-law theory with respect to the legal status of telegraph companies should be amended by statutory laws. They have become as equally important to the commercial interest of the world as that of any common carrier of goods. They are agents of the government and have the power of exercising the right of eminent domain, without which they could not invade the private property of an individual without his consent. With all these privileges granted by the government, and the almost perfect control over the art of telegraphy by the late and modern improvements, it is but fair and just that they be placed under almost if not the same restrictions as that which the common law imposes on common carriers.

<sup>49</sup> See cases cited in notes 24 and 52.

<sup>50</sup> *West. U. Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 18 Ky. Law Rep. 995, 66 Am. St. Rep. 361, 36 L. R. A. 711; *Alabama & V. R. Co. v. Cumberland Tel., etc., Co.*, 88 Miss. 438, 41 South. 258; *Postal Tel., etc., Co. v. Wells*, 82 Miss. 733, 35 South. 190; *Blackwell Milling, etc., Co. v. West. U. Tel. Co.*, 17 Okl. 376, 89 Pac. 235, 10 Ann. Cas. 855; *Lothian v. Tel. Co.*, 25 S. D. 319, 126 N. W. 621; *State v. Super. Ct.*, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C, 287, Ann. Cas. 1913D, 78.

<sup>51</sup> *West. U. Tel. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279.



§ 35. **Common carriers in absence of statute are not—reason.**—Telegraph and telephone companies are not common carriers in the absence of statutes making them such.<sup>52</sup> And yet, there seems to be a misunderstanding among a few of the courts on this subject, and this, too, in the absence of statutes. These courts fail to see that in order to be liable as common carriers, they must be insurers of a correct transmission of messages as well as to serve all impartially who apply to them. If it were not necessary under the common law for them to be insurers of a correct transmission in order to be liable as common carriers, then, as a matter of fact, it would not be necessary for statutes to be enacted declaring them common carriers; for it is held by the common law that they are so much like common carriers as that they must serve the public in good faith and impartially. They are insurers of a correct transmission of messages only when they fail to exercise due care in the transmission, and in order to make them absolutely and unconditionally liable for any incorrectness in the sending of the messages, except when prevented by the act of God or the public enemy, it must be done by statutory enactments.

§ 36. **Reasonableness of statutes—making them common carriers.**—Many of the most important business transactions of the world depend for their successful consummation upon the accuracy with which telegraph companies transmit the messages received by them. Often the messages are of the utmost importance to either the sender or addressee, and a failure to make an accurate and correct transmission of these would cause them very great damage. Public policy, the protection of the property rights of the public, the safety of the people with whom they carry on business, all require a degree of care commensurate with the magnitude of the public interest involved. Therefore a clear and definite understanding of these companies' liabilities should be known by the public and not subject those with whom they deal to be forever and eternally troubled, harassed, and annoyed by conditions, stipulations, and limitations of liability made by such companies and forced upon the public. There is no more reason why an individual should be bound by the laws of the state than telegraph companies. If

<sup>52</sup> *Birkett v. West. U. Tel. Co.*, 103 Mich. 361, 61 N. W. 645, 50 Am. St. Rep. 374, 33 L. R. A. 404; *Kiley v. West. U. Tel. Co.*, 109 N. Y. 231, 16 N. E. 75; *Redpath v. West. U. Tel. Co.*, 112 Mass. 71, 17 Am. Rep. 69; *Clement v. West. U. Tel. Co.*, 137 Mass. 463; *Becker v. West. U. Tel. Co.*, 11 Neb. 87, 7 N. W. 868, 38 Am. Rep. 356; *Lassiter v. West. U. Tel. Co.*, 89 N. C. 334; *United States Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519; *Hart v. West. U. Tel. Co.*, 66 Cal. 579, 6 Pac. 637, 56 Am. Rep. 119; *West. U. Tel. Co. v. Hearue*, 77 Tex. 83, 13 S. W. 970.



the passage of such laws have the effect to make the individual a better citizen and prevent him from committing wrongs; or, in other words, if they induce him to be more careful and particular in his business transactions with his fellow man, the same reason should apply to laws pertaining to telegraph and telephone companies. If a telegraph company knows that it will be liable absolutely and unconditionally to its patrons for a failure to make a correct transmission of all the messages delivered to it for transmission, the company will be much more careful and particular in looking after its business than it would if it could limit by stipulation its own liability. Such statutes bring about better service to the public and for this reason the public receives a more valuable consideration in return for the many rights and privileges granted the company, and which are not enjoyed by the individuals, thereby making them more equitable both to the public and to the company.<sup>53</sup>

**§ 37. Statutes superior to any agreement.**—These statutes are superior to any agreement made by a telegraph or telephone company. They enter into and become a part of the agreement made between the company and its patrons, and none of these agreements can be made so as to be in conflict with them; otherwise they will be void. The telegraph and telephone companies are bound by the laws of the state as much as any inhabitant thereof, and these statutes, therefore, always become a part of the contract made with the patron for the transmission of messages. That is, the telegraph or telephone company cannot ignore the law and set itself up as having superior power to the states to make laws, but must obey the latter and transmit messages in accordance with such law or be liable for its failure in that respect.<sup>54</sup>

**§ 38. Binding in foreign states—relation to commerce.**—A statutory provision that “any telegraph company is hereby declared to be liable for the nondelivery of dispatches intrusted to its care, and for all mistakes in transmitting messages made by any person in its employ, \* \* \* and any such telegraph company shall not be exempted from such liability by reason of any clause, conditions, or agreement contained in its printed blanks,” is equitable, fair, and obligatory on all telegraph companies doing business in the state, and applies to such companies when contracting to correctly send a message to another state.<sup>55</sup> They are not penal statutes so as to

<sup>53</sup> West. U. Tel. Co. v. Kemp, 44 Neb. 194, 62 N. W. 451, 48 Am. St. Rep. 723.

<sup>54</sup> Id.

<sup>55</sup> Id. The court in this case said: “The contract was made at Papillion within this state and the defendant undertook to transmit correctly the mes-

be unenforceable in other states. They are a part of the contract of sending, and a failure to transmit correctly to its destination, which may be within another state is a breach thereof, and the party injured thereby becomes entitled to all damages actually flowing therefrom, or such as was presumed to have been contemplated at the time the contract was made, as a result of such breach. Both the telegraph and telephone are instruments of commerce, so it is also declared that no reasonable distinction exists between the office of common carrier "by telephone and the office of common carrier of goods by railway or steamboat. In both cases it is commerce between the states," so far as the principle concerns the power of a state to tax goods started for transportation to another state or delivered to a common carrier for that purpose.<sup>56</sup> It is also said that: "The electric telegraph line is at this day and time as much a common carrier and national highway in the transmission of telegraphic business and intelligence as the railroads and steam vessels."<sup>57</sup> Again, it is declared that a telegraph company "occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods."<sup>58</sup>

§ 39. **Alarm system—messenger service.**—It has been held that where a telegraph company, in addition to its general business, connects offices, dwelling houses, and other buildings with the police station, thereby establishing an alarm system, and which also maintains a staff of messenger boys for the use of patrons in receiving and delivering packages and other property, they paying for such services, is not a common carrier in respect to said services, unless it was incorporated to carry on such business.<sup>59</sup>

§ 40. **Telephone for private business.**—The installation of a local telephone plant, by a company doing a public business, in a

sage to Kansas City. It did not do so. The contract of the defendant, therefore, was broken, and the plaintiff thereby sustained damages. The place where part of the service was to be performed can make no difference; the contract was made here, and was to be in part performed in this state, and the defendant is liable for the breach thereof."

<sup>56</sup> *Matter of Taxation of the Penn. Tel. Co.*, 48 N. J. Eq. 91, 20 Atl. 846, 27 Am. St. Rep. 462.

<sup>57</sup> *Union Trust Co. of N. Y. v. Atchison, Topeka & S. F. Co.*, 8 N. M. 327, 43 Pac. 701.

<sup>58</sup> *Dailey v. State*, 51 Ohio St. 348, 37 N. E. 710, 24 L. R. A. 724, 46 Am. St. Rep. 578; *West. U. Tel. Co. v. State Board of Assmt.*, 132 U. S. 472, 10 Sup. Ct. 161, 33 L. Ed. 409; *West. U. Tel. Co. v. Mayor of New York (C. C.)* 38 Fed. 552, 3 L. R. A. 449.

<sup>59</sup> *Hirsch v. American Dist. Tel. Co.*, 112 App. Div. 265, 98 N. Y. Supp. 371, reversing 48 Misc. Rep. 370, 95 N. Y. Supp. 562.

large building so that only persons, while in the different rooms thereof, can communicate with each other, and not with the outside public, is not a part of the public business of the latter as for the purpose of rate regulation.<sup>60</sup> However, the rule would be otherwise if the local plant was connected with the general telephone exchange, or with the outside public.

<sup>60</sup> Chesapeake, etc., Tel. Co. v. Manning, 186 U. S. 238, 22 Sup. Ct. 881, 46 L. Ed. 1144.

## CHAPTER III

## CORPORATE RIGHTS AND FRANCHISES

- § 41. Incorporation.
- 42. Franchise—distinguished from charter.
- 43. Same—kinds of franchises—primary and secondary.
- 44. License not a franchise—acceptance of—a contract.
- 45. Alienability of franchise—primary.
- 46. Same continued—secondary.
- 47. Same continued—leases.
- 48. Legislature may authorize sale or lease.
- 49. Contracts and combinations.

§ 41. **Incorporation.**—Nearly every state in the Union now provides for the formation of corporations under general laws, and in a few states certain provisions are made by the constitution as to the formation of certain kinds or classes of corporations. Except in so far as regulated by special constitutional or statutory provisions the formation and incorporation of telegraph, telephone, and electric companies is governed by the principles relating to corporations in general.<sup>1</sup> Some of the states have special statutory laws for the creation of telegraph and telephone companies, but, if such statutes relate to telegraph companies, telephone companies may also be formed thereunder, unless it is expressed therein to the contrary.<sup>2</sup> A statute providing for the incorporation of a company to manufacture electricity for telephoning purposes, etc., authorizes the organization of companies to construct and operate telephone lines, and does not limit the purposes merely to the manufacturing of electricity for telephoning purposes.<sup>3</sup> The constitutional or statutory au-

<sup>1</sup> The Georgia constitution confers upon the legislature the exclusive power to charter telegraph companies, and a charter granted by a superior court is therefore null and void. *Doboy, etc., Tel. Co. v. De Magathias* (C. C.) 25 Fed. 697; *Crawford Electric Co. v. Knox County Power Co.*, 110 Me. 285, 86 Atl. 119, Ann. Cas. 1914C, 933, electrical companies.

<sup>2</sup> *Chesapeake, etc., Tel. Co. v. Baltimore, etc., Tel. Co.*, 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; *State v. Central New Jersey Tel. Co.*, 53 N. J. Law, 341, 21 Atl. 460, 11 L. R. A. 664; *Hudson River Tel. Co. v. Watervliet Turnpike, etc., Co.*, 135 N. Y. 393, 32 N. E. 148, 31 Am. St. Rep. 838, 17 L. R. A. 674; *York Tel. Co. v. Keesey*, 5 Pa. Dist. R. 366; *Central Pennsylvania Tel., etc., Co. v. Wilkes-Barre, etc., R. Co.*, 11 Pa. Co. Ct. Rep. 417; *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828; *Cumberland Tel., etc., Co. v. United Electric R. Co.* (C. C.) 42 Fed. 273, 12 L. R. A. 544.

<sup>3</sup> *Doty v. American Tel., etc., Co.*, 123 Tenn. 329, 130 S. W. 1053, Ann. Cas. 1912C, 167, construing *Home Tel. Co. v. Nashville*, 118 Tenn. 1, 101 S. W.



thority for the incorporation of these kinds of companies would also give authority for the formation and incorporation of wireless telegraph and telephone companies without expressly naming the latter companies.<sup>4</sup>

§ 42. **Franchise—distinguished from charter.**—The legal idea of a franchise is the power or privilege conferred by the state upon a collection of individuals or incorporated body, not possessed by the inhabitants of the state as of common right. There is a distinction between a franchise and a charter. A charter contains the grant of a franchise, but it is not the franchise itself. There is generally no evidence that a franchise has been granted except the charter which contains the grant. The constitutional inhibition against impairing the obligation of contracts is not operative upon the charter but upon the contract which the charter contains, and protects franchises because they are valuable property or contract rights.<sup>5</sup> The right to carry on a public telegraph, telephone and electric business with the rights and privileges usually incident thereto is ordinarily termed a franchise,<sup>6</sup> which is exercised by and pursuant to authority acquired from the sovereign power.<sup>7</sup> This may be inquired into by quo warranto,<sup>8</sup> and if it is ascertained in such a proceeding that the right has been illegally or improperly granted, or if there has been a nonuser or misuser of same, it may be forfeited of this right.<sup>9</sup> But, in order that such right be forfeited as a result of its having been illegally or improperly granted, it must be accom-

770. 11 Ann. Cas. 824, as being arbiter on the subject; Crawford Electric Co. v. Knox County Power Co., 110 Me. 285, 86 Atl. 119, Ann. Cas. 1914C, 933, extent of franchise of electric company.

<sup>4</sup> See §§ 1, 2, and 10.

<sup>5</sup> Oakland R. R. Co. v. Oakland, etc., Co., 45 Cal. 365, 13 Am. Rep. 181; Crawford Electric Co. v. Knox County Power Co., 110 Me. 285, 86 Atl. 119, Ann. Cas. 1914C, 933, distinction between "franchise" and "power."

<sup>6</sup> California State Tel. Co. v. Alta Tel. Co., 22 Cal. 398, overruled on other grounds in San Francisco v. Spring Valley Waterworks, 48 Cal. 493; West. U. Tel. Co. v. Omaha, 73 Neb. 527, 103 N. W. 84; Lowther v. Bridgeman, 57 W. Va. 306, 50 S. E. 410; West. U. Tel. Co. v. Norman (C. C.) 77 Fed. 13; Rural Home Tel. Co. v. Kentucky, etc., Tel. Co., 128 Ky. 209, 107 S. W. 787, 32 Ky. Law Rep. 1068, holding that the mode of acquiring franchise must be complied with or the company will be a trespasser and without standing in court; Atty. Gen. v. Haverhill Gas Co., 215 Mass. 394, 101 N. E. 1061, Ann. Cas. 1914C, 1266.

<sup>7</sup> Lowther v. Bridgeman, 57 W. Va. 306, 50 S. E. 410; Tel., etc., Co. v. Secretary, 159 Mich. 195, 123 N. W. 568.

<sup>8</sup> People v. Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245; Clark v. Interstate Independent Tel. Co., 72 Neb. 883, 101 N. W. 977.

<sup>9</sup> People v. Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245; State v. Cumberland Tel., etc., Co., 114 Tenn. 194, 86 S. W. 390. See State v. Sunset Tel.

plished through a writ of quo warranto instituted by the state, and not by a suit for injunction brought by a taxpayer to restrain the exercise of the franchise;<sup>10</sup> nor can a municipality adjudge that a franchise has been lost by nonuser where no such authority is vested in the municipality by its charter.<sup>11</sup>

**§ 43. Same—kinds of franchises—primary and secondary.**—There are two kinds of franchises, the primary franchise, and the secondary franchise. The primary franchise is the right of being or existing as a corporation. It is a right granted by the legislature to a body of individuals to be and to act as an artificial person, without incurring individual liability. It is the right to be, to exist, to be known, and to be recognized as a corporation and clothed with such rights and immunities as are not enjoyed by the people in common. The secondary franchise is the right to construct, operate, and maintain a corporation. The one is the right to be a corporation, and the other is the right to carry on and operate the same after the primary franchise has been vested in the corporation. So applying the general corporation laws to the subject of telegraph, telephone, and electric companies, the primary franchise is that power, right, or privilege vested in an incorporated body of people by the legislature of the state to carry on a general telegraph, telephone, or electric business.<sup>12</sup> When this specific right or power or franchise has been conferred upon these companies, the power was also given to such companies by implication, if not otherwise, to employ the necessary and usual means to effectuate that purpose; the usual and necessary means being the erecting of poles, the stringing of wires, the operating of offices and exchanges, etc.<sup>13</sup> This power is regarded as incident of corporate existence, and is known as the secondary franchise. This is a power, however, which need not necessarily be granted to a corporation, but may be granted to an individual,<sup>14</sup> and this notwithstanding the statute creating

etc., Co., 86 Wash. 309, 150 Pac. 427, adopting manual telephones instead of automatic phones for which franchise granted not nonuser.

<sup>10</sup> Clark v. Interstate Independent Tel. Co., 72 Neb. 883, 101 N. W. 977.

<sup>11</sup> Matter of Seaboard Tel., etc., Co., 68 App. Div. 283, 74 N. Y. Supp. 15.

<sup>12</sup> Doty v. American, etc., Tel. Co., 123 Tenn. 329, 130 S. W. 1053, Ann. Cas. 1912C, 167; Crawford Electric Co. v. Knox County Power Co., 110 Me. 285, 86 Atl. 119, Ann. Cas. 1914C, 933.

<sup>13</sup> Doty v. American, etc., Tel. Co., 123 Tenn. 329, 130 S. W. 1053, Ann. Cas. 1912C, 167; West. U. Tel. Co. v. Omaha, 73 Neb. 527, 103 N. W. 84; Crawford Electric Co. v. Knox County Power Co., 110 Me. 285, 86 Atl. 119, Ann. Cas. 1914C, 933.

<sup>14</sup> Lowther v. Bridgeman, 57 W. Va. 306, 50 S. E. 410. See State v. Cadwallader, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319.

the grant refers in terms to "companies."<sup>15</sup> It has also been held that an individual may own and operate a telephone system without legislative authority, unless there is some restriction imposed by the legislature upon such right.<sup>16</sup> Thus, where a telephone company has acquired from a city and county a franchise to operate its system, agreeing to furnish any person for whom it might not construct a line telephone service, a line constructed by such person, parties constructing such lines for private use, and to be connected to the company's lines, and not to be used in competition with the business of the company, are not required to obtain a franchise therefor.<sup>17</sup> While this may be true it would be necessary to have legislative authority to exercise the right of eminent domain; and the right to occupy public streets or highways must be derived either directly or indirectly from the state.<sup>18</sup>

§ 44. License not a franchise—acceptance of—a contract.—It has been held by some courts that there is a distinction between a franchise granted by the legislature to a telegraph or telephone company and a license granted to either of the companies by a municipal corporation, in that the latter can not grant a franchise, but can only grant a mere license,<sup>19</sup> although the constitution or statute of the state requires that the consent of the municipality is necessary for the exercise of the franchise.<sup>20</sup> However, it has been

<sup>15</sup> *Lowther v. Bridgeman*, 57 W. Va. 306, 50 S. E. 410.

<sup>16</sup> *Magee v. Overshiner*, 150 Ind. 127, 49 N. E. 951, 65 Am. St. Rep. 358, 40 L. R. A. 370.

<sup>17</sup> *Cumberland Tel., etc., Co. v. Cartwright Creek Tel. Co.*, 128 Ky. 396, 108 S. W. 875, 32 Ky. Law Rep. 1357.

<sup>18</sup> *People v. Chicago Tel. Co.*, 220 Ill. 238, 77 N. E. 245.

<sup>19</sup> A license or privilege to occupy city streets is not a franchise and can only be granted in pursuance of legislative authority. *People v. Chicago Tel. Co.*, 220 Ill. 238, 77 N. E. 245. A grant to a telephone company of the right to construct and maintain a telephone system is a mere license and not exclusive, and the municipality may subsequently grant to another company a like privilege. *Rock Island v. Central U. Tel. Co.*, 132 Ill. App. 248. See, also, *Chicago v. Chicago Tel. Co.*, 230 Ill. 157, 82 N. E. 607, 13 L. R. A. (N. S.) 1084, 12 Ann. Cas. 109; *People v. Central U. Tel. Co.*, 192 Ill. 307, 61 N. E. 428, 85 Am. St. Rep. 338; *Dakota Cent. Tel. Co. v. Huron (C. C.)* 165 Fed. 226; *Chicago Tel. Co. v. Northwestern Tel. Co.*, 199 Ill. 324, 65 N. E. 329; *Twin Village Water Co. v. Damariscotta Gaslight Co.*, 98 Me. 325, 56 Atl. 1112; *Tel. Co. v. Board of Councilmen*, 141 Ky. 588, 133 S. W. 564; *Tel. Co. v. Frankfort*, 143 Ky. 86, 136 S. W. 138.

<sup>20</sup> *Dakota Cent. Tel. Co. v. Huron (C. C.)* 165 Fed. 226. See *Barhite v. Home Tel. Co.*, 50 App. Div. 25, 63 N. Y. Supp. 659, holding that, where the franchise is obtained from the legislature to occupy city streets, the consent of the city is not necessary, although the latter may regulate and control the manner in which it is exercised.



held that, where the right to occupy public streets is termed a license, and not a franchise, it may be inquired into by information in the nature of a writ of quo warranto, since this right can only be granted pursuant to legislative authority.<sup>21</sup> So the distinction between license and franchise as applied in cases of this kind has been questioned, since, in either case, the right is acquired from the legislature, either directly or indirectly.<sup>22</sup> Especially would this be the case if the power to grant a franchise has been delegated to the municipal corporation.<sup>23</sup> Regardless of what it may be termed, whether a franchise or license, when a municipal corporation grants to a telegraph or telephone company rights, franchises, licenses, or privileges, and the grants are accepted in pursuance of the terms and conditions of a legal ordinance authorizing the same, a contract is then created between the municipality and the company,<sup>24</sup> which is binding upon the former so that it cannot be revoked or rescinded

<sup>21</sup> *People v. Chicago Tel. Co.*, 220 Ill. 238, 77 N. E. 245; *State v. Milwaukee Independent Tel. Co.*, 133 Wis. 588, 114 N. W. 108, 315.

<sup>22</sup> *State v. East Cleveland R. Co.*, 6 Ohio Cir. Ct. R. 318; *Tel. Co. v. Frankfort, Ky.* (C. C.) 190 Fed. 346. See *Mt. Pleasant Tel. Co. v. Ohio, etc., Tel. Co.*, 140 Ill. App. 27; *Cumberland Tel., etc., Co. v. Cartwright Creek Tel. Co.*, 128 Ky. 385, 108 S. W. 875, 32 Ky. Law Rep. 1357; *Old Colony Trust Co. v. Wichita* (C. C.) 123 Fed. 762, affirmed in 132 Fed. 641, 66 C. C. A. 19.

<sup>23</sup> *State v. Milwaukee Independent Tel. Co.*, 133 Wis. 588, 114 N. W. 108, 315. See § 243.

<sup>24</sup> *City of Louisville v. Louisville Home Tel. Co.*, 149 Ky. 234, 148 S. W. 13, Ann. Cas. 1914A, 1240; *Northwestern Tel. Exch. Co. v. Anderson*, 12 N. D. 585, 98 N. W. 706, 102 Am. St. Rep. 580, 1 Ann. Cas. 110, 65 L. R. A. 771; *West. U. Tel. Co. v. Syracuse*, 24 Misc. Rep. 338, 53 N. Y. Supp. 690, modified in 35 App. Div. 631, 55 N. Y. Supp. 1151; *Chicago v. Chicago Tel. Co.*, 230 Ill. 157, 82 N. E. 607, 13 L. R. A. (N. S.) 1084, 12 Ann. Cas. 109, cannot be enforced by mandamus; *Village of London Mills v. White*, 208 Ill. 289, 70 N. E. 313; *People v. Central U. Tel. Co.*, 192 Ill. 307, 61 N. E. 428, 85 Am. St. Rep. 338; *Rock Island v. Central U. Tel. Co.*, 132 Ill. App. 248; *Chesapeake, etc., Tel. Co. v. Baltimore*, 90 Md. 638, 45 Atl. 446; *Chesapeake, etc., Tel. Co. v. Baltimore*, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033; *Cumberland Tel., etc., Co. v. Cartwright Creek Co.*, 128 Ky. 395, 108 S. W. 875, 32 Ky. Law Rep. 1357; *People v. Tel. Co.*, 245 Ill. 121, 91 N. E. 1065. In *Chicago Tel. Co. v. Northwestern Tel. Co.*, 199 Ill. 324, 65 N. E. 329, it was held a privilege granted by a city to construct a public improvement in the streets constitutes merely a license to the company until it accepts the grant and constructs the improvements thereunder in accordance with the terms and conditions of the grant, then a contract is created between the city and the company. See *City v. Baxter Springs Light, etc., Co.*, 64 Kan. 591, 68 Pac. 63; *Clarksburg, etc., Light Co. v. City*, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142. See, also, *Southern Bell Tel., etc., Co. v. Mobile* (C. C.) 162 Fed. 523; *Cumberland Tel., etc., Co. v. Evansville*, 143 Fed. 238, 74 C. C. A. 368, affirming (C. C.) 127 Fed. 187; *Morristown v. East*



without cause;<sup>25</sup> neither can it be nullified or materially impaired;<sup>26</sup> nor can new and burdensome conditions be imposed when the same are not justifiable under the police powers of the municipality.<sup>27</sup> Not only is the contract binding upon the municipality, but upon the company as well as to the conditions imposed,<sup>28</sup> and estops the latter to repudiate any of the provisions of such con-

Tennessee Tel. Co., 115 Fed. 304, 53 C. C. A. 132; Russell v. Sebastian, 233 U. S. 195, 34 Sup. Ct. 517, 58 L. Ed. 912, Ann. Cas. 1914C, 1282. See § 84.

*Construction of.*—Doubtful contracts must be construed in favor of the municipality. Colorado Tel. Co. v. Fields, 15 N. M. 431, 110 Pac. 571, 30 L. R. A. (N. S.) 1088.

<sup>25</sup> London Mills v. White, 208 Ill. 289, 70 N. E. 313; People v. Central U. Tel. Co., 192 Ill. 307, 61 N. E. 428, 85 Am. St. Rep. 338; Rock Island v. Central U. Tel. Co., 132 Ill. App. 248; Hudson Tel. Co. v. Jersey City, 49 N. J. Law, 303, 8 Atl. 123, 60 Am. Rep. 619; Morristown v. East Tennessee Tel. Co., 115 Fed. 304, 53 C. C. A. 132. See Tel. Co. v. Board of Councilmen, 141 Ky. 588, 133 S. W. 564. See, also, Russell v. Sebastian, 233 U. S. 195, 34 Sup. Ct. 517, 58 L. Ed. 912, Ann. Cas. 1914C, 1282, and note. See § 84. But see Nebraska Tel. Co. v. Lincoln, 84 Neb. 325, 121 N. W. 442; Id., 82 Neb. 59, 117 N. W. 284, 28 L. R. A. (N. S.) 221, where clause in grant was legislative and subject to repeal. Incorporation of a territory into a city as affecting prior rights as to use of the highway by electric company, see Public Service Corp. v. Westfield, 80 N. J. Eq. 295, 84 Atl. 718; People v. Chicago Tel. Co., 245 Ill. 121, 91 N. E. 1065; Id., 245 Ill. 154, 91 N. E. 1070.

<sup>26</sup> Southern Bell Tel., etc., Co. v. Mobile (C. C.) 162 Fed. 523; Northwestern Tel. Exch. Co. v. Anderson, 12 N. D. 585, 98 N. W. 706, 102 Am. St. Rep. 580, 1 Ann. Cas. 110, 65 L. R. A. 771; Chesapeake, etc., Tel. Co. v. Baltimore, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033; West. U. Tel. Co. v. Syracuse, 24 Misc. Rep. 338, 53 N. Y. Supp. 690, modified in 35 App. Div. 631, 55 N. Y. Supp. 1151. In Rock Island v. Central U. Tel. Co., 132 Ill. App. 248, and Southern Bell Tel., etc., Co. v. Mobile (C. C.) 162 Fed. 523, municipality was enjoined from interfering with the grants made by the city and accepted by telephone companies. See Nebraska Tel. Co. v. Lincoln, 84 Neb. 325, 121 N. W. 442; Id., 82 Neb. 59, 117 N. W. 284, 28 L. R. A. (N. S.) 221.

<sup>27</sup> Chesapeake, etc., Tel. Co. v. Baltimore, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033. See § 243.

<sup>28</sup> Cumberland Tel., etc., Co. v. Evansville, 143 Fed. 238, 74 C. C. A. 368, affirming (C. C.) 127 Fed. 187; Jamestown v. Home Tel. Co., 125 App. Div. 1, 109 N. Y. Supp. 297; Superior v. Tel. Co., 141 Wis. 363, 122 N. W. 1023. See, also, Moberly v. Richmond Tel. Co., 126 Ky. 369, 103 S. W. 714, 31 Ky. Law Rep. 783; Chicago v. Chicago Tel. Co., 230 Ill. 157, 82 N. E. 607, 13 L. R. A. (N. S.) 1084, 12 Ann. Cas. 109, holding that an obligation imposed upon a telephone company, by acceptance of a condition in an ordinance granting the right to use the streets that the latter shall file statements of its gross receipts and pay a certain percentage thereof into the city is contractual, and not enforceable by mandamus, but concedes that ordinarily this is the proper remedy to compel a public service corporation to perform a duty lying within the scope of its general corporate nature, the performance of which is a condition of its creation. Louisville v. Louisville Home Tel. Co.,

tract.<sup>29</sup> But, where the designation of streets or the manner of constructing the line is made by a court in pursuance to statute, the court cannot insert requirements not authorized by the statute, although the requirements are assented to by the company.<sup>30</sup> The same rule is applicable to grants made to electric light companies; and it has been held that the acceptance of the grant may arise from the fact that the company has constructed its plant and expended large sums of money thereon.<sup>31</sup> And where a telegraph, telephone, or electric company has erected its poles and strung its wires, or has gone to much expense in placing its wires under ground in pursuance to a grant from the municipality, an acceptance arises; and the fact that the incorporation of the company is incomplete at the time the grant is made by a municipal corporation does not affect its right thereto.<sup>32</sup> Furthermore, where a telegraph, telephone, or electric company has been organized under the laws of the state, a municipal corporation cannot question the validity of the company's incorporation in a suit to restrain the municipality from interfering with the exercise of the rights which it has granted.<sup>33</sup> This is based on the ground that the company is a *de jure* corporation, and none save the state itself can question the validity of the corporation.

**§ 45. Alienability of franchise—primary.**—The primary franchise, or the right or privilege to be a telegraph, telephone or elec-

149 Ky. 234, 148 S. W. 13, Ann. Cas. 1914A, 1240, holding that a condition that a telephone company shall install no party lines is valid and is a part of the contract which may be enforced by the city, regardless of what effect such line might have upon the public. See § 84.

<sup>29</sup> Cumberland Tel., etc., Co. v. Cartwright Creek Tel. Co., 128 Ky. 395, 108 S. W. 875, 32 Ky. Law Rep. 1357; Postal Tel. Cable Co. v. Newport, 76 S. W. 159, 25 Ky. Law Rep. 635; Louisville v. Louisville Home Tel. Co., 149 Ky. 234, 148 S. W. 13, Ann. Cas. 1914A, 1240.

*Construction of contract* must be made in favor of public rights. Colorado Tel. Co. v. Fields, 15 N. M. 431, 110 Pac. 571, 30 L. R. A. (N. S.) 1088.

<sup>30</sup> City of Bayonne v. Lord, 61 N. J. Law, 136, 38 Atl. 752.

<sup>31</sup> Duluth v. Duluth Tel. Co., 84 Minn. 486, 87 N. W. 1128; City v. Baxter Springs Light, etc., Co., 64 Kan. 591, 68 Pac. 63; Clarksburg, etc., Light Co. v. City of Clarksburg, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142, holding that a municipal grant of privilege, not exclusive, of occupying the city streets for the conveyance of electricity for public use therein confers a valid franchise constituting a contract under the constitutional provisions prohibiting the passage of any law impairing contract obligations. Platts-mouth v. Nebraska Tel. Co., 80 Neb. 460, 114 N. W. 588, 14 L. R. A. (N. S.) 654, 127 Am. St. Rep. 779.

<sup>32</sup> State v. Citizens' Tel. Co., 9 N. J. Law J. 210, 5 Atl. 274.

<sup>33</sup> Old Colony Trust Co. v. Wichita (C. C.) 123 Fed. 762, affirmed in 132 Fed. 641, 66 C. C. A. 19.

tric company, cannot be alienated, either absolutely or conditionally, without the consent of the creating power.<sup>34</sup> There is by no means the same harmony of opinion as to the fundamental principles upon which the doctrine is based. The following reasons have been assigned by the courts for its existence: A franchise is a personal trust, and the state has therefore a right to declare who shall be the transferee of such trust;<sup>35</sup> a corporation enjoying public franchises is an agent of the state and on the ordinary principles of agency is incapable of delegating its powers without the permission of the principal;<sup>36</sup> a grant of a public franchise is a contract be-

<sup>34</sup> *Philadelphia v. West. U. Tel. Co.*, 11 Phila. (Pa.) 327, 2 Wkly. Notes Cas. 455; *Cumberland Tel., etc., Co. v. Evansville*, 127 Fed. 187, affirmed in 143 Fed. 238, 74 C. C. A. 368; *Atlantic, etc., Tel. Co. v. Union Pac. R. Co.* (C. C.) 1 Fed. 745, 1 McCrary, 188, 541. Compare *Tel. Co. v. Board of Councilmen*, 141 Ky. 588, 133 S. W. 564. See, also, *Commonwealth v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672; *Richardson v. Sibley*, 11 Allen (Mass.) 65, 87 Am. Dec. 700; *Penn. R. R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; *Lauman v. Lebanon Valley R. Co.*, 30 Pa. 42, 72 Am. Dec. 685; *Roper v. McWhorter*, 77 Va. 214; *Hall v. Sullivan R. R. Co.*, 2 Red. Am. R. R. Cas. 621; *Gue v. Tidewater Canal Co.*, 24 How. 257, 16 L. Ed. 635; *Morgan v. Louisiana*, 93 U. S. 217, 23 L. Ed. 860; *Coe v. Columbus, etc., R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518; *Clarke v. Omaha, etc., R. Co.*, 4 Neb. 458; *Black v. Delaware, etc., Canal Co.*, 24 N. J. Eq. 465; *Amant v. New Alexandria Turnpike Co.*, 13 Serg. & R. (Pa.) 210, 15 Am. Dec. 593; *Gulf, etc., R. Co. v. Morris*, 67 Tex. 692, 4 S. W. 156; *Bruffett v. Great W. R. R. Co.*, 25 Ill. 353; *Arthur v. Commercial Bank*, 9 Smedes & M. (Miss.) 394, 48 Am. Dec. 719; *Ragan v. Aiken*, 9 Lea (Tenn.) 609, 42 Am. Rep. 684; *Troy, etc., R. Co. v. Kerr*, 17 Barb. (N. Y.) 581; *Troy & Boston R. Co. v. Boston Hoosac Tunnel, etc., R. Co.*, 86 N. Y. 107; *Abbott v. Johnstown, etc., R. Co.*, 80 N. Y. 27, 36 Am. Dec. 572; *People v. Albany, etc., R. Co.*, 77 N. Y. 232; *East Boston Freight Co. v. Hubbard*, 10 Allen (Mass.) 459, note; *Stockton v. Central R. Co.*, 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97; *Fietsam v. Hay*, 122 Ill. 293, 13 N. E. 501, 3 Am. St. Rep. 492; *Bardstown, etc., R. Co. v. Metcalf*, 4 Metc. (Ky.) 199, 81 Am. Dec. 541; *Kennebec, etc., R. Co. v. Portland, etc., R. Co.*, 59 Me. 9; *State v. Consolidation Coal Co.*, 46 Md. 1; *Richards v. Merrimack, etc., R. Co.*, 44 N. H. 127; *Pittsburg, etc., R. Co. v. Allegheny County*, 63 Pa. 126. See, also, *Attorney General v. Haverhill Gaslight Co.*, 215 Mass. 394, 101 N. E. 1061, Ann. Cas. 1914C, 1266, and note citing authorities.

<sup>35</sup> *Shepley v. Atlantic, etc., R. Co.*, 55 Me. 395; *Kennebec, etc., R. Co. v. Portland, etc., R. Co.*, 59 Me. 9; *Bank of Middlesbury v. Edgerton*, 30 Vt. 182; *Miller v. Rutland, etc., R. Co.*, 36 Vt. 452; *U. S. v. West. U. Tel. Co.* (C. C.) 50 Fed. 28; *U. S. v. Union Pac. R. Co.*, 160 U. S. 1, 16 Sup. Ct. 190, 40 L. Ed. 319; *U. S. v. Northern Pac. R. Co.* (C. C.) 120 Fed. 546; *Reiff v. West. U. Tel. Co.*, 49 N. Y. Super. Ct. 441; *Benedict v. West. U. Tel. Co.*, 9 Abb. N. C. (N. Y.) 214.

<sup>36</sup> *Beman v. Rufford*, 1 Sim. N. S. 569; *Great Northern R. Co. v. Eastern Counties R. Co.*, 9 Hare, 306; *Winch v. Birkenhead, etc., R. Co.*, 5 De Gex. &



tween the state and the grantee, by which the latter undertakes to perform certain public duties, from the performance of which he cannot release himself without the consent of the other contracting party;<sup>37</sup> the powers of the grantee of a franchise like other grantees of the sovereignty are strictly limited by the instrument of grant, and the existence of a power to alienate such a franchise cannot be inferred in the absence of express statutory provisions;<sup>38</sup> transfer of franchise may sometimes be illegal, as tending to the establishment of monopolies.<sup>39</sup> It has been held that a mortgage deed which professes and manifests an intent to convey the franchise of being a corporation will not be for that reason entirely void, but will be operative to convey the property, and perhaps also the secondary franchises, being void only so far as it undertakes to con-

S. 562, 13 Eng. L. & Eg. 506; *Richmond Waterworks Co. v. Richmond, L. R.*, 3 Ch. Div. 82.

<sup>37</sup> *Thomas v. Railroad Co.*, 101 U. S. 83, 25 L. Ed. 950. In this case the court by Justice Miller very ably said: "The principle is that, where a corporation like a railroad company has granted to it by charter a franchise in a large measure intended to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions or by which it undertakes without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantee of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy." See, also, *Com. v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672; *Roper v. McWhorter*, 77 Va. 214; *Munroe v. Thomas*, 5 Cal. 470; *Lauman v. Lebanon, etc., R. Co.*, 30 Pa. 42, 72 Am. Dec. 685; *Central Transportation Co. v. Pullman Palace Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; *Freeman v. Minneapolis, etc., R. Co.*, 28 Minn. 443, 10 N. W. 594; *Kenton County Court v. Turnpike Co.*, 10 Bush (Ky.) 529; *Lakin v. Railroad Co.*, 13 Or. 436, 11 Pac. 68, 57 Am. Rep. 25; *Pierce v. Emery*, 32 N. H. 484; *Railroad Co. v. Brown*, 17 Wall. 445, 21 L. Ed. 675; *Chicago Gaslight Co. v. People's Gaslight Co.*, 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124; *Black v. Delaware, etc., Canal Co.*, 22 N. J. Eq. 130; *York, etc., R. Co. v. Winans*, 17 How. 30, 15 L. Ed. 27.

<sup>38</sup> *Thomas v. Railroad Co.*, 101 U. S. 82, 25 L. Ed. 950; *Board of Coms. of Tippecanoe County v. Lafayette, etc., R. Co.*, 50 Ind. 85; *People v. Chicago Trust Co.*, 130 Ill. 268, 22 N. E. 798, 17 Am. St. Rep. 319, 8 L. R. A. 497n; *Lauman v. Lebanon, etc., R. Co.*, 30 Pa. 42, 72 Am. Dec. 685; *Penn. R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; *Richardson v. Sibley*, 11 Allen (Mass.) 65, 87 Am. Dec. 700; *Abbott v. Johnstown, etc., R. Co.*, 80 N. Y. 27, 36 Am. Rep. 572; *Black v. Delaware, etc., Canal Co.*, 24 N. J. Eq. 464; *Central Trans. Co. v. Pullman Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55.

<sup>39</sup> *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279, 34 Am. St. Rep. 541, 15 L. R. A. 145.



vey the corporate capacity of the mortgagor.<sup>40</sup> Neither can they be alienated or seized under judicial process by creditors, without the consent of the legislature, because this would disable them from discharging the public duties which they have assumed and in consideration of which their franchises have been granted.<sup>41</sup> The fact that the alienation would be beneficial to the pecuniary interest of both the telegraph, telephone, or electric companies, and also the public, is not a matter to be considered by the court in a question of this nature.<sup>42</sup> And it makes no difference who are the incorporators of the company and for what general purpose it was created. For instance, where a railroad company is authorized to construct, in connection with its railroad, a telegraph line, to manage and control the same, and to fix the rate of charges thereon, a contract made in the absence of the legislative consent by which it undertakes to divest itself of this public duty, by transferring the privilege to another company, is *ultra vires* and void.<sup>43</sup> Some courts hold that an agreement entered into by a telegraph company with a similar company to divide earnings and expenses is neither *ultra vires* nor against public policy.<sup>44</sup>

§ 46. **Same continued—secondary.**—While there may be some doubt entertained as to the right of a telegraph, telephone, or electric company to alienate its secondary franchise without the legis-

<sup>40</sup> *Butler v. Rahm*, 46 Md. 541; *Pullman v. Cincinnati, etc.*, R. Co., 20 Fed. Cas. No. 11461, 4 Biss. 35; *Fietsam v. Hay*, 122 Ill. 293, 13 N. E. 501, 3 Am. St. Rep. 492.

<sup>41</sup> *Hays v. Ottawa, etc.*, R. Co., 61 Ill. 422; *Tippecanoe County v. Lafayette, etc.*, R. Co., 50 Ind. 85; *Anderson v. Cin. Sou. R. Co.*, 86 Ky. 44, 5 S. W. 49, 9 Ky. Law Rep. 303, 9 Am. St. Rep. 263; *Treadwell v. Salisbury Mfg. Co.*, 7 Gray (Mass.) 393, 66 Am. Dec. 490; *Chollette v. Omaha, etc.*, R. Co., 26 Neb. 159, 4 L. R. A. 135, 41 N. W. 1106; *Richards v. Merrimack, etc.*, R. Co., 44 N. H. 127; *Susquehanna Canal Co. v. Bonham*, 9 Watts & S. (Pa.) 27, 42 Am. Dec. 315; *International, etc.*, R. Co. v. *Eckford*, 71 Tex. 274, 8 S. W. 679; *Nagle v. Alexandria, etc.*, R. Co., 83 Va. 707, 3 S. E. 369, 5 Am. St. Rep. 308; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979.

<sup>42</sup> *U. S. v. West. U. Tel. Co. (C. C.)* 50 Fed. 28.

<sup>43</sup> *Central Branch Union Pac. R. Co. v. West. U. Tel. Co. (C. C.)* 3 Fed. 417, 1 *McCrary*, 557; *West. U. Tel. Co. v. U. Pac. Co. (C. C.)* 3 Fed. 1, 1 *McCrary*, 418; *Atlantic, etc., Tel. Co. v. Union Pac. R. Co. (C. C.)* 1 Fed. 745, 1 *McCrary*, 188, 541. Compare *West. U. Tel. Co. v. Kansas Pacific R. Co. (D. C.)* 4 Fed. 284; *West. U. Tel. Co. v. St. Joseph, etc., R. Co.*, 3 Fed. 430, 1 *McCrary*, 565; *West. U. Tel. Co. v. Union Pac. R. Co. (C. C.)* 3 Fed. 423, 1 *McCrary*, 558; *U. S. v. Union Pac. R. Co.*, 160 U. S. 1, 16 Sup. Ct. 190, 40 L. Ed. 319.

<sup>44</sup> *Benedict v. West. U. Tel. Co.*, 9 Abb. N. C. (N. Y.) 314.

lative consent, the prevailing doctrine is, however, that it has no right to make such a conveyance in any form whether by sale,<sup>45</sup> lease or mortgage. There may be an exception to the rule in that it may sell all the personal property, or at least so much thereof as is not necessary for the purpose of discharging its public duties.<sup>46</sup> But it cannot alienate the franchise to manage or control its lines, as this would result in the company becoming powerless to perform its public duties. And if it has public duties to discharge it cannot be alienated or seized under judicial process by creditors without the consent of the legislature,<sup>47</sup> nor be levied on by execution,<sup>48</sup> and should a telegraph company alienate its franchise to another company without statutory authority, it will be liable to third parties for all torts committed on them by their successors.<sup>49</sup> Nor can it release itself from its contract obligations on the claim that the agreement was *ultra vires* and against public policy.<sup>50</sup>

§ 47. Same continued—leases.—For the same reason that a telegraph, telephone, or electric company cannot alienate absolutely or conditionally its franchise of being a corporation, it cannot, by lease or any other contract, in the absence of legislative authority, turn over to another corporation its line and the use of its franchise,

<sup>45</sup> *Richardson v. Sibley*, 11 Allen (Mass.) 65, 87 Am. Dec. 700; *Com. v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672; *Worcester v. Western R. Corp.*, 4 Metc. (Mass.) 564; *Arthur v. Com., etc., Bank*, 9 Smedes & M. (Miss.) 394, 48 Am. Dec. 719; *Pierce v. Emery*, 32 N. H. 484; *Central Trans. Co. v. Pullman Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837, reversing *Oregonian R. Co. v. Oregon R. & Nav. Co.*, 22 Fed. 245, 10 Sawy. 464; *Id.*, 23 Fed. 232, 10 Sawy. 472; *Thomas v. Western Jersey R. Co.*, 101 U. S. 71, 25 L. Ed. 950; *York, etc., R. Co. v. Wimans*, 17 How. 31, 15 L. Ed. 27.

<sup>46</sup> *Cumberland Tel., etc., Co. v. Evansville (C. C.)* 127 Fed. 187, affirmed in 143 Fed. 238, 74 C. C. A. 368; *Michigan Tel. Co. v. St. Joseph*, 121 Mich. 502, 80 N. W. 383, 80 Am. St. Rep. 520, 47 L. R. A. 87n; *Coe v. Columbus, etc., R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518; *Arthur v. Commercial Bank*, 9 Smedes & M. (Miss.) 394, 48 Am. Dec. 719; *Atty. Gen. v. Haverhill Gaslight Co.*, 215 Mass. 394, 101 N. E. 1061, Ann. Cas. 1914C, 1266.

<sup>47</sup> *Treadwell v. Salisbury Mfg. Co.*, 7 Gray (Mass.) 393, 66 Am. Dec. 490; *National Foundry Works v. Oconto Water Co. (C. C.)* 52 Fed. 43; *Gulf, etc., R. Co. v. Newell*, 73 Tex. 334, 11 S. W. 342, 15 Am. St. Rep. 788.

<sup>48</sup> *Ammant v. New Alexandria & Pitt. Turnpike Road*, 13 Serg. & R. (Pa.) 210, 15 Am. Dec. 593.

<sup>49</sup> *Naglee v. Alexandria, etc., R. Co.*, 83 Va. 707, 3 S. E. 369, 5 Am. St. Rep. 308.

<sup>50</sup> *Canal & C. R. Co. v. St. Charles St. R. Co.*, 44 La. Ann. 1069, 11 South. 702.

since a lease might have the same effect as a sale of the property;<sup>51</sup> however, it has been held that a telegraph company could lease its lines and equipments for a reasonable length of time.<sup>52</sup> For instance, where a contract is entered into between two companies, whereby one leases to the other its franchises for a period of nine hundred and ninety-nine or any great number of years, the lease would virtually, under such circumstances, amount to a sale. Where a telegraph, telephone, or electric company has a public duty to perform and the same has been acquired by a legislative grant, it cannot dispose of the obligations so acquired, in any manner, without the consent of the granting power.<sup>53</sup> Where the legislature gives the right to one company to lease its line to another company, the grant does not necessarily carry with it the franchise of being a corporation, and thereby exempt the lessor from the responsibilities for which it has obligated itself.<sup>54</sup> It is the duty of the parties to the contract of lease to abandon the contract, after they learn the true status of their condition.

**§ 48. Legislature may authorize sale or lease.**—The legislature may authorize a telegraph, telephone, or electric company to alienate its franchise, but it must be by an express grant or by reasonable implication.<sup>55</sup> The statutes and general policy of some jurisdictions are, however, very liberal in regard to such transfers in

<sup>51</sup> *Atlantic, etc., Tel. Co. v. Union Pac. R. Co.* (C. C.) 1 Fed. 745, 1 McCrary, 541; *Philadelphia v. West. U. Tel. Co.*, 11 Phila. (Pa.) 327, 2 Wkly. Notes Cas. 455. A railroad cannot lease its telegraph line to another telegraph company. *U. S. v. Union Pac. R. Co.*, 160 U. S. 1, 16 Sup. Ct. 190, 40 L. Ed. 319; *Atlantic, etc., Tel. Co. v. Union Pac. R. Co.* (C. C.) 1 Fed. 745, 1 McCrary, 541. See *O'Brien v. Tel. Co.*, 62 Wash. 598, 114 Pac. 441.

<sup>52</sup> *Philadelphia v. West. U. Tel. Co.*, 11 Phila. (Pa.) 327, 2 Wkly. Notes Cas. 455; *West. Tel. Co. v. Baltimore, etc., R. Co.*, 69 Md. 211, 14 Atl. 531.

<sup>53</sup> *Ricketts v. Chesapeake, etc., R. Co.*, 33 W. Va. 433, 10 S. E. 801, 25 Am. St. Rep. 901, 7 L. R. A. 534; *Gulf, etc., R. Co. v. Newell*, 73 Tex. 334, 11 S. W. 342, 15 Am. St. Rep. 788.

<sup>54</sup> *Harmon v. Columbia, etc., R. Co.*, 28 S. C. 401, 5 S. E. 835, 13 Am. St. Rep. 686.

<sup>55</sup> *Williams v. West. U. Tel. Co.*, 93 N. Y. 162; *Michigan Tel. Co. v. St. Joseph*, 121 Mich. 502, 80 N. W. 383, 80 Am. St. Rep. 520, 47 L. R. A. 87; *Hatch v. American U. Tel. Co.*, 9 Abb. N. C. (N. Y.) 223; *State v. Cumberland Tel., etc., Co.*, 114 Tenn. 194, 86 S. W. 390; *Badger Tel. Co. v. Wolf River Tel. Co.*, 120 Wis. 169, 97 N. W. 907; *Brunswick Gaslight Co. v. United Gas, etc., Light Co.*, 85 Me. 532, 27 Atl. 525, 35 Am. St. Rep. 385, note, holding that a gas company possessing and exercising the right to lay its pipes in the public streets cannot sell, lease, or assign its corporate rights and privileges to another gas company without legislative consent. See *Louisville v. Tel. Co.*, 224 U. S. 649, 32 Sup. Ct. 572, 56 L. Ed. 934.



the case of these companies.<sup>56</sup> An unauthorized transfer of a franchise may be afterwards ratified by the legislature, but there must be an expressed intent on the part of this body to ratify the transfer.<sup>57</sup> Where the right to alienate a franchise has been given by the state, a lease of such franchise may be implied from such grant; but an authority to lease does not give the right to alienate,<sup>58</sup> nor does authority to hold and convey such real and personal property as may be proper for the construction and maintenance of its lines authorize such company to alienate its franchise or such of its property as may be necessary for the exercise thereof.<sup>59</sup> Where authority has been given by statute to alienate the franchise of telegraph and telephone companies, and a sale has been made in pursuance thereto, it is not illegal because it is the result of a ruinous rate war and for the purpose of ending further competition.<sup>60</sup> A mortgage may also be given on such property from the authority to sell, and, where a sale has been made of such property, the purchaser with notice takes the same subject to a mortgage and all other duties to which the vendor was obligated.<sup>61</sup> A lease may be made of the franchise of a telegraph and telephone company where the authority has been authorized by statute,<sup>62</sup> provided the requirements

<sup>56</sup> See *Hatch v. American Union Tel. Co.*, 9 Abb. N. C. (N. Y.) 223; *Michigan Tel. Co. v. St. Joseph*, 121 Mich. 502, 80 N. W. 383, 80 Am. St. Rep. 520, 47 L. R. A. 87; *Tel. Co. v. Board of Councilmen*, 141 Ky. 588, 133 S. W. 564; *Tel. Co. v. Frankfort*, 143 Ky. 86, 136 S. W. 138.

<sup>57</sup> *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950.

<sup>58</sup> *Cumberland Tel. Co. v. Evansville (C. C.)* 127 Fed. 187, affirmed in 143 Fed. 238, 74 C. C. A. 368.

<sup>59</sup> *Cumberland Tel., etc., Co. v. Evansville*, supra. See *Wichita v. Old Colony Trust Co.*, 132 Fed. 641, 66 C. C. A. 19, holding that a transfer of all the company carries the franchise to operate the system, although the franchise is not expressly mentioned in the deed.

<sup>60</sup> *State v. Cumberland Tel., etc., Co.*, 114 Tenn. 194, 86 S. W. 390.

<sup>61</sup> An ordinance granting to a telegraph company the right to occupy the city streets stipulated that in the event of a sale by the company of its properties, its vendee should be bound by all the obligations imposed on the original company. Such a sale took place afterward, and for some time after the sale the purchasing company gave the subscribers of the purchased company connections with its own subscribers. It was held that the purchasing company, having bought with notice, was bound to assume and carry out all the obligations of the old company, and that its action in purchasing the old company's subscribers with connections to its own lines operated as an acknowledgment by it of the character of its assumed obligations, and that it could not thereafter discontinue such connections. *Mahan v. Mich. Tel. Co.*, 132 Mich. 242, 93 N. W. 629.

<sup>62</sup> *Reiff v. West. U. Tel. Co.*, 49 N. Y. Super. Ct. 441, holding further that, under statutory authority to lease telegraph lines and property, such lease cannot be enjoined on the ground that it tends to create a monopoly or is



of the statute have been complied with;<sup>63</sup> but a provision in the charter authorizing such company to lease its lines, fixtures, and apparatus does not authorize a lease of its franchise,<sup>64</sup> or authorize its lessee to build new lines on new routes.<sup>65</sup> And, where the authority has been given by the legislature to a telegraph or telephone company to sell or lease its franchise, the consent of the municipal corporation is unnecessary.<sup>66</sup>

§ 49. **Contracts and combinations.**—Whether contracts and combinations between different telegraph and telephone companies are valid depends exclusively upon statutory provisions, where there are such statutes, or, in the absence of a statute in this respect, upon the question of public policy.<sup>67</sup> While telegraph and telephone companies, being public service corporations, affected by a public interest, cannot make contracts which are in general restraint of trade,<sup>68</sup> or which tend to restrict the free and general use of their lines,<sup>69</sup> yet the law permits them to make contracts in partial restraint of trade, under some circumstances, where they are not unreasonable and are supported by sufficient consideration.<sup>70</sup> But, where the business to which the contract relates is of such a char-

contrary to public policy. *Bradford City v. Pennsylvania, etc., Tel. Co.*, 26 Pa. Co. Ct. R. 321, leases authorized except in case of parallel or competing lines.

<sup>63</sup> *Reiff v. West. U. Tel. Co.*, 49 N. Y. Super. Ct. 441.

<sup>64</sup> *Philadelphia v. West. U. Tel. Co.*, 11 Phila. (Pa.) 327, 2 Wkly. Notes Cas. 455.

<sup>65</sup> *Id.*

<sup>66</sup> *Michigan Tel. Co. v. St. Joseph*, 121 Mich. 502, 80 N. W. 383, 80 Am. St. Rep. 520, 47 L. R. A. 87.

<sup>67</sup> *Benedict v. West. U. Tel. Co.*, 9 Abb. N. C. (N. Y.) 214. See, also, *Wayne-Monroe Tel. Co. v. Ontario Tel. Co.*, 60 Misc. Rep. 435, 112 N. Y. Supp. 424; *Tel. Co. v. Tel. Co.*, 47 Ind. App. 411, 92 N. E. 558, 93 N. E. 234; *Tel. Co. v. Tel. Co. (Iowa)* 123 N. W. 951; *Matter of Jackson*, 57 Misc. Rep. 1, 107 N. Y. Supp. 799; *Home Tel. Co. v. Sarcoxie*, 236 Mo. 114, 139 S. W. 108, 36 L. R. A. (N. S.) 124, if valid when made cannot be invalidated by subsequent legislation.

<sup>68</sup> *Central New York, etc., Tel. Co. v. Averill*, 199 N. Y. 128, 92 N. E. 206, 32 L. R. A. (N. S.) 494, 139 Am. St. Rep. 878; *Gwynn v. Citizens' Tel. Co.*, 69 S. C. 434, 48 S. E. 460, 67 L. R. A. 111, 104 Am. St. Rep. 819; *Id.*, 61 S. C. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870; *Bank v. Kinloch, etc., Tel. Co.*, 258 Ill. 202, 101 N. E. 535, 45 L. R. A. (N. S.) 465, Ann. Cas. 1914B, 258. See, also, § 253.

<sup>69</sup> *Id.* See § 253.

<sup>70</sup> *Wayne-Monroe Tel. Co. v. Ontario Tel. Co.*, 60 Misc. Rep. 435, 112 N. Y. Supp. 424; *Tel. Co. v. Tel. Co.*, 47 Ind. App. 411, 92 N. E. 558, 93 N. E. 234; *Cumberland Tel., etc., Co. v. State*, 100 Miss. 102, 54 South. 670, 39 L. R. A. (N. S.) 277; *Bank v. Kinloch, etc., Tel. Co.*, 258 Ill. 202, 101 N. E. 535, Ann. Cas. 1914B, 258, 45 L. R. A. (N. S.) 465.

acter that it cannot be subjected even to the partial restraint which is contemplated without injury to the interest which the company owes to the public, then such partial restraint cannot be tolerated.<sup>71</sup> However, a contract is not altogether void because of a void provision contained therein, if that provision can be separated from the rest of the contract.<sup>72</sup> A lawful promise made for a lawful consideration is not invalid by reason only of an unlawful promise being made at the same time and for the same consideration.<sup>73</sup> It has been held that an arrangement between telegraph or telephone companies to prevent a competition which would be ruinous to each is not contrary to public policy; <sup>74</sup> nor would an arrangement between two such companies to divide their receipts and expenses in certain proportions be invalid.<sup>75</sup> It has also been held that it was not contrary to public policy for two telephone companies to make a contract providing for a physical connection between the two systems, and stipulating that it may be terminated by either company on notice, and the patrons of each are bound to know that such connection is liable to be discontinued; <sup>76</sup> but where the contract for such a connection is silent as to its continuance or discontinuance, it fixes a status affected by a public interest which cannot be voluntarily terminated by either or both of the companies,<sup>77</sup> but only by a retirement of one of the companies from the business.<sup>78</sup> But any agreement or combination between competing telegraph or telephone companies, the necessary consequence of which is the con-

<sup>71</sup> *Central New York, etc., Tel. Co. v. Averill*, 199 N. Y. 128, 92 N. E. 206, 139 Am. St. Rep. 878, 32 L. R. A. (N. S.) 494; *West. U. Tel. Co. v. Chicago, etc., R. R. Co.*, 86 Ill. 246, 29 Am. Rep. 28; *St. Louis, etc., R. Co. v. Postal Tel. Co.*, 173 Ill. 508, 51 N. E. 382; *West. U. Tel. Co. v. American U. Tel. Co.*, 65 Ga. 160, 38 Am. Rep. 781.

<sup>72</sup> *Central New York, etc., Tel. Co. v. Averill*, 199 N. Y. 128, 92 N. E. 206, 139 Am. St. Rep. 878, 32 L. R. A. (N. S.) 494; *Chicago Gaslight Co. v. People's Gaslight Co.*, 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124.

<sup>73</sup> *Central New York, etc., Tel. Co. v. Averill*, 199 N. Y. 128, 92 N. E. 206, 139 Am. St. Rep. 878, 32 L. R. A. (N. S.) 494.

<sup>74</sup> *Benedict v. West. U. Tel. Co.*, 9 Abb. N. C. (N. Y.) 214.

<sup>75</sup> *Id.*

<sup>76</sup> *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319. See *Cumberland, etc., Tel. Co. v. State*, 100 Miss. 102, 54 South. 670, 39 L. R. A. (N. S.) 277.

<sup>77</sup> *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; *Campbellsville Tel. Co. v. Lebanon, etc., Tel. Co.*, 118 Ky. 277, 80 S. W. 1114, 26 Ky. Law Rep. 127, 84 S. W. 518, 27 Ky. Law Rep. 90; *Tel. Co. v. Tel., etc., Co.*, 159 N. C. 9, 74 S. E. 636, 638.

<sup>78</sup> *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319.

trolling of rates, or the suppression of competition in such a way as to create a monopoly, is an agreement in restraint of trade, against public policy, and void.<sup>79</sup>

<sup>79</sup> Central New York, etc., Tel. Co. v. Averill, 199 N. Y. 128, 92 N. E. 206, 32 L. R. A. (N. S.) 494, 139 Am. St. Rep. 878; Dunbar v. American Tel., etc., Co., 224 Ill. 9, 79 N. E. 423, 8 Ann. Cas. 57, 115 Am. St. Rep. 132; Charles-town Gas Co. v. Kanawha Gas Co., 58 W. Va. 22, 50 S. E. 876, 112 Am. St. Rep. 936, 6 Ann. Cas. 654; Southern Electric, etc., Co. v. State, 91 Miss. 195, 44 South. 785, 124 Am. St. Rep. 638. See Bank v. Kinloch, etc., Tel. Co., 258 Ill. 202, 101 N. E. 535, 45 L. R. A. (N. S.) 465, Ann. Cas. 1914B, 258.

As to remedy, see State v. Cadwallader, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; Bland v. Cumberland Tel., etc., Co. (Ky.) 109 S. W. 1180, 33 Ky. Law Rep. 399.

As to construction of contracts, see West. U. Tel. Co. v. American Bell Tel. Co., 125 Fed. 342, 60 C. C. A. 220; Id. (C. C.) 187 Fed. 425.

## CHAPTER IV

## CONSTRUCTION, MAINTENANCE AND REGULATION

- § 50. Right of way—definition.
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§ 50. Right of way—definition.—It would be proper, in considering the term “right of way” and the accompanying incidents thereunder, to first learn what is meant by such a term. A “right of way,” as applied to telegraph, telephone, and electric companies,



is the right held by these companies in the land on which their poles, towers, guys, and other similar appliances are erected, and that, to a certain extent, over which their wires are strung. The exact property a telegraph, telephone or electric company has to the land upon and over which its lines are constructed is not the same at all points. That which is possessed by them depends upon the manner in which the right was acquired; whether by purchase, by grant, or by the exercise of the right of eminent domain. If the right is acquired by either of the first two ways, it will be determined by the terms of the conveyance or patent; as, when a deed is made to one of these companies in which the right of way is described by metes and bounds, the exact property conveyed to the company will depend upon the construction of the deed. In the latter case the company would only possess an easement, the fee remaining in the original owner, except where it is otherwise provided by statute.

§ 51. **Interest in land acquired.**—It seems very clearly that the company, unless it is so expressed in the deed or patent, should not have the same interest in the land lying between the poles or towers and in the land over which the wires are stretched, as it has in that on which the poles or towers are erected. It is very true, unless the wires are strung near the surface of the ground, that the company has little use for this land between the poles and its use for former or other purposes is in no wise prevented, whether it lies along the public highway or over private property.<sup>1</sup> We presume that there is no question that it could be described in the deed so as to make a conveyance of it; but the question is, Is the right of way over this land conveyed, or at least is the same interest therein conveyed as that on which the poles are erected, when its metes and bounds are not expressly stated? We answer the question in the negative. It is not like the right of way of a railroad, since it is absolutely necessary for the latter to have the same interest in all the land on which its bed or embankment is built. In the case of a telegraph, tele-

<sup>1</sup> A telegraph company by a judgment condemning land for its use under the eminent domain act does not acquire the fee to the land or the right to use it for any other purpose than to erect telegraph poles and suspend wires upon them and maintain and repair the same, and use the structure for telegraph purposes. This, of course, gives the company the right at all times when necessary to construct or repair the line to enter upon the strip condemned, doing as little damage as possible. The company cannot cultivate such strip, or take exclusive possession of it, or enjoy it for any other purpose. The only exclusive right of occupancy the company acquires is the ground occupied by the poles erected for telegraphic purposes. *Lockie v. Mutual U. Tel. Co.*, 103 Ill. 401. See *East Tennessee Tel. Co. v. Paris Elec. Co.*, 156 Ky. 762, 162 S. W. 530, Ann. Cas. 1915C, 543.

phone, or electric company, the land is of no use whatever to the company except to go upon for the purpose of constructing and keeping its lines in repair; and when it is used for this purpose, the adjoining land, as well as this, is almost as often used.<sup>2</sup>

§ 52. **Same continued—compensation.**—Both state and federal constitutions provide that private property shall not be taken for public use without just compensation first being made to the owner thereof, or secured to be made. This is a right given to every individual by the supreme law of the land for the protection of his property, and without which he would be living in a state of nature, harassed and annoyed by his pilfering neighbors. It follows, therefore, that before a telegraph, telephone, or an electric company can acquire a legal right of way, it must obtain the right either by deed, by patent, by prescription, or by payment of damages after proper condemnation proceedings; and if one of these companies acquires the right of way not according to one of these methods, it will be *prima facie* guilty of trespass, and the owner of the land may therefore maintain an action of damages or ejectment at his election.

§ 53. **Same continued—owner not estopped.**—In many cases telegraph, telephone, and electric companies enter upon the land of another without the latter's knowledge or consent; but the fact that they do, or that he permitted them to do so, does not give the company a title to a right of way or estop him from maintaining an action for damages,<sup>3</sup> and yet it may preclude him from maintaining an action of ejectment.<sup>4</sup> The mere failure of the landowner to order the company off of his land, or to bring an action against it as a trespasser until near the end of the statute of limitation, will not operate as a consent to its use and occupation; but an unreasonable delay in such a case, in insisting upon damages, will be considered a waiver of damages by the owner. And should he stand by until the line is completed and in operation and public interest has become involved, he will be denied the right to maintain an action of ejectment, or the right to enjoin them. His only remedy under such circumstances is a proceeding brought to recover damages.

<sup>2</sup> *Lockie v. Mutual U. Tel. Co.*, 103 Ill. 401.

<sup>3</sup> *Blashfield v. Empire St. Tel. Co.* (Sup.) 18 N. Y. Supp. 250; *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1, 25 N. E. 496, 19 Am. St. Rep. 461, 11 L. R. A. 634n; *Bronson v. Albion Tel. Co.*, 67 Neb. 111, 93 N. W. 201, 60 L. R. A. 429, 2 Ann. Cas. 639; *Maxwell v. Central Dist., etc., Tel. Co.*, 51 W. Va. 121, 41 S. E. 125; *Omaha v. Flood*, 57 Neb. 124, 77 N. W. 379.

<sup>4</sup> *Daffinger v. Pittsburgh, etc., Tel. Co.*, 31 Pittsb. Leg. J. N. S. (Pa.) 37, 14 York Leg. Rec. (Pa.) 46.

**§ 54. Further considered—how and from whom acquired.**—Having briefly considered the nature and meaning of the term “right of way,” we shall now apply ourselves to a somewhat lengthy discourse on the subject of the sources from which the right of way may be acquired, and the manner in which it is acquired under each. But in treating these two—that is, the sources from which the right of way may be acquired, and the manner in which it is acquired under each—we shall consider them together as nearly as possible. There are several different sources from which a right of way may be acquired. As, for instance, it may be acquired by a grant from the government or a federal grant; or by a state grant; or by a municipal grant; or by an agreement with the owner of the land, when it is over private land; or by a contract with a railroad company, when it is to be constructed along its roadbed. And first among these different sources to be discussed, we shall take up the subject of a federal grant.

**§ 55. Same continued—federal grant.**—We now come to the subject of a right of way, acquired by a telegraph company by a grant from the government; but before entering into the subject we shall say a few things in regard to the nature of a federal grant. A federal grant, broadly stated, is a conferring, by the federal government, of a franchise by charter in which certain rights are given to a corporation not enjoyed as of common right, or a mode, or act of creating a title or interest in any person or corporation to land which had previously belonged to the granting power. In the present instance, it will be our purpose to consider the first part of this definition—a franchise conferred upon a corporation. There is a difference between a grant from our government and one from the crown with respect to the power of revocation. With us, the grant is an executed contract made by the government as one party to the contract and the corporation as the other; neither can rescind or revoke the contract without the other's consent, unless the right has been reserved in some manner, or except for special causes and by the process of law.<sup>5</sup> No law can be passed by the supreme law-making power which would in effect annul or revoke the grant, as each individual has a constitutional guaranty that no law shall be passed which would impair the obligation of any of his contracts. While grants from the crown may be avoided, upon three grounds: First, where the crown professes to give a greater estate than it possesses in the subject-matter of the grant; second, where the

<sup>5</sup> *Duncan v. Beard*, 2 Nott & McC. (S. C.) 400; *Nichols v. Hubbard*, 5 Rich. (S. C.) 267.



same estate or part of same estate has already been granted to another; and, third, where the crown has been deceived in the consideration expressed in the grant.<sup>6</sup>

§ 56. **Same continued—what is granted.**—A federal grant of a right of way to a telegraph company is an easement<sup>7</sup> or privilege conferred thereon for a valuable consideration, after certain conditions are complied with, to construct and operate a line of wires over lands in which it has a fee-simple title. By an early act of Congress, and supplemental legislation thereto, a right of way was granted to telegraph companies, over public lands and all military and post roads of the United States, and under or across any of its navigable streams or waters, after complying with certain conditions therein prescribed.<sup>8</sup> There is no question as to the constitutionality

<sup>6</sup> *Gladstone v. Earl of Sandwich*, 5 M. & G. 995, 12 L. J. C. P. 41. See *Com'th v. Boley*, 1 Wkly. Notes Cas. (Pa.) 303.

<sup>7</sup> See *Yeager v. Tuning*, 79 Ohio St. 121, 86 N. E. 657, 19 L. R. A. (N. S.) 700, 128 Am. St. Rep. 679.

<sup>8</sup> United States statute authorizing occupation of post roads by telegraph lines. U. S. Rev. St., §§ 5263–5268 (U. S. Comp. St. 1913, §§ 10072–10077) 14 Stat. 221; Act of July 24, 1866, c. 230. "Any telegraph company organized under the laws of any state, shall have the right to construct, maintain and operate telegraph lines over any part of the public domain, over and along any of the military or post roads of the United States, and under or across any of its navigable streams or waters; provided such lines are not so placed as to obstruct navigation, or interfere with the proper use of the military or post roads." U. S. Rev. St. § 5263. "Any such company may take from the public lands through which its line passes the necessary stone, timber and other materials for its poles, stations or other needful uses in constructing its line, and pre-empt such portion of the unoccupied public land as may be necessary for its stations, not exceeding forty acres for each station; such stations to be not within fifteen miles of each other." U. S. Rev. St. § 5264. The Act of March 3, 1901, c. 832, 31 Stat. 1058, providing for grants to telegraph companies of franchises in the Indian Territory, necessarily annulled all previous conflicting grants made by any of the Indian nations. *Muskogee Nat. Tel. Co. v. Hall*, 55 C. C. A. 208, 118 Fed. 382, disapproving *Muskogee Nat. Tel. Co. v. Hall* (1901) 4 Ind. T. 18, 64 S. W. 600. By Act of Congress of March 3, 1901 (31 U. S. Stat. 1084), the secretary of the interior is given full authority to grant of rights of way to telegraph lines in the territory, and no line may be constructed there without authority from him. *Muskogee Nat. Tel. Co. v. Hall* (1901) 4 Ind. T. 18, 64 S. W. 600. See *West. U. Tel. Co. v. Visalia*, 149 Cal. 744, 87 Pac. 1023; *West. U. Tel. Co. v. Pennsylvania R. Co.*, 195 U. S. 540, 95 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517; *Richmond v. Southern Bell Tel., etc., Co.*, 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162; *Tel. Co. v. Hopkins*, 160 Cal. 106, 116 Pac. 557; *West. U. Tel. Co. v. Inman, etc., Steamship Co.*, 59 Fed. 365, 8 C. C. A. 152. Congress did not exceed its powers in enacting this act. *Essex v. New England Tel. Co.*, 239 U. S. 313, 36 Sup. Ct. 102, 60 L. Ed. —.



of these laws as they were enacted under the power given Congress to control interstate commerce.

§ 57. **Statutes defining what are post roads, etc.**—Similar statutes have been passed defining what shall be post roads, and within the term are included all letter carriers or free delivery routes,<sup>9</sup> and all railroads or parts of railroads over which mails are carried.<sup>10</sup> Thus the streets of the District of Columbia are "post roads" within the meaning of the statute.<sup>11</sup> It supersedes all conflicting state legislation on the same subject.<sup>12</sup>

§ 58. **Must comply with conditions—character of.**—No telegraph company acquires any rights under these statutes until it has filed with the postmaster general its written acceptance of all the conditions therein imposed.<sup>13</sup> This question was settled in a case in which a telegraph company, in the exercise of the right of eminent domain, instituted a proceeding to condemn and appropriate so much of a bridge, which was built across a navigable river in pursuance of state and national legislation, as was necessary to support a line of wires proposed to be built thereon, and for the construction, maintenance, and operation of same. The company owning the bridge, claiming that the condemnation proceeding was without authority of law, brought an action to enjoin the construction of such lines. The court held in this case that, before the company could exercise the right of eminent domain with respect to the crossing of the bridge, it would be necessary to file a written acceptance

<sup>9</sup> Act of Congress, June 8, 1872, c. 335, §§ 200-205, 17 Stat. 308, 309; U. S. Rev. St. § 3964 (U. S. Comp. St. 1913, § 7456). See *Toledo v. West U. Tel. Co.*, 107 Fed. 10, 46 C. C. A. 111, 52 L. R. A. 730. See *West U. Tel. Co. v. Visalia*, 149 Cal. 744, 87 Pac. 1023; *Richmond v. Southern Bell Tel., etc., Co.*, 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162.

<sup>10</sup> Act of Congress June 8, 1872, c. 335, §§ 200-205, 17 Stat. 308, 309; U. S. Rev. St. § 3964 (U. S. Comp. St. 1913, § 7456). See case cited in note 9. See *Richmond v. Southern Bell Tel., etc., Co.*, 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162; *West U. Tel. Co. v. Baltimore, etc., Tel. Co. (C. C.)* 19 Fed. 660; *West U. Tel. Co. v. Burlington, etc., R. Co. (C. C.)* 11 Fed. 1, 3 McCrary, 130.

<sup>11</sup> *Hewett v. West U. Tel. Co.*, 4 Mackey (D. C.) 424; *West U. Tel. Co. v. Visalia*, 149 Cal. 744, 87 Pac. 1023; *St. Louis v. West U. Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380.

<sup>12</sup> *Pensacola Tel. Co. v. West U. Tel. Co.*, 2 Woods, 643, Fed. Cas. No. 10,960, affirmed 96 U. S. 1, 24 L. Ed. 708; *West U. Tel. Co. v. Atlantic, etc., Tel. Co.*, 5 Nev. 102. Compare *West U. Tel. Co. v. New York (C. C.)* 38 Fed. 552, 3 L. R. A. 449.

<sup>13</sup> "Before any telegraph company exercising any of the powers and privileges conferred, it shall file its written acceptance with the postmaster general" of the restrictions and obligations required. U. S. Rev. St. § 5263.

of all the conditions of these statutes.<sup>14</sup> The obligations and restrictions to be accepted are important in their character; one of which is that the telegraph line should be so constructed and operated as not to obstruct the navigable streams and waters, or interfere with travel on military roads.<sup>15</sup> Congress has intervened and has seen fit to make the filing of a written acceptance an essential prerequisite to the building of a telegraph line over a navigable stream, and to the enjoyment of the privileges conferred by that act; and its authority is paramount.<sup>16</sup> Before it can construct a line of wires across a navigable stream, it must first have obtained the grant from Congress under these acts, with all of which conditions it must comply. And should a line of wires be constructed along the bed of a navigable stream, without filing a written acceptance of the conditions stated in these statutes, and a steamer should be damaged by its anchor having been caught in the wires, the company will be liable for damages.<sup>17</sup>

§ 59. Scope and effect of act—statute permissive only.—It is held that this statute is permissive only,<sup>18</sup> and that there is nothing

<sup>14</sup> *Pacific, etc., Tel. Co. v. Chicago, etc., Bridge Co.*, 36 Kan. 113, 12 Pac. 560.

<sup>15</sup> U. S. Rev. St. § 5263. In constructing a line on a drawbridge, the line should be constructed so as not to interfere with the opening of the draw span of the bridge, or otherwise obstruct navigation. *Pacific Mut. Tel. Co. v. Chicago, etc., Bridge Co.*, 36 Kan. 113, 12 Pac. 560. See *West. U. Tel. Co. v. Inman, etc., Steamship Co.*, 59 Fed. 365, 8 C. C. A. 152; *Pacific Mut. Tel. Co. v. Chicago, etc., Bridge Co.*, 36 Kan. 118, 12 Pac. 560, cannot interfere with the opening of the draw-span of the bridge and thus obstruct navigation; *West. U. Tel. Co. v. Inman, etc., Steamship Co.*, 59 Fed. 365, 8 C. C. A. 152, holding that the burden is upon the owner of the cable to show that it was not so maintained as to obstruct navigation.

<sup>16</sup> *Hewett v. West. U. Tel. Co.*, 4 Mackey (D. C.) 424; *City of Richmond (D. C.)* 43 Fed. 85, any unnecessary interference with free movement of vessels falls within act; *West. U. Tel. Co. v. Inman, etc., Steamship Co.*, 59 Fed. 365, 8 C. C. A. 152, although vessel is plowing through soft mud.

<sup>17</sup> *City of Richmond (D. C.)* 43 Fed. 85; *West. U. Tel. Co. v. Inman, etc., Steamship Co.*, 59 Fed. 365, 8 C. C. A. 152, how cable should be laid depends on nature of locality and character and extent of navigation; *City of Richmond, supra*, may be necessary to sink cable under surface of bottom of stream.

<sup>18</sup> *St. Louis v. West. U. Tel. Co.*, 148 U. S. 102, 13 Sup. Ct. 485, 37 L. Ed. 380; *Pensacola Tel. Co. v. West. U. Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708; *West. U. Tel. Co. v. Atty. Gen.*, 125 U. S. 548, 8 Sup. Ct. 961, 31 L. Ed. 790; *Richmond v. Southern Bell, etc., Co.*, 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162; *West. U. Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *Toledo v. West. U. Tel. Co.*, 107 Fed. 10, 46 C. C. A. 111, 52 L. R. A. 730.

in it which would imply that the permission to extend its lines along roads, not built or owned by the United States, or over and under navigable streams, or over bridges not built or owned by the federal government, carries with it any exemption from ordinary burdens of taxation.<sup>19</sup> It may also be affirmed that it carries with it no exemption from the ordinary burdens which may be cast upon those who would appropriate to their exclusive use any portion of the public highway.<sup>20</sup>

**§ 60. State cannot prohibit company from doing business therein on compliance with said act.**—The state cannot therefore by any specific statute prevent a telegraph company from placing its lines along military and post roads, or stop the use of it after it has been placed there,<sup>21</sup> after the company has complied with all the conditions of the statute.<sup>22</sup> The power of Congress to grant to these companies the right of way over these roads and across public lands is absolute, and this power is acquired by the authority conferred in Congress to regulate interstate commerce; any law of a state which obstructs or burdens interstate commerce, or hinders the regular and legal administration of the government, must be

<sup>19</sup> See § 61 et seq.

<sup>20</sup> *St. Louis v. West. U. Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380. See § 62 et seq.

<sup>21</sup> *West. U. Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790.

<sup>22</sup> *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Hodges v. West. U. Tel. Co.*, 72 Miss. 910, 18 South. 84, 29 L. R. A. 770; *Moore v. Eufaula*, 97 Ala. 670, 11 South. 921; *West. U. Tel. Co. v. Fremont*, 39 Neb. 692, 58 N. W. 415, 26 L. R. A. 698; *West. U. Tel. Co. v. Atlantic, etc., States Tel. Co.*, 5 Nev. 102; *West. U. Tel. Co. v. Visalia*, 149 Cal. 744, 87 Pac. 1023; *Hewett v. West. U. Tel. Co.*, 4 Mackey (D. C.) 424; *Matter of Pennsylvania Tel. Co.*, 48 N. J. Eq. 91, 20 Atl. 848, 27 Am. St. Rep. 462; *Postal Tel. Cable Co. v. Morgan's Louisiana, etc., R. Co.*, 49 La. Ann. 58, 21 South. 183; *Daily v. State*, 51 Ohio St. 348, 37 N. E. 710, 46 Am. St. Rep. 578, 24 L. R. A. 724; *Tel. Co. v. Super. Ct.*, 15 Cal. App. 679, 115 Pac. 1091, 1100; *Charleston v. Postal*, 3 Am. Elec. Cas. 56, 62; *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688, 15 Sup. Ct. 268, 360, 39 L. Ed. 311; *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692, 14 Sup. Ct. 1094, 38 L. Ed. 871; *Leloup v. Mobile*, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311; *Ratterman v. West. U. Tel. Co.*, 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. Ed. 229; *West. U. Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *West. U. Tel. Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067; *Pensacola Tel. Co. v. West. U. Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708; *Southern Bell Tel., etc., Co., v. Richmond (C. C.)* 78 Fed. 858; *St. Louis v. West. U. Tel. Co. (C. C.)* 63 Fed. 68; *West. U. Tel. Co. v. New York (C. C.)* 38 Fed. 552, 3 L. R. A. 449; *West. U. Tel. Co. v. American U. Tel. Co.*, Fed. Cas. No. 17,444, 9 Biss. 72.



held to be unconstitutional and void.<sup>23</sup> This act of Congress supercedes all conflicting state legislation on the same subject.<sup>24</sup>

§ 61. **Same continued—exception to power—police regulations.**—These statutes do not deprive the state of its police power.<sup>25</sup> While they may operate to prevent the state or any of its municipalities from an arbitrary or absolute exclusion of a telegraph company, which has complied with this provision, from any post road,<sup>26</sup> yet they do not affect the rights of the state or its agency to regulate the use of streets and highways by such companies.<sup>27</sup> For instance, the streets in a town are included in the term "post roads,"<sup>28</sup> and the authority therein could not exclude a telegraph company from entering upon its streets;<sup>29</sup> yet it could regulate the size and

<sup>23</sup> *Moore v. Eufaula*, 97 Ala. 670, 11 South. 921; *Matter of Pennsylvania Tel. Co.*, 48 N. J. Eq. 91, 20 Atl. 846, 27 Am. St. Rep. 462; *West. U. Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *Tel. Co. v. Hopkins*, 160 Cal. 106, 116 Pac. 557. Purely domestic business within the state cannot even be entirely prohibited by the state. *West. U. Tel. Co. v. Andrews*, 216 U. S. 165, 30 Sup. Ct. 286, 54 L. Ed. 430, reversing (C. C.) 154 Fed. 95; *Ludwig v. West. U. Tel. Co.*, 216 U. S. 146, 30 Sup. Ct. 280, 54 L. Ed. 423, affirming (C. C.) 156 Fed. 152, and disapproving *West. U. Tel. Co. v. State*, 82 Ark. 302, 101 S. W. 745; *West. U. Tel. Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355, reversing 75 Kan. 609, 90 Pac. 299. See, however, *Harvard L. Rev.* 549-551.

<sup>24</sup> *Pensacola Tel. Co. v. West. U. Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708; *West. U. Tel. Co. v. Atlantic, etc.*, *States Tel. Co.*, 5 Nev. 102.

<sup>25</sup> *American, etc., Tel. Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454, and note for other cases.

<sup>26</sup> See cases cited in note 22.

<sup>27</sup> *People v. Squire*, 145 U. S. 175, 12 Sup. Ct. 880, 36 L. Ed. 666, affirming 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 894; *Michigan Tel. Co. v. Charlotte (C. C.)* 93 Fed. 11; *City of Toledo v. West. U. Tel. Co.*, 107 Fed. 10, 46 C. C. A. 111, 52 L. R. A. 730. See *American Tel., etc., Co. v. Harborcreek Tp.*, 23 Pa. Super. Ct. R. 437; *West. U. Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *Ganz v. Ohio Postal Tel. Cable Co.*, 140 Fed. 692, 72 C. C. A. 186; *State v. West. U. Tel. Co.*, 75 Kan. 609, 90 Pac. 299, holding that a telegraph company is not relieved from compliance with a statute requiring foreign corporations to comply with certain conditions for the privilege of exercising their franchise within a state because of its acceptance of the act of 1866. See, also, § 80 et seq. See, also, § 242 et seq.

<sup>28</sup> See § 77.

<sup>29</sup> *Hodges v. West. U. Tel. Co.*, 72 Miss. 910, 18 South. 84, 29 L. R. A. 770; *Michigan Tel. Co. v. Benton Harbor*, 121 Mich. 512, 80 N. W. 386, 47 L. R. A. 104; *Chamberlain v. Iowa Tel. Co.*, 119 Iowa, 619, 93 N. W. 596; *New Orleans v. Great Southern Tel., etc., Co.*, 40 La. Ann. 41, 3 South. 533, 8 Am. St. Rep. 502; *State v. Red Lodge*, 30 Mont. 338, 76 Pac. 758; *Texarkana v. Southwestern Tel., etc., Co.*, 48 Tex. Civ. App. 16, 106 S. W. 915; *Summit Tp. v. New York, etc., Tel. Co.*, 57 N. J. Eq. 123, 41 Atl. 146; *American U. Tel. Co. v. Harrison*, 31 N. J. Eq. 627; *Carthage v. Central New York Tel.*,



location of the poles, the height of the wires and their location; and, where they become an obstruction and a nuisance, it could remove them or require them to be placed under the ground,<sup>30</sup> or it might impose a reasonable charge for the privilege of erecting and maintaining telegraph lines along its streets where the city owns the streets.<sup>31</sup> And a city ordinance requiring telegraph companies engaged in business within its corporate limits to pay a license tax is valid and can be enforced notwithstanding the fact that the company has complied with all the conditions of such statutes.<sup>32</sup> So also the acceptance by a telegraph company of the provisions of these statutes, does not confer any exemption from taxation for state purposes upon lines and other property constructed within the state.<sup>33</sup>

**§ 62. Does not interfere with right to compensation.**—When a telegraph company has acquired a right of way over the public highway by federal grant, the abutting landowners are not deprived of the right to be compensated for said right of way because the land upon which the grant is given is burdened with an additional servitude, or because the easement of access to their property has been obstructed, or because the enjoyment of the highway has been

etc., Co., 185 N. Y. 448, 78 N. E. 165, 113 Am. St. Rep. 932, reversing 110 App. Div. 625, 96 N. Y. Supp. 919, and affirming 48 Misc. Rep. 423, 96 N. Y. Supp. 917; *Barhite v. Home Tel. Co.*, 50 App. Div. 25, 63 N. Y. Supp. 659; *Wisconsin Tel. Co. v. Milwaukee*, 126 Wis. 1, 104 N. W. 1009, 110 Am. St. Rep. 886, 1 L. R. A. (N. S.) 581; *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828; *Kenosha v. Tel. Co.*, 149 Wis. 338, 135 N. W. 848; *Wichita v. Old Colony Trust Co.*, 132 Fed. 641, 66 C. C. A. 19; *Toronto v. Bell Tel. Co.*, 6 Ont. L. Rep. 335, 2 Ont. Wkly. Rep. 750. See, also, cases cited in note 22, *supra*.

<sup>30</sup> *American, etc., Tel. Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454n. See, also, § 81 et seq. *Barhite v. Home Tel. Co.*, 50 App. Div. 25, 63 N. Y. Supp. 659; *West. U. Tel. Co. v. Richmond*, 224 U. S. 160, 32 Sup. Ct. 449, 56 L. Ed. 710, affirming (C. C.) 178 Fed. 310.

<sup>31</sup> See § 85 et seq.

<sup>32</sup> See § 85 et seq.

<sup>33</sup> *West. U. Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *West. U. Tel. Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067; *West. U. Tel. Co. v. Missouri*, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. Ed. 1116; *Atlantic, etc., Tel. Co. v. Philadelphia*, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. Ed. 995; *West. U. Tel. Co. v. Taggart*, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. Ed. 49; *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688, 15 Sup. Ct. 268, 360, 39 L. Ed. 311; *Massachusetts v. West. U. Tel. Co.*, 141 U. S. 40, 11 Sup. Ct. 889, 35 L. Ed. 628; *Leloup v. Mobile*, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311; *West. U. Tel. Co. v. Visalia*, 149 Cal. 744, 87 Pac. 1023, holding that the franchise granted by the act of 1866 is not subject to state taxation either directly or indirectly.

interfered with.<sup>34</sup> Neither does the act authorize the taking without compensation of state or municipal property,<sup>35</sup> which includes public streets and highways.<sup>36</sup> In the absence of condemnation proceedings, the consent of the owner of the property must be obtained, although compensation therefor has been tendered.<sup>37</sup>

§ 63. **Same continued—reason of rule.**—"It is a misconception, however, to suppose that the franchise or privilege granted by the act of 1866 carries with it the unrestricted right to appropriate the public property of a state. It is like any other franchise, to be exercised in subordination to public as to private rights. While a grant from one government may supersede and abridge franchises and rights held at the will of its grantor, it cannot abridge any property rights of a public character created by the authority of another sovereignty. No one would suppose that a franchise from the federal government to a corporation, state or national, to construct interstate roads or lines of travel, transportation, or communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a state. It

<sup>34</sup> *Kester v. West. U. Tel. Co.* (C. C.) 108 Fed. 926; *Phillips v. Postal Tel. Cable Co.*, 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868; *West. U. Tel. Co. v. Pennsylvania R. Co.*, 195 U. S. 540, 25 Sup. Ct. 133, 150, 49 L. Ed. 312, 322, 1 Ann. Cas. 517; *West. U. Tel. Co. v. Ann Arbor R. Co.*, 178 U. S. 239, 20 Sup. Ct. 867, 44 L. Ed. 1052; *Pensacola Tel. Co. v. West. U. Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708; *Sunset Tel., etc., Co. v. Pomona* (C. C.) 164 Fed. 561, affirmed in 172 Fed. 829, 97 C. C. A. 251.

<sup>35</sup> *Cumberland Tel., etc., Co. v. Evansville* (C. C.) 127 Fed. 187, affirmed in 143 Fed. 238, 74 C. C. A. 368; *St. Louis v. West. U. Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; *Postal Tel. Cable Co. v. Newport*, 76 S. W. 159, 25 Ky. Law Rep. 635; *American Tel., etc., Co. v. Harborecreek*, 23 Pa. Super. Ct. R. 437; *Postal Tel. Cable Co. v. Baltimore*, 156 U. S. 210, 15 Sup. Ct. 356, 39 L. Ed. 399.

<sup>36</sup> *Sunset Tel., etc., Co. v. Pomona* (C. C.) 164 Fed. 561, affirmed in 172 Fed. 829, 97 C. C. A. 251; *St. Louis v. West. U. Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; *Tel., etc., Co. v. Pasadena*, 161 Cal. 265, 118 Pac. 796; *Springfield v. Postal Tel. Cable Co.*, 253 Ill. 346, 97 N. E. 672.

<sup>37</sup> *West. U. Tel. Co. v. Pennsylvania R. Co.*, 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517; *West. U. Tel. Co. v. Ann Arbor R. Co.*, 178 U. S. 239, 20 Sup. Ct. 867, 44 L. Ed. 1052.

would not be claimed, for instance, that under a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the statehouse grounds of the state, and construct its depot there, without paying the value of the property thus appropriated. Although the statehouse grounds be property devoted to public uses, it is property devoted to the public uses of the state, and property whose ownership and control is in the state, and it is not within the competency of the national government to dispossess the state of such control and use or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees, without suitable compensation to the state. This rule extends to streets and highways; they are the public property of the state. While for purposes of travel and common use they are open to the citizens of every state alike, and no state can by its legislation deprive the citizens of another state of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by citizen or a corporation of the same or another state, or a corporation of a national government, it is within the competency of the state, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation. It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraph or telephones, the state may, if it choose, exact from the party or corporations given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated.”<sup>38</sup>

§ 64. Same continued—along railroads—compensation, when allowed to owner of fee.—For the same reason given above, a telegraph company cannot acquire a right of way along and upon the right of way of a railroad company without first compensating the landowner or the railroad company. This act of Congress is permissive only, and the manner in which the right of way is acquired by the condemnation proceedings is left with the laws of the state in which the road is located. In some instances, a railroad company constructs a line of wires along its roads for its own conveniences in carrying out the business of the company, such as the giving of orders and doing all other business necessary for the discharge and performance of its duties. When such is the case, the owner of the fee, if such may still be in him, will not be entitled to an additional compensation for the right of way; but if the line is built by any

<sup>38</sup> St. Louis v. West. U. Tel. Co., 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380.



other corporation, by any kind of an agreement entered into by the railroad and such corporation, the owner of the fee will be entitled to additional compensation, notwithstanding that the telegraph company will, in connection with its other corporate business, render to the road the same services it would have obtained had the line belonged to the road, and had been built by it for its own convenience, provided it is not used exclusively for the benefit and convenience of the road.<sup>39</sup>

**§ 65. Same continued—compensation to road—reason for allowing.**—The interest which a railroad company has to its right of way, regardless of the manner in which it is acquired, entitles it to be compensated by any telegraph company which condemns so much of said road as may be necessary for a construction of a line of its wires thereon, unless it is otherwise agreed to by the two companies; and this right is not affected in any wise by this act of Congress.<sup>40</sup> Every citizen has a right guaranteed by the fundamental law of our land, that he shall not be deprived of any of his property rights without a due compensation therefor, determined by proper legal proceedings; and it is upon this guarantee to every American citizen in the security and protection of his property rights, which has formed and concentrated our government into one invulnerable unit and made it the grandest, the proudest, and most powerful nation of the world. For the same reason that the property of a private person could not be taken against his consent by any corporation or body of persons without first paying him a due consideration for same, the property rights of any corporation cannot be legally acquired by any other corporation or body of persons without paying or tendering to said corporation a due compensation for said rights. Under our laws, a corporation is a citizen and is protected in the security of its property the same as a private individual. While a railroad may not have the same interest to the land on which its road is located as that possessed by an individual to his land, it nevertheless has an interest in this land or right of way for the purpose of carrying out its corporate business, paramount to any other person or corporation, and therefore has the same right to be protected and secured in this right that an individual has to his private property. No one would presume to say that a telegraph or

<sup>39</sup> *American Tel., etc., Co. v. Smith*, 71 Md. 535, 18 Atl. 918, 7 L. R. A. 200. See, also, cases cited in note 34.

<sup>40</sup> *West. U. Tel. Co. v. Pennsylvania R. Co.*, 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517; *West. U. Tel. Co. v. Ann Arbor R. Co.*, 178 U. S. 239, 20 Sup. Ct. 867, 44 L. Ed. 1052; *Postal Tel. Cable Co. v. Southern R. Co.* (C. C.) 89 Fed. 190.



telephone company could construct a line of its wires over and across the property of an individual against his consent without first compensating him for said right; for he is as secure from the depredation of his property in this respect as by any other known way. This is his guaranteed right. There may be other ways in which the right of way of a railroad company may be used by other corporations or private citizens, but there is no way in which it is so often used and subjected as for telegraph companies whose wires are strung from one end of the road to the other, and on every road of any consequence; and to say that these telegraph companies should not compensate the railroad company for the use of its easement would be unreasonable, unjust, and would not protect the railroad in this guaranteed right.

§ 66. **Same continued—must obtain consent or condemn.**—Most all of our lands were originally acquired either directly or indirectly by grant from the United States and, by a technical meaning seldom considered, the paramount title to which was never granted, but for certain purposes and reasons it might under certain circumstances revert back to the original owner or grantor. It matters not what technical constructions may be placed on these grants from the government, there is not the least possible or the remotest doubt that the grantees of these lands have acquired all the right, title, and interest in said grants to make them absolutely perfect and sound in every possible respect and superior to all other claims or demands, except such as may fall under the police power, or such as may be necessary to carry on the affairs of the public. While there may be a distinction between a grant of these lands and a grant of a right of way to a railroad company, in that the fee may not always be granted to the latter, yet it is not to be presumed that Congress made such grants without also giving them the right to demand compensation for their rights of way when condemned by telegraph companies. And so it is held that telegraph companies must obtain the consent of the owners of the right of way, or condemn the same for telegraph purposes and make compensation therefor.<sup>41</sup> As was said by an eminent judge: "We cannot suppose it was the intention of Congress by these enactments, even if it had the power to do so,

<sup>41</sup> *West. U. Tel. Co. v. Am. U. Tel. Co.*, 9 Biss. 72, Fed. Cas. No. 17,444; *Atlantic, etc., Tel. Co. v. Chicago, etc., R. Co.*, 6 Biss. 159, Fed. Cas. No. 632; *West. U. Tel. Co. v. Ann Arbor R. Co.*, 90 Fed. 379, 33 C. C. A. 113; *Id.*, 178 U. S. 243, 2 Sup. Ct. 867, 44 L. Ed. 1052; *Southwestern R. Co. v. Southern, etc., Tel. Co.*, 46 Ga. 43, 12 Am. Rep. 585; *Northwestern Tel. Exch. Co. v. Chicago, etc., R. Co.*, 76 Minn. 334, 79 N. W. 315. See *Western, etc., R. Co. v. West. U. Tel. Co.*, 138 Ga. 420, 75 S. E. 471, 42 L. R. A. (N. S.) 225.

to put the right of way of every railroad company in the country at the mercy of the telegraph companies, and allow the latter to use them for the construction of their lines, without making compensation to any one therefor.”<sup>42</sup>

§ 67. **Same continued—right acquired by agreement.**—It is not always necessary that a condemnation proceeding be instituted in order for a telegraph company to acquire a right of way over the private property of an individual, since it may be acquired by the owner's consent, or by an agreement entered into with him. The statute or act of Congress does not confer the right of eminent domain,<sup>43</sup> or authorize any compulsory proceedings for the taking of the property without the owner's consent,<sup>44</sup> so that, if the company is not entitled under the state statutes to exercise the right of eminent domain, it cannot take private property without the owner's consent, although the company is willing to make just compensation therefor.<sup>45</sup> The same rule of law applies to the right of way of a railroad. The company, however, may obtain a privilege from the railroad to construct its lines of wires upon and along the right of way of the road. If a right of way has been granted to a telegraph company to construct its line over private property of an individual, or that of a railroad, or over that belonging to the state or its municipalities for a certain period of time, and this has expired, another agreement must be obtained from the owner, or condemnation proceedings instituted for the privilege of remaining thereon. The right of eminent domain cannot be delegated, and so the lessee of a telegraph line cannot exercise the right of eminent

<sup>42</sup> *Am. Tel. Co. v. Pearce*, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200, note. See, also, *Pensacola Tel. Co. v. West. U. Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708, affirming 2 Woods, 643, Fed. Cas. No. 10,960.

<sup>43</sup> See § 69.

<sup>44</sup> *West. U. Tel. Co. v. Pennsylvania R. Co.*, 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517; *West. U. Tel. Co. v. Ann Arbor R. Co.*, 178 U. S. 239, 20 Sup. Ct. 867, 44 L. Ed. 1052; *Pensacola Tel. Co. v. West. U. Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708; *West. U. Tel. Co. v. Polhemus (C. C.)* 167 Fed. 231. The statute does not authorize the taking of private property without the owner's consent, but provides that if such consent is obtained no state legislation shall prevent the occupation of the places named in the act for telegraph purposes by companies accepting the provisions of the act. *West. U. Tel. Co. v. Pennsylvania R. Co.*, supra; *Pensacola Tel. Co. v. West. U. Tel. Co.*, supra.

<sup>45</sup> *West. U. Tel. Co. v. Pennsylvania R. Co.*, 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517. See, also, *West. U. Tel. Co. v. Polhemus (C. C.)* 167 Fed. 231.

domain conferred by statute upon his lessor; <sup>46</sup> therefore, before the lessee could obtain a right of way for its lines, an agreement should be obtained from the owner, or the lessee should have the state to confer upon it the power to exercise the right of eminent domain.

**§ 68. Same continued—exclusive use—cannot be acquired.**—This act of Congress does, however, prevent a railroad company's right of way from being exclusively used by one telegraph company. <sup>47</sup> The legislature of Florida granted an exclusive right to a certain company to construct its lines along the right of way of a railroad. It was held, however, that such a grant was in conflict with the act of Congress which was specially intended to secure to all companies equal privileges and to prevent monopolies, and that it could not stand. <sup>48</sup>

**§ 69. Condemnation proceedings must be under state statutes.**—This act of Congress does not undertake to provide compulsory proceedings to condemn part of the right of way of a railroad, or to

<sup>46</sup> *West. U. Tel. Co. v. Pennsylvania R. Co.*, 195 U. S. 594, 25 Sup. Ct. 150, 49 L. Ed. 332, 1 Ann. Cas. 533.

<sup>47</sup> Under U. S. Rev. St. § 5263 (U. S. Comp. St. 1913, § 10072), a railroad company cannot grant to a telegraph company the sole right to construct a line over the right of way, so as to exclude other companies whose lines would not interfere with those of the first company. *West. U. Tel. Co. v. Am. U. Tel. Co.*, 9 Biss. 72, Fed. Cas. No. 17,444.

<sup>48</sup> A telegraph company in Texas cannot acquire by agreement with a railroad company the exclusive right to use its right of way for a line of telegraph. *West. U. Tel. Co. v. Baltimore & O. Tel. Co.* (C. C.) 19 Fed. 660, 22 Fed. 133; *West. U. Tel. Co. v. Am. U. Tel. Co.*, 65 Ga. 160, 38 Am. Rep. 781; *Baltimore, etc., Tel. Co. v. Morgan's Louisiana, etc., R. Co.*, 37 La. Ann. 883; *Pacific Postal Tel. Cable Co. v. West. U. Tel. Co.* (C. C.) 50 Fed. 493; *Keasley on Electric Wires*, p. 135. See, also, *Southwestern R. Co. v. Southern, etc., Tel. Co.*, 46 Ga. 43, 12 Am. Rep. 585; *New Orleans, etc., R. Co. v. Southern, etc., Tel. Co.*, 53 Ala. 211; *West. U. Tel. Co. v. Burlington, etc., R. Co.* (C. C.) 11 Fed. 1, 3 McCrary, 130. A railroad company maintaining telegraph wires granted to a telegraph company the right to place a wire on the poles of the railroad company and to establish stations and to do business with points off the road, the railroad company reserving to itself the right to the local business. It was held that the right granted was not exclusive, and that the railroad could put up and maintain another wire for its own use or for the use of a third party. *West. U. Tel. Co. v. Marietta, etc., R. Co.*, 38 Ohio St. 24. There are some authorities holding a contrary view on this subject. *Canadian Pacific R. Co. v. West. U. Tel. Co.*, 17 Canada Sup. Ct. 151; *West. U. Tel. Co. v. Chicago, etc., R. Co.*, 86 Ill. 246, 29 Am. Rep. 28; *West. U. Tel. Co. v. Atlantic, etc., Tel. Co.*, 7 Biss. 367, Fed. Cas. No. 17,445. In view of the act of Congress, a state cannot grant to a telegraph company exclusive rights in the right of way of any railroad within the state. "The statute



condemn public or private property of the state or individuals for an easement for a telegraph company, but this right is left exclusively to the laws of the state in which is located the right of way attempted to be sought.<sup>49</sup> Nor can a federal court, under this act, with its equity powers, use its injunction process so as to effect an equitable condemnation of an easement of a right of way over a railroad along which it has constructed its line under a contract with a prior owner of the railroad whose ownership had been terminated by the foreclosure of a mortgage existing prior to the contract.<sup>50</sup>

§ 70. **Companies not subject to act.**—This act of Congress does not apply to telephone companies,<sup>51</sup> nor does it extend to the installation by a regularly organized telegraph company, of a district telegraph system for the collection and distribution of telegraph messages and for the operation of call boxes, watchmen, and police signals, and the like;<sup>52</sup> nor does it embrace telegraph companies not organized under the laws of a state, but under the laws of a for-

amounts to a prohibition of all state monopolies in this particular." *Pensacola Tel. Co. v. West. U. Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708, affirming 2 Woods, 643, Fed. Cas. No. 10,960.

<sup>49</sup> *West. U. Tel. Co. v. Pennsylvania R. Co.*, 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517; *West. U. Tel. Co. v. Pennsylvania R. Co.*, 195 U. S. 594, 25 Sup. Ct. 150, 49 L. Ed. 332, 1 Ann. Cas. 533; *Sunset Tel. etc., Co. v. Pomona (C. C.)* 164 Fed. 561, affirmed in 172 Fed. 829, 97 C. C. A. 251; *Pensacola Tel. Co. v. West. U. Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708; *Postal Tel. Cable Co. v. Cleveland, etc., R. Co. (C. C.)* 94 Fed. 234; *Postal Tel. Cable Co. v. Southern R. Co. (C. C.)* 89 Fed. 190; *West. U. Tel. Co. v. Pennsylvania R. Co.*, 123 Fed. 33, 59 C. C. A. 113, reversing (C. C.) 120 Fed. 981, and affirming (C. C.) 120 Fed. 362; *Postal Tel. Cable Co. v. Morgan's Louisiana, etc., R. Co.*, 49 La. Ann. 58, 21 South. 183; *Nicoll v. New York, etc., Tel. Co.*, 62 N. J. Law, 733, 42 Atl. 583, 72 Am. St. Rep. 666, affirming 62 N. J. Law, 156, 40 Atl. 627; *West. U. Tel. Co. v. Ann Arbor R. Co.*, 178 U. S. 243, 20 Sup. Ct. 867, 44 L. Ed. 1052, reversing 90 Fed. 379, 33 C. C. A. 113. See, also, § 67. *Northwestern, etc., Co. v. Chicago, etc., Ry.*, 76 Minn. 334, 79 N. W. 315; *Postal Tel. Cable Co. v. Southern Ry. (C. C.)* 89 Fed. 190. See *West. U. Tel. Co. v. Superior Court*, 15 Cal. App. 679, 115 Pac. 1091, 1100, obligatory on state to allow telegraph companies the right to condemn.

<sup>50</sup> *West. U. Tel. Co. v. Ann Arbor R. Co.*, 90 Fed. 379, 33 C. C. A. 113.

<sup>51</sup> *Richmond v. Southern Bell Tel., etc., Co.*, 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162; *Sunset Tel., etc., Co. v. Pomona (C. C.)* 164 Fed. 561, affirmed in 172 Fed. 829, 97 C. C. A. 251; *Cumberland Tel., etc., Co. v. Evansville (C. C.)* 127 Fed. 187, affirmed in 143 Fed. 238, 74 C. C. A. 368.

<sup>52</sup> *Toledo v. West. U. Tel. Co.*, 107 Fed. 10, 46 C. C. A. 111, 52 L. R. A. 730. See *Hirsch v. American Dist. Tel. Co.*, 112 App. Div. 265, 98 N. Y. Supp. 371.



eign country,<sup>53</sup> nor to domestic telegraph companies which have not accepted the provisions of the act.<sup>54</sup>

§ 71. **Subsidized acts.**—By an early act of Congress<sup>55</sup> and supplemental acts thereto<sup>56</sup> subsidized railroad companies, known generally as the Pacific railroads, were granted rights of way over the public domain and were required to construct and operate telegraph lines along their various routes under special provisions with regard to telegraphic service to be furnished to the government and the public.<sup>57</sup> When, therefore, a railroad company's right of way is one acquired by congressional grant under these acts, the grants must have been considered as having been accepted subject to the provisions of the act giving the telegraph companies the right to occupy and use such right of way without compensation to the railroad.<sup>58</sup>

§ 72. **State grants—distinguished from federal grants.**—For the reason that telegraph companies may acquire from the federal government a right of way over and across public and private property does not prevent the state from making such grants; for we find that most, if not all, of the states have passed laws giving the right to telegraph and telephone companies, under certain conditions and restrictions, to construct and operate lines upon the public highways.<sup>59</sup> It will be seen that there is a distinction between a

<sup>53</sup> *De Castro v. Compagnie Francaise*, 85 Hun, 231, 32 N. Y. Supp. 960, affirmed in 155 N. Y. 688, 50 N. E. 1116.

<sup>54</sup> *Chicago, etc., Bridge Co. v. Pacific Mut. Tel. Co.*, 36 Kan. 113, 12 Pac. 535.

<sup>55</sup> Act July 1, 1862, c. 120, 12 Stat. 489.

<sup>56</sup> Act July 2, 1864, c. 220, 13 Stat. 373; Act Aug. 7, 1888, c. 772, 25 Stat. 382.

<sup>57</sup> *U. S. v. Union Pac. R. Co.*, 160 U. S. 1, 16 Sup. Ct. 190, 40 L. Ed. 319.

<sup>58</sup> *Mercantile Trust Co. v. Atlantic, etc., R. Co. (C. C.)* 63 Fed. 513.

<sup>59</sup> Code of Ala. 1896, §§ 1244, 2490; Code of Tenn. 1896, § 1830; Code of Va. 1887, §§ 1287-1290, construed in *Southern Bell Tel., etc., Co. v. Richmond*, 103 Fed. 31, 44 C. C. A. 147; *Richmond v. Southern Bell Tel. Co.*, 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162; *Miss. L.* 1886, p. 93, construed in *Meridian v. West. U. Tel. Co.*, 72 Miss. 916, 18 South. 81; *Hodges v. West. U. Tel. Co.*, 72 Miss. 910, 18 South. 84, 29 L. R. A. 770; *Postal Cable Tel. Co. v. Norfolk, etc., R. Co.*, 88 Va. 920, 14 S. E. 803; *Hudson Tel. Co. v. Jersey City*, 49 N. J. Law, 303, 8 Atl. 123, 60 Am. Rep. 619; *Marshfield v. Wisconsin Tel. Co.*, 102 Wis. 604, 78 N. W. 735, 44 L. R. A. 565, construing *Wis. Rev. St.* 1898, § 1778; *State v. Cumberland Tel., etc., Co.*, 52 La. Ann. 1411, 27 South. 795; *State v. Flad*, 23 Mo. App. 185; *State v. Spokane*, 24 Wash. 53, 63 Pac. 1116; *West. U. Tel. Co. v. Williams*, 86 Va. 696, 11 S. E. 106, 8 L. R. A. 429, note, 19 Am. St. Rep. 908. See, also, *State v. Central New Jersey Tel. Co.*, 53 N. J. Law, 341, 21 Atl. 460, 11 L. R. A. 664; *Barhite v. Home Tel. Co.*, 50 App. Div. 25, 63 N. Y. Supp. 639; *Cincinnati Inclined Plane R. Co. v. City*,

federal and a state grant with respect to the kind of companies to which the grant may be made. In the former, as stated elsewhere, the grant can only be made to a telegraph company,<sup>60</sup> but in the latter it may be made to either or both a telegraph or telephone company.<sup>61</sup> It would require much time and space to set forth all the statutes of the several states on this subject; so we will leave the reader to consult the laws of his own state in regard to this question.<sup>62</sup>

§ 73. **On railroad.**—In some states these statutes confer upon telegraph and telephone companies the right of using the right of way of a railroad company.<sup>63</sup> It has been held that, under a statute authorizing telegraph companies to construct their lines “along

etc., Ass’n, 48 Ohio St. 390, 27 N. E. 890, 29 Am. St. Rep. 559, 12 L. R. A. 534; *State v. Bell Tel. Co.*, 36 Ohio St. 296, 38 Am. Rep. 583; *People’s Tel., etc., Co. v. Berks, etc., Turnpike Road*, 199 Pa. 411, 49 Atl. 284; *Texarkana v. Southwestern Tel., etc., Co.*, 48 Tex. Civ. App. 16, 106 S. W. 915; *Roberts v. Wisconsin Tel. Co.*, 77 Wis. 589, 46 N. W. 800, 20 Am. St. Rep. 143; *Postal Tel. Cable Co. v. Southern R. Co. (C. C.)* 89 Fed. 190; *Beaver County v. Central District, etc., Tel. Co.*, 219 Pa. 340, 68 Atl. 846, holding that a bridge is part of highway; *Cable Co. v. County*, 160 Cal. 129, 116 Pac. 566; *Tel., etc., Co. v. Township*, 80 N. J. Law, 158, 76 Atl. 444; *Bailey v. Tel. Co.*, 147 App. Div. 224, 131 N. Y. Supp. 1000; *Snee v. Tel. Co.*, 24 S. D. 361, 123 N. W. 729; *Doty v. American, etc., Co.*, 123 Tenn. 329, 130 S. W. 1053, Ann. Cas. 1912C, 167; *Tel. Co. v. Gainesville (Tex. Civ. App.)* 141 S. W. 1044.

<sup>60</sup> § 56 et seq.; § 70.

<sup>61</sup> *People’s Tel., etc., Co. v. Berks, etc., Turnpike Road*, 199 Pa. 411, 49 Atl. 284; *Cincinnati Inclined Plane R. Co. v. City, etc., Tel. Assoc.*, 48 Ohio St. 390, 27 N. E. 890, 29 Am. St. Rep. 559, 12 L. R. A. 534; *Texarkana v. Southwestern Tel., etc., Co.*, 48 Tex. Civ. App. 16, 106 S. W. 915; *Roberts v. Wisconsin Tel. Co.*, 77 Wis. 589, 46 N. W. 800, 20 Am. St. Rep. 143. See, contra, *Home Tel. Co. v. Nashville*, 118 Tenn. 1, 101 S. W. 770, 11 Ann. Cas. 824; *Sunset Tel., etc., Co. v. Pomona (C. C.)* 164 Fed. 561, affirmed in 172 Fed. 829, 97 C. C. A. 251; *Canadian, etc., R. Co. v. Moosehead Tel. Co.*, 106 Me. 363, 76 Atl. 885, 29 L. R. A. (N. S.) 703, 20 Ann. Cas. 721.

<sup>62</sup> See *Richmond v. Southern Bell Tel., etc., Co.*, 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162.

<sup>63</sup> *Postal Tel. Cable Co. v. Morgan’s Louisiana, etc., R. Co.*, 49 La. Ann. 58, 21 South. 183; *St. Louis, etc., R. Co. v. Postal Tel. Co.*, 173 Ill. 508, 51 N. E. 382; *Southwestern Tel. Co. v. Kansas City, etc., R. Co.*, 109 La. 892, 33 South. 910; *South Carolina, etc., R. Co. v. American Tel., etc., Co.*, 65 S. C. 459, 43 S. E. 970; *Railroad Co. v. Postal Tel. Cable Co.*, 101 Tenn. 62, 46 S. W. 571, 41 L. R. A. 403; *Ft. Worth, etc., R. Co. v. Southwestern Tel., etc., Co.*, 96 Tex. 160, 71 S. W. 270, 60 L. R. A. 145; *Postal Tel. Cable Co. v. Farmville, etc., R. Co.*, 96 Va. 661, 32 S. E. 468; *Postal Tel. Cable Co. v. Southern R. Co. (C. C.)* 89 Fed. 190; *Railroad Co. v. Tel. Co.*, 106 Me. 363, 76 Atl. 885, 29 L. R. A. (N. S.) 703, 20 Ann. Cas. 721. See, *New York, etc., R. Co. v. Electric Co.*, 219 Mass. 85, 106 N. E. 566, L. R. A. 1915B, 822, electric company crossing track.

and parallel to any of the railroads of the state," a telegraph company is not authorized to condemn a right of way along and upon the right of way of a railroad company; it is only allowed to run in the direction lengthwise of the railroad, alongside and equidistant from it throughout all its parts.<sup>64</sup> While these statutes are subordinate to the act of Congress on the same subject, yet they may nevertheless be resorted to for condemnation of a right of way along railroads when necessary.<sup>65</sup>

§ 74. **Same continued—conditions not to interfere with running trains.**—These statutes provided that telegraph or telephone lines shall not be constructed along the railroad so as to interfere with travel. If it were not for this condition these companies might, by a multiplication of wires, interfere with the running of trains, and the possible falling of poles would endanger the safety of trains. It has therefore been expressly stated both in the act of Congress and the various state statutes on the subject that the lines must be so constructed and maintained as not to interfere with travel. They do not state how far they shall be from the railroad, but it is an implied condition on the part of these companies that the lines shall not be so closely erected to the road as to obstruct the operation of the railroad.<sup>66</sup>

§ 75. **Same continued—award.**—Another condition required of a telegraph or a telephone company before constructing a line of wires along and upon a railroad's right of way is that the latter

<sup>64</sup> Postal Tel. Co. v. Norfolk, etc., R. Co., 88 Va. 920, 14 S. E. 803. See St. Louis, etc., R. Co. v. Postal Tel. Co., 173 Ill. 508, 51 N. E. 382; Southwestern Tel. Co. v. Kansas City, etc., R. Co., 109 La. 892, 33 South. 910; Postal Tel. Cable Co. v. Farmville, etc., R. Co., 96 Va. 661, 32 S. E. 468; South Carolina, etc., R. Co. v. American Tel., etc., Co., 65 S. C. 459, 43 S. E. 970; Postal Tel. Cable Co. v. Morgan's, etc., R. Co., 49 La. Ann. 58, 21 South. 183.

<sup>65</sup> Postal Tel. Cable Co. v. Morgan's, etc., R. Co., 49 La. Ann. 58, 21 South. 183.

<sup>66</sup> See notes 8 and 59 for cases cited. See, also, §§ 161, 201. See also, Western, etc., R. Co. v. West. U. Tel. Co., 138 Ga. 420, 75 S. E. 471, 42 L. R. A. (N. S.) 225.

*Right of railroad to cut wires at crossing.*—In determining the respective rights of a telephone company and a railroad company at a place where the former's wires on a public highway cross the railroad right of way, the rights of the public, as well as property rights, should be considered. So, where a telephone company constructs its lines along a public highway in a proper manner under the terms of a legislative grant, and uses them in the public service, a railroad company has no authority to treat the wires at a railroad crossing as a nuisance and cut them down, if they do not in any way endanger the railroad employes, or interfere with the moving of trains or with the railroad right of way. Alt v. State, 88 Neb. 259, 129 N.



must be compensated for the use of its roadbed by either of these companies.<sup>67</sup> While it is very clear that the railroad should be compensated for the use of its easement, since not to do so would be against the constitutional guaranty to every property owner, in that it would be depriving it of its property without due compensation,<sup>68</sup> yet, in a matter of this kind, it is very difficult to determine how much should be awarded. The construction of the line of wires along a railroad will occupy, with its poles and crosspieces thereon, a right of way of the company of some eight or ten feet, but, knowing this fact, there is no means of ascertaining the amount of damages in money that would be inflicted upon the railroad. The land along the railroad company's right of way may be of a peculiar or particular value for specific purposes, and this fact must be taken into consideration in the awarding of damages to the road, since the telegraph or telephone company cannot avail itself of improved conditions without due and proper compensation. There is one fact, however, undisputed: The telegraph or telephone company must make compensation proportionately for the cost and expense of the railroad in putting in condition its right of way.<sup>69</sup> The circumstances in every case are not the same, so each must be considered in the light of its own surroundings and decided on its own peculiar state of facts.

§ 76. **Canal—under same statutes.**—In some states these statutes grant to telegraph and telephone companies the right to construct their lines upon, or along, by, and across canals. Thus, under a Louisiana statute,<sup>70</sup> the land of the state, though appropriated to the use of a canal, may be used by a telephone company along and over the waters of the state, provided that the ordinary use of the company does not interfere with it in any manner, or obstruct in the least the use of it by the state or the plaintiff company.<sup>71</sup>

W. 432, 35 L. R. A. (N. S.) 1212. See, also, *St. Louis, etc., R. Co. v. Batesville, etc. Tel. Co.*, 80 Ark. 499, 97 S. W. 660; *McGowan v. State*, 146 Ala. 679, 40 South. 142.

<sup>67</sup> *Postal Tel. Cable Co. v. Southern R. Co.* (C. C.) 89 Fed. 190.

<sup>68</sup> See §§ 64, 65.

<sup>69</sup> *Postal Cable Tel. Co. v. Morgan's Louisiana, etc., R., etc., Co.*, 21 South. 183, 49 La. Ann. 58, affirming *Postal Tel. Co. v. Louisiana, etc., R. Co.*, 43 La. Ann. 522, 9 South. 119. In the latter case an award of \$50 per mile was allowed.

<sup>70</sup> No. 124, Laws 1880.

<sup>71</sup> *State v. Cumberland, etc., Tel. Co.*, 52 Ia. Ann. 1411, 27 South. 795. See *Minnesota, etc., P. Co. v. Pratt*, 101 Minn. 197, 112 N. W. 395, 11 L. R. A. (N. S.) 105, electric plant.



§ 77. The term "highway" embraces city streets.—These statutes which confer upon telegraph and telephone companies the right to occupy "public highways" of the state embrace city streets, unless a different intent is clearly indicated,<sup>72</sup> yet it has been held that, where the term "public roads" is used in the statutes, streets of a city are not embraced therein.<sup>73</sup> The term will also embrace a turnpike,<sup>74</sup> but not a railroad or its right of way,<sup>75</sup> nor will it embrace lands granted for canal purposes.<sup>76</sup>

§ 78. Conditions of grantee.—In the granting by the state to telegraph, telephone, and electric companies the right to construct and operate lines of wires across private property, along and upon highways, railroads, and along, across, and under navigable waters, there are certain conditions for the welfare and convenience of the public always required of the grantees, for the enjoyment of such right. For instance, in some states authority is given by statutes to all telegraph and telephone companies to erect poles on which to place their wires, on all highways or public roads, by first obtaining the consent in writing of the county board of the county in which such highway is situated,<sup>77</sup> and that the posts, arms, insulators, and other fixtures of such telegraph or telephone lines be so erected, placed, and maintained as not to obstruct or interfere with the ordinary use of such highways, railroads, streets, or water, or with the convenience of any landowners more than may be unavoidable,<sup>78</sup> or change or adjust, when necessary, its system of operating its lines as not to curtail the enjoyment by the public of the best mode of travel and transportation,<sup>79</sup> or not to interfere with the

<sup>72</sup> *Abbott v. Duluth (C. C.)* 104 Fed. 833; *Chamberlain v. Iowa Tel. Co.*, 119 Iowa, 619, 93 N. W. 596, city's consent unnecessary; *East Tenn. Tel. Co. v. Russellville*, 106 Ky. 667, 51 S. W. 308; *Duluth v. Duluth Tel. Co.*, 84 Minn. 486, 87 N. W. 1127; *Northwestern Tel. Exch. Co. v. Minneapolis*, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175; *Michigan Tel. Co. v. Boston Harbor*, 121 Mich. 512, 80 N. W. 386, 47 L. R. A. 104; *State v. Sheyboyan*, 111 Wis. 23, 86 N. W. 657.

<sup>73</sup> *Nebraska Tel. Co. v. West. Independent Long Distance Tel. Co.*, 68 Neb. 772, 95 N. W. 18.

<sup>74</sup> *People's Tel., etc., Co. v. Berks, etc., Turnpike Road*, 199 Pa. 411, 49 Atl. 284.

<sup>75</sup> *West. U. Tel. Co. v. Penn. R. Co.*, 123 Fed. 33, 59 C. C. A. 113, reversing (C. C.) 120 Fed. 981.

<sup>76</sup> *State v. Cumberland Tel., etc., Co.*, 52 La. Ann. 1411, 27 South. 795.

<sup>77</sup> *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453.

<sup>78</sup> *Miss. Laws* 1886, p. 93.

<sup>79</sup> *Cincinnati Inclined Plane R. Co. v. Tel. Association*, 48 Ohio St. 390, 29 Am. St. Rep. 559, 12 L. R. A. 534, 27 N. E. 890.

opening and closing of a drawbridge across a navigable stream,<sup>80</sup> nor obstruct steamers or travels upon the navigable waters. And these companies must always first make compensation for damages and injuries inflicted upon the owners of the fee or right of way,<sup>81</sup> or they would be taking the property of others without compensation.

§ 79. **Municipal grants—right to—how acquired.**—Telegraph, telephone, or electric companies cannot occupy the streets of a city without first obtaining the authority so to do from the state, but this may be done directly or indirectly by the legislature,<sup>82</sup> and, while this power is vested primarily in the legislature,<sup>83</sup> it may be delegated to a municipality.<sup>84</sup> Whether the right to authorize the use of its streets exists in the municipality in particular cases is a question to be determined by the construction of its charter and legislative provisions in force in the state.<sup>85</sup> When the right has been granted, an easement is vested in the company which becomes a property right, and thereby entitled to all the constitutional protection afforded to other property and contracts.<sup>86</sup> However, this right must be exercised in such a manner as not unnecessarily to obstruct

<sup>80</sup> *Pac. Mut. Tel. Co. v. Chicago, etc., Bridge Co.*, 36 Kan. 113, 12 Pac. 535.

<sup>81</sup> *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453.

<sup>82</sup> *Morristown v. East Tennessee Tel. Co.*, 115 Fed. 304, 53 C. C. A. 132; *Southern Bell Tel., etc., Co. v. Mobile (C. C.)* 162 Fed. 523; *People v. Chicago Tel. Co.*, 220 Ill. 238, 77 N. E. 245; *Tel. Co. v. Vail (Iowa)* 136 N. W. 120; *Pomona v. Tel. Co.*, 224 U. S. 330, 32 Sup. Ct. 477, 56 L. Ed. 788.

<sup>83</sup> *People v. Chicago Tel. Co.*, 220 Ill. 238, 77 N. E. 245; *Southern Bell Tel., etc., Co. v. Mobile (C. C.)* 162 Fed. 523; *Morristown v. East Tennessee Tel. Co.*, 115 Fed. 304, 53 C. C. A. 132; *Domestic Tel. Co. v. Newark*, 49 N. J. Law, 344, 8 Atl. 128.

<sup>84</sup> *Morristown v. East Tennessee Tel. Co.*, 115 Fed. 304, 53 C. C. A. 132; *Southern Bell Tel. Co. v. Mobile (C. C.)* 162 Fed. 523; *Tel., etc., Co. v. Pasadena*, 161 Cal. 265, 118 Pac. 796; *Tel. Co. v. Holliday*, 143 Ky. 149, 136 S. W. 135; *Vermillion v. Exch. Co.*, 189 Fed. 289, 111 C. C. A. 21; *Crawford Elec. Co. v. Knox County Power Co.*, 110 Me. 285, 86 Atl. 119, Ann. Cas. 1914C, 933.

<sup>85</sup> *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278; *Dillon on Mun. Corp.* (3d Ed.) § 89.

<sup>86</sup> *Southern Bell Tel. Co. v. Mobile (C. C.)* 162 Fed. 523; *Plattsmouth v. Nebraska Tel. Co.*, 80 Neb. 460, 114 N. W. 588, 14 L. R. A. (N. S.) 654, and note, 127 Am. St. Rep. 799; *Kibbie Tel. Co. v. Landphere*, 151 Mich. 309, 115 N. W. 244, 16 L. R. A. (N. S.) 689; *West. U. Tel. Co. v. Polhemus*, 178 Fed. 904, 102 C. C. A. 105, 29 L. R. A. (N. S.) 465.

*Streets abandoned.*—Where streets are abandoned by the city, poles and lines thereon cannot be removed without compensating the company. *L. & N. R. Co. v. Russellville Home Tel. Co.*, 163 Ky. 415, 173 S. W. 1105, L. R. A. 1915E, 138.

or injure the street,<sup>87</sup> and be subject to all proper legislative or municipal regulations.<sup>88</sup> Having this right in the streets, the company has the further right to place therein all necessary and proper appliances for such purpose;<sup>89</sup> but this does not authorize any invasion of adjoining private property for the purpose of constructing the line or stringing wires across such property.<sup>90</sup> Where the municipality has the power to grant to these companies the right to the use of its streets, it must be confined to a reasonable exercise thereof, and it cannot therefore grant to a private citizen the right to construct a line of wires for his own use.<sup>91</sup> While the legislature may, and which is ordinarily the case, delegate the power to municipalities to grant the use and occupation of its streets to these companies, yet this is not necessary, because if the state has authorized the construction of telegraph and telephone lines on all public highways of the state, a municipality could not exclude such companies from its streets,<sup>92</sup> unless this grant is made on the condition that the consent of the municipality be first obtained.<sup>93</sup>

**§ 80. Duties and rights of municipality under.**—As a general rule, telegraph, telephone, and electric companies are given by statute the right to occupy highways and streets,<sup>94</sup> but it is made the duty and right of each municipality to fix the terms and conditions

<sup>87</sup> See chapter IX.

<sup>88</sup> See chapter V.

<sup>89</sup> *Simonds v. Maine Tel., etc., Co.*, 104 Me. 440, 72 Atl. 175, 28 L. R. A. (N. S.) 942; *Tel. Co. v. Holliday*, 143 Ky. 149, 136 S. W. 135; *West. U. Tel. Co. v. Polhemus*, 178 Fed. 904, 102 C. C. A. 105, 29 L. R. A. (N. S.) 465.

<sup>90</sup> *Majenica Tel. Co. v. Rogers*, 43 Ind. App. 306, 87 N. E. 165.

<sup>91</sup> *Sheffield v. Central Union Tel. Co. (C. C.)* 36 Fed. 164.

<sup>92</sup> *Hodges v. West. U. Tel. Co.*, 72 Miss. 910, 18 South. 84, 29 L. R. A. 770; *Chamberlain v. Iowa Tel. Co.*, 119 Iowa, 619, 93 N. W. 596; *Michigan Tel. Co. v. Benton Harbor*, 121 Mich. 512, 80 N. W. 386, 47 L. R. A. 104; *New Orleans v. Great Southern Tel., etc., Co.*, 40 La. Ann. 41, 3 South. 533, 8 Am. St. Rep. 502; *State v. Red Lodge*, 30 Mont. 338, 76 Pac. 758; *Summit Tp. v. New York, etc., Tel. Co.*, 57 N. J. Eq. 123, 41 Atl. 146; *American U. Tel. Co. v. Harrison*, 31 N. J. Eq. 627; *Texarkana v. Southwestern Tel., etc., Co.*, 48 Tex. Civ. App. 16, 106 S. W. 915; *Carthage v. Central New York Tel., etc., Co.*, 185 N. Y. 448, 78 N. E. 165, 113 Am. St. Rep. 932; *Barhite v. Home Tel. Co.*, 50 App. Div. 25, 63 N. Y. Supp. 659; *Wisconsin Tel. Co. v. Milwaukee*, 126 Wis. 1, 104 N. W. 1009, 110 Am. St. Rep. 886, 1 L. R. A. (N. S.) 581; *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828; *Wichita v. Old Colony Trust Co.*, 132 Fed. 641, 66 C. C. A. 19; *Toronto v. Bell Tel. Co.*, 6 Ont. L. Rep. 335, 2 Ont. Wkly. Rep. 750. Nature of right acquired, see *Bland v. Cumberland Tel., etc., Co.*, 109 S. W. 1180, 33 Ky. Law Rep. 399.

<sup>93</sup> See § 82.

<sup>94</sup> See § 79.



upon which its own streets may be used.<sup>95</sup> In the first place, in order for such companies to take advantage of and be protected by these statutes, they must be complied with in the manner pointed out by such statutes,<sup>96</sup> otherwise their acts will be prohibited by injunction;<sup>97</sup> these statutes cannot be enlarged by municipal ordinances.<sup>98</sup> Thus, where a statute grants the right to these companies to construct a line of wires over and through streets, it has been held that this did not give the city the authority to place the wires underground.<sup>99</sup> An exercise of the right granted by such statutes, delegated to the municipal authority, does not deprive the latter of the police power over its streets;<sup>100</sup> and, in order to carry out and maintain the municipal government, a license tax<sup>101</sup> or rental<sup>102</sup> may be imposed on such companies doing business wholly or partly within the city limits; this right is not affected by the act of Congress from which federal grants are given.<sup>103</sup> The municipality may require these companies to compensate it in other and different ways, for the privilege of constructing their lines over and upon the streets, where the same is used to make the repairs rendered necessary by such additional use to which the streets are used.<sup>104</sup> It has been held that a legislative act or municipal ordi-

<sup>95</sup> See chapter V. See, also, *Postal Tel. Cable Co. v. Chicopee*, 207 Mass. 341, 93 N. E. 927, 32 L. R. A. (N. S.) 997.

<sup>96</sup> See chapter V.

<sup>97</sup> *Broome v. New York, etc., Tel. Co.*, 42 N. J. Eq. 141, 7 Atl. 851; *New York, etc., Tel. Co. v. Township of East Orange*, 42 N. J. Eq. 490, 8 Atl. 289.

<sup>98</sup> *Chesapeake Tel. Co. v. Mackenzie*, 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 219.

<sup>99</sup> *Com. v. Warwick*, 185 Pa. 623, 40 Atl. 93.

<sup>100</sup> *West. U. Tel. Co. v. Philadelphia (Pa.)* 12 Atl. 144; *American, etc., Tel. Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454n; *Indianapolis v. Consumers' Gas Trust Co.*, 140 Ind. 107, 39 N. E. 433, 49 Am. St. Rep. 183, 27 L. R. A. 514.

<sup>101</sup> *West. U. Tel. Co. v. Fremont*, 39 Neb. 692, 58 N. W. 415, 26 L. R. A. 698; *Postal Tel. Cable Co. v. Norfolk*, 101 Va. 125, 43 S. E. 207; *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692, 14 Sup. Ct. 1094, 38 L. Ed. 871; *Tel. Co. v. Richmond (C. C.)* 178 Fed. 310.

<sup>102</sup> See § 84 et seq.

<sup>103</sup> *St. Louis v. West. U. Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380. See § 72.

<sup>104</sup> *Zanesville v. Zanesville Tel., etc., Co.*, 64 Ohio St. 67, 59 N. E. 781, 83 Am. St. Rep. 725, 52 L. R. A. 150; *Norwood Borough v. West. U. Tel. Co.*, 25 Pa. Super. Ct. R. 406; *Atlantic, etc., Tel. Co. v. Philadelphia*, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. Ed. 995; *West. U. Tel. Co. v. New Hope*, 187 U. S. 419, 23 Sup. Ct. 204, 47 L. Ed. 240.

*Power requiring company to carry municipal wires on poles.*—A municipality may require public service corporation, as a condition to receiving a



nance, authorizing the construction of the line of wires upon the streets is void if it fails to provide for compensation to abutting owners.<sup>105</sup> But where the municipalities are given the right and duty to fix the terms and conditions upon which their own streets may be used, they cannot defeat the grant of the company's right given by the statute, by either refusing to name the conditions, or by imposing unreasonable restrictions or conditions.<sup>106</sup> Whenever there is a disagreement between the municipality and these companies about some term or condition imposed by the former, there should be and generally is a court in which this disagreement may be settled. It is not only of interest to the municipality and to these companies that all the conditions should be agreed upon as speedily as possible, but it is also of great interest to the public.<sup>107</sup>

§ 81. **Same continued—unconditional statutes.**—It has been seen that the legislature may grant to telegraph, telephone and electric companies the right to occupy city streets upon such companies complying with conditions and restrictions of the city, but the legislative grant may be unconditional; and when such is the case the city cannot impose any conditions or restrictions upon such companies,<sup>108</sup> except under the police power,<sup>109</sup> nor can its officers

license, to place poles on its streets to permit the municipality to use them to carry its fire alarm and electric light wires without compensation, where the benefit to the municipality does not exceed the cost of inspecting the poles to keep them safe from travelers and the risk it runs of being held liable to them for injuries because of the presence of the poles in the street; and it is immaterial that the high current of the municipal wires renders greater care necessary on the part of the employes at work upon the poles, and makes possible inductive disturbance on the licensee's line, which may require it to maintain a higher voltage than it otherwise would. This would not be unconstitutional as an interference with interstate commerce. *Postal Tel. Cable Co. v. Chicopee*, 207 Mass. 341, 93 N. E. 927, 32 L. R. A. (N. S.) 997; *West. U. Tel. Co. v. Richmond* (C. C.) 178 Fed. 310; *Hudson, etc., Tel. Co. v. Linden*, 80 N. J. Law, 158, 76 Atl. 444; *St. Louis v. West. U. Tel. Co.* (C. C.) 63 Fed. 68, affirmed 166 U. S. 388, 17 Sup. Ct. 608, 41 L. Ed. 1044; *New Orleans, etc., Tel. Co. v. Great Southern, etc., Tel. Co.*, 40 La. Ann. 41, 3 South. 533, 8 Am. St. Rep. 502; *Texarkana Gas, etc., Co. v. Texarkana*, 58 Tex. Civ. App. 109, 123 S. W. 213, condition to furnish free of charge electric light for use in certain public buildings. See § 81.

<sup>105</sup> *Stowers v. Postal Tel. Co.*, 68 Miss. 559, 9 South. 356, 24 Am. St. Rep. 290, 12 L. R. A. 864, note; *Chesapeake, etc., Tel. Co. v. Mackenzie*, 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 219; *Southwestern R. Co. v. Southern, etc., Tel. Co.*, 46 Ga. 43, 12 Am. Rep. 585.

<sup>106</sup> See § 44.

<sup>107</sup> *Zanesville v. Zanesville Tel., etc., Co.*, 64 Ohio St. 67, 59 N. E. 781, 83 Am. St. Rep. 725, 52 L. R. A. 150.

<sup>108</sup> See § 79.

<sup>109</sup> See § 80.

interfere with the exercise of the companies' privileges.<sup>110</sup> But should the city be without authority to impose reasonable conditions upon these companies—having merely the power to consent or refuse consent—they may, nevertheless, annex certain conditions on them for the right of easement over the streets;<sup>111</sup> and, if the companies acquire an easement in the streets in accordance to said conditions, and occupy them, they cannot afterwards repudiate the conditions.<sup>112</sup> This principle of law is founded on the ground of estoppel and will be closely observed as in all other cases of this nature. The city authority cannot revoke a designation of the streets in which a company may place its poles, when the company has conformed to the conditions upon which the designation was made, and has expended money in placing poles upon the designated streets.<sup>113</sup>

**§ 82. Must obtain consent of municipality.**—Many of these statutes, or constitutions, which give telegraph, telephone, and electric companies the right to construct lines of wires upon the streets of cities provide that this right shall not be exercised without first obtaining the consent of the municipality,<sup>114</sup> and where this is the case the consent must be obtained,<sup>115</sup> and in the manner provided;<sup>116</sup> however, if there is no particular mode of manifesting such consent prescribed, it may be either express or implied.<sup>117</sup> This

<sup>110</sup> *State v. Flad*, 23 Mo. App. 185.

<sup>111</sup> See chapter V. See, also, § 80, and cases in note.

<sup>112</sup> *Southern Bell Tel. Co. v. Richmond*, 103 Fed. 31, 44 C. C. A. 147. See § 44.

<sup>113</sup> *Hudson Tel. Co. v. Mayer, etc., Jersey City*, 49 N. J. Law, 303, 8 Atl. 123, 60 Am. Rep. 619.

<sup>114</sup> See *Rough River Tel. Co. v. Cumberland, etc., Co.*, 119 Ky. 470, 27 Ky. Law Rep. 32, 84 S. W. 517; *East Tennessee Tel. Co. v. Anderson County Tel. Co.*, 115 Ky. 488, 24 Ky. Law Rep. 235S, 74 S. W. 218; *Postal Tel. Cable Co. v. Newport*, 25 Ky. Law Rep. 635, 76 S. W. 159; *Missouri River Tel. Co. v. Mitchell*, 22 S. D. 191, 116 N. W. 67; *Dakota Cent. Tel. Co. v. Huron (C. C.)* 165 Fed. 226; *Northwestern Tel. Exch. Co. v. St. Charles (C. C.)* 151 Fed. 386; *Haldiman v. Tel. Co.*, 25 Ont. L. R. 467, 19 Ont. W. R. 335, 2 Ont. W. R. 194. See *Salem v. Tel., etc., Co.*, 61 Or. 319, 122 Pac. 290; *East Tennessee Tel. Co. v. Paris Elec. Co.*, 156 Ky. 762, 162 S. W. 530, Ann. Cas. 1915C, 543.

<sup>115</sup> *Id.* See, also, *East Tennessee Tel. Co. v. Russellville*, 106 Ky. 667, 51 S. W. 308, 24 Ky. Law Rep. 305.

<sup>116</sup> *Rural Home Tel. Co. v. Kentucky, etc., Tel. Co.*, 128 Ky. 209, 32 Ky. Law Rep. 106S, 107 S. W. 787; *Merchants' Police, etc., Tel. Co. v. Citizens' Tel. Co.*, 123 Ky. 90, 29 Ky. Law Rep. 512, 93 S. W. 642; *Bland v. Cumberland Tel., etc., Co.*, 33 Ky. Law Rep. 399, 109 S. W. 1180; *East Tennessee Tel. Co. v. Paris Elec. Co.*, 156 Ky. 762, 162 S. W. 530, Ann. Cas. 1915C, 543.

<sup>117</sup> *Dakota Cent. Tel. Co. v. Huron (C. C.)* 165 Fed. 226; *Pelham v. Pel-*

requirement does not ordinarily apply to the company's subsequent maintenance and operation, but is intended for the purpose of enabling municipalities to impose proper conditions within the limits of the police power before the company can place its poles and wires in the streets;<sup>118</sup> but, if the statute requires municipal consent to "maintain and operate," such consent is necessary for the maintenance as well as for the construction.<sup>119</sup> Where this consent is necessary, a company which occupies the streets of a city without first obtaining such consent will be guilty of trespass, and the poles and wires upon the streets would become a public nuisance,<sup>120</sup> however, the municipality, by permitting the company to construct its lines upon the streets and expend large sums of money in so doing, might be precluded by its acquiescence and laches from objecting to the occupancy of the streets,<sup>121</sup> if the provisions in the statutes are not mandatory.<sup>122</sup> The consent when necessary may ordinarily be granted subject to any reasonable and proper conditions;<sup>123</sup> but conditions cannot be legally imposed by a municipality other than those permitted by the statute,<sup>124</sup> unless they can be sustained under its police powers in regard to the control and regulation of its streets.<sup>125</sup> However, it has been held that the company, by accepting the rights granted, may be bound by a condition annexed thereto which the municipality was not authorized to impose.<sup>126</sup>

§ 83. **Compensation to municipality—charge must be reasonable.** When telegraph or telephone companies occupy the streets of a municipality where the latter owns its streets, it may exact com-

ham Tel. Co., 131 Ga. 325, 62 S. E. 186; *Missouri River Tel. Co. v. Mitchell*, 22 S. D. 191, 116 N. W. 67.

<sup>118</sup> *Dakota Cent. Tel. Co. v. Huron (C. C.)* 165 Fed. 226.

<sup>119</sup> *Southern Bell Tel., etc., Co. v. Richmond*, 103 Fed. 31, 44 C. C. A. 147.

<sup>120</sup> *East Tennessee Tel. Co. v. Russellville*, 106 Ky. 667, 21 Ky. Law Rep. 305, 51 S. W. 308; *Bland v. Cumberland Tel., etc., Co.*, 109 S. W. 1180, 33 Ky. Law Rep. 399.

<sup>121</sup> *Bradford v. New York, etc., Tel. Co.*, 206 Pa. 582, 56 Atl. 41.

<sup>122</sup> *Southern Bell, etc., Tel. Co. v. Richmond*, 103 Fed. 31, 44 C. C. A. 147; *East Tennessee Tel. Co. v. Anderson Tel. Co.*, 115 Ky. 488, 74 S. W. 218, 24 Ky. Law Rep. 2358; *State v. Spokane*, 24 Wash. 53, 63 Pac. 1116; *Marshfield v. Wisconsin, etc., Tel. Co.*, 102 Wis. 604, 78 N. W. 735, 44 L. R. A. 565, note; *St. Paul v. Freedy*, 86 Minn. 350, 90 N. W. 781.

<sup>123</sup> *Southern Bell Tel., etc., Co. v. Richmond*, 103 Fed. 31, 44 C. C. A. 147.

<sup>124</sup> *Missouri River Tel. Co. v. Mitchell*, 22 S. D. 191, 116 N. W. 67; *State v. Flad*, 23 Mo. App. 185.

<sup>125</sup> See *State v. Milwaukee Independent Tel. Co.*, 133 Wis. 588, 114 N. W. 108, 315.

<sup>126</sup> *Southern Bell, etc., Tel. Co. v. Richmond*, 103 Fed. 31, 44 C. C. A. 147.



compensation of these companies in the nature of a rental,<sup>127</sup> without infringing upon the rights acquired by these companies under the act granted by Congress.<sup>128</sup> The charge thus imposed is not a tax, but is in the nature of a rental.<sup>129</sup> This right, however, has been denied under other charter and statutory provisions.<sup>130</sup> As a police measure, however, there may be imposed a license fee or tax to cover the cost of police regulation and supervision, provided the amount of the fee or tax is reasonably commensurate with such cost.<sup>131</sup> Where the municipality has the power to demand compensation for the privilege of maintaining a telephone system upon its streets, the charge therefor may be fixed by means of competitive bidding, and the municipality may award the franchise or privilege to the bidder offering the largest percentage of its gross receipts.<sup>132</sup> In whatsoever manner the charge is fixed, it should be reasonable,

<sup>127</sup> *Nebraska Tel. Co. v. Lincoln*, 82 Neb. 59, 117 N. W. 284, 28 L. R. A. (N. S.) 221; *Postal Tel. Cable Co. v. Baltimore*, 79 Md. 502, 29 Atl. 819, 24 L. R. A. 161, affirmed in 156 U. S. 210, 15 Sup. Ct. 356, 39 L. Ed. 399; *St. Louis v. West. U. Tel. Co.*, 149 U. S. 465, 13 Sup. Ct. 990, 37 L. Ed. 810; *St. Louis v. West. U. Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; *Memphis v. Postal Cable Co.*, 145 Fed. 602, 76 C. C. A. 292, reversing (C. C.) 139 Fed. 707; *Tel., etc., Co. v. Pasadena*, 161 Cal. 265, 118 Pac. 796; *Springfield v. Postal Tel. Cable Co.*, 164 Ill. App. 276; *Mitchell v. Tel. Co.*, 25 S. D. 409, 127 N. W. 582; *Tel. Co. v. Richmond (C. C.)* 178 Fed. 310. See § 61. See § 675.

<sup>128</sup> *St. Louis v. West. U. Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380. See § 61.

<sup>129</sup> *St. Louis v. West. U. Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; *Memphis v. Postal Tel. Cable Co.*, 145 Fed. 602, 76 C. C. A. 292. See § 675.

<sup>130</sup> *Hodges v. West. U. Tel. Co.*, 72 Miss. 910, 18 South. 84, 29 L. R. A. 770.

<sup>131</sup> *Allentown v. West. U. Tel. Co.*, 148 Pa. 117, 23 Atl. 1070, 33 Am. St. Rep. 820; *Schellsburg v. West. U. Tel. Co.*, 26 Pa. Super. Ct. R. 343; *Philadelphia v. Postal Tel. Cable Co.*, 67 Hun. 21, 21 N. Y. Supp. 556; *Kittanning Borough v. West. U. Tel. Co.*, 26 Pa. Super. Ct. R. 346; *Atlantic, etc., Tel. Co. v. Philadelphia*, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. Ed. 995; *West. U. Tel. Co. v. New Hope*, 187 U. S. 419, 23 Sup. Ct. 204, 47 L. Ed. 240; *Lancaster v. Briggs*, 118 Mo. App. 570, 96 S. W. 314; *Springfield v. Postal Tel. Cable Co.*, 253 Ill. 346, 97 N. E. 672; *Tel. Co. v. Richmond (C. C.)* 178 Fed. 310. See § 61. See *Ex parte Cramer*, 62 Tex. Cr. R. 11, 136 S. W. 61, 36 L. R. A. (N. S.) 78, Ann. Cas. 1913C, 588; *Postal Tel. Cable Co. v. Chicopee*, 207 Mass. 341, 93 N. E. 927, 32 L. R. A. (N. S.) 997. See § 675.

<sup>132</sup> *Plattsburg v. People's Tel. Co.*, 88 Mo. App. 306. See *California v. Bunceton Tel. Co.*, 112 Mo. App. 722, 87 S. W. 604, holding that payment cannot be avoided by a telephone company which has obtained its right by offering a certain percentage of its gross receipts at a competitive bidding on the ground that others have been granted a like privilege without charge. *California v. Bunceton Tel. Co.*, 112 Mo. App. 722, 87 S. W. 604; *Plattsburg v. People's Tel. Co.*, 88 Mo. App. 306; *Moberly v. Richmond Tel. Co.*, 126 Ky. 369, 103 S. W. 714, 31 Ky. Law Rep. 783.



otherwise the ordinance imposing it will be invalid.<sup>133</sup> As to the reasonableness of an ordinance which charges five dollars a pole per annum, it was said: "Prima facie an ordinance like that is reasonable. The court cannot assume that such a charge is excessive, and so excessive as to make the ordinance unreasonable and void; for, as applied in certain cases, a like charge for so much appropriation of the streets may be reasonable. If, within a few blocks of Wall Street, New York, the telegraph company should place on the public streets 1,500 of the large poles, it would seem as though no court could declare that five dollars a pole was an excessive annual rental for the ground so exclusively appropriated; while, on the other hand, a charge for a like number of poles in a small village, where space is abundant and land of little value, would be manifestly unreasonable, and might be so excessive as to be void. Indeed, it may be observed, in line with thoughts heretofore expressed, that this charge is one in the nature of rental; that the occupation by this interstate commerce company of the streets cannot be denied by the city; that all that it can insist upon is, in this respect, reasonable compensation for the space in the streets thus exclusively appropriated; and it follows in the nature of things that it does not lie exclusively in its power to determine what is reasonable rental. The inquiry must be open to the courts and it is an inquiry which must depend largely upon matters not apparent upon the face of the ordinance, but existing only in the actual state of affairs in the city."<sup>134</sup> It has been held that a charge by a city of three dollars per pole as rental for the occupancy and use of its streets by a telegraph company is reasonable.<sup>135</sup>

§ 84. **Termination of franchise to occupy streets.**—A municipal ordinance which grants to a company authority to construct and maintain telegraph, telephone, and electric lines on the streets of a city, without any limitation as to time, and for a consideration therein named, is, when accepted and acted upon by the grantee, a contract with the city which cannot thereafter be abolished or altered

<sup>133</sup> Collingdale Borough v. Keystone State Tel., etc., Co., 33 Pa. Super. Ct. R. 351; Postal Tel. Cable Co. v. New Hope, 192 U. S. 55, 24 Sup. Ct. 204, 48 L. Ed. 338; Postal Tel. Cable Co. v. Taylor, 192 U. S. 64, 24 Sup. Ct. 208, 48 L. Ed. 342. See § 675.

<sup>134</sup> St. Louis v. West. U. Tel. Co., 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 350.

<sup>135</sup> Memphis v. Postal Tel., etc., Co., 164 Fed. 600, 91 C. C. A. 135, 16 Ann. Cas. 342; Springfield v. Postal Tel. Cable Co., 253 Ill. 346, 97 N. E. 672, presumption of reasonableness. See Jamestown v. Tel. Co., 125 App. Div. 1, 109 N. Y. Supp. 297.

in its essential terms without the consent of the grantee.<sup>136</sup> The franchise or right to use the streets is an irrevocable contract and cannot be revoked without just cause,<sup>137</sup> and one which the city cannot by indirection or otherwise arbitrarily declare forfeited;<sup>138</sup> nor can it remove the company's lines arbitrarily and without notice,<sup>139</sup> upon the expiration of the right by lapse of the stipulated period. When the company's stipulated time has expired for the use of the streets, it has no right to continue the said use without the consent of the city, and should it attempt so to do, the city may enjoin it from further use.<sup>140</sup> And it has been held that, where the right of the company to use the streets is unsettled, the company cannot have a preliminary injunction to restrain the removal of its poles by the municipality.<sup>141</sup>

**§ 85. Grants to electric companies—municipal ownership—liability of.**—The power of a municipality to maintain, purchase, or lease an electric lighting plant or to contract for lighting its streets and public places depends upon the extent of authority conferred upon the municipality by the legislature, and also upon the manner of the exercise of the powers granted. There is no question about the legislature having the right to authorize municipalities to erect, maintain, sell, or lease electric light plants, or to contract for electric lighting of its streets.<sup>142</sup> The grant may be made to an indi-

<sup>136</sup> *New Orleans v. Great Southern Tel., etc., Co.*, 40 La. Ann. 41, 3 South. 533, 8 Am. St. Rep. 502; *Indianapolis v. Consumers' Gas Trust Co.*, 140 Ind. 107, 39 N. E. 433, 49 Am. St. Rep. 183, 27 L. R. A. 514; *Williams v. Citizens' R. Co.*, 130 Ind. 71, 29 N. E. 408, 30 Am. St. Rep. 201, 15 L. R. A. 64; *Gregsten v. Chicago*, 145 Ill. 451, 36 Am. St. Rep. 496, 34 N. E. 426. See § 44.

<sup>137</sup> *West. U. Tel. Co. v. Toledo (C. C.)* 103 Fed. 746. See, also, *In re Seaboard Tel., etc., Co.*, 68 App. Div. 283, 74 N. Y. Supp. 15. See § 44.

<sup>138</sup> *Abbott v. Duluth (C. C.)* 104 Fed. 833; *Old Colony Trust Co. v. Wichita (C. C.)* 123 Fed. 762. See § 44.

<sup>139</sup> *Mutual U. Tel. Co. v. Chicago (C. C.)* 16 Fed. 309. See § 44. See, also, *L. & N. R. Co. v. Russellville Home Tel. Co.*, 163 Ky. 415, 173 S. W. 1105, L. R. A. 1915E, 138.

<sup>140</sup> *Mut. U. Tel. Co. v. Chicago (C. C.)* 16 Fed. 309. See § 44.

<sup>141</sup> *New York, etc., Co. v. East Orange Tp.*, 42 N. J. Eq. 490, 8 Atl. 289. See § 44.

<sup>142</sup> *Jacksonville Elec. L. Co. v. Jacksonville*, 36 Fla. 229, 18 South. 677, 51 Am. St. Rep. 24, 30 L. R. A. 540; *Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214; *State v. City of Hiawatha*, 53 Kan. 477, 36 Pac. 1119; *Citizens' Gaslight Co. v. Town of Wakefield*, 161 Mass. 432, 37 N. E. 444, 31 L. R. A. 457; *Opinion of Justices*, 150 Mass. 593, 24 N. E. 1084, 8 L. R. A. 487; *Mitchell v. Negaunee*, 113 Mich. 359, 71 N. W. 646, 38 L. R. A. 157, 67 Am. St. Rep. 468; *Tuttle v. Brush Elec. Ill. Co.*, 50 N. Y. Super. Ct. 464; *Black v. Chester*, 175 Pa. 101, 34 Atl. 354; *Linn v. Chambersburg Borough*, 160 Pa. 511, 28 Atl. 842, 25 L. R. A. 217; *Smith v. City of*

vidual,<sup>143</sup> or to a private corporation, or the authority may be conferred upon the municipality to own, itself, electric lighting plants, and this too, not only for the use of the municipality, but for private use.<sup>144</sup> Under either case, the municipality would have, under the police power, the power of regulating the manner in which the use of the streets should be put,<sup>145</sup> and in this the same as it would have over telegraph and telephone companies in the use of the streets. And where a municipality owns the fee of the streets it may authorize the erection and maintenance of poles and wires in the streets for the purpose of furnishing light for the municipality and its inhabitants, provided the ordinary use of the street for purposes of travel is not thereby materially obstructed.<sup>146</sup> With regard to the liability, it is generally held that a municipality engaged in the enterprise of manufacturing and selling electric light to its inhabitants is not engaged in a public governmental duty, and is consequently held to the same responsibility for injuries received on account of the negligent conduct of its officers as a private individual or company running an opposition plant in the same municipality would be.<sup>147</sup> The rule would not be changed if the au-

Nashville. 88 Tenn. 464, 12 S. W. 924, 7 L. R. A. 469; *Ellinwood v. Reedsburg*, 91 Wis. 131, 64 N. W. 885; *Posey v. North Birmingham*, 154 Ala. 511, 45 South. 663, 15 L. R. A. (N. S.) 711, and note. But city cannot condemn property for spur track to power plant. *Wise v. Yazoo City*, 96 Miss. 507, 51 South. 453, 26 L. R. A. (N. S.) 1130, Ann. Cas. 1912B, 377.

<sup>143</sup> *Crawford Elec. Co. v. Knox County Power Co.*, 110 Me. 285, 86 Atl. 119, Ann. Cas. 1914C, 933.

<sup>144</sup> *Mitchell v. Negaunee*, 113 Mich. 359, 71 N. W. 646, 38 L. R. A. 157, 67 Am. St. Rep. 468; *Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214; *Linn v. Chambersburg Borough*, 160 Pa. 511, 28 Atl. 842, 25 L. R. A. 217; *Thompson-Houston Elec. L. Co. v. City of Newton (C. C.)* 42 Fed. 723.

<sup>145</sup> See chapter V.

<sup>146</sup> *McWethy v. Aurora Elec. L. & P. Co.*, 202 Ill. 218, 67 N. E. 9.

<sup>147</sup> *Davoust v. Alameda*, 149 Cal. 69, 84 Pac. 760, 9 Ann. Cas. 847, 5 L. R. A. (N. S.) 536; *Eaton v. Weiser*, 12 Idaho. 544, 86 Pac. 541, 118 Am. St. Rep. 225; *Aiken v. Columbus*, 167 Ind. 139, 78 N. E. 657, 12 L. R. A. (N. S.) 416; *Thomas v. Somerset*, 30 Ky. Law Rep. 131, 97 S. W. 420, 7 L. R. A. (N. S.) 963; *Hodgins v. Bay City*, 156 Mich. 687, 121 N. W. 274, 132 Am. St. Rep. 546; *Fisher v. New Bern*, 140 N. C. 506, 53 S. E. 342, 111 Am. St. Rep. 857, 5 L. R. A. (N. S.) 542; *Abrams v. Seattle*, 60 Wash. 356, 111 Pac. 168, 140 Am. St. Rep. 916. See *State v. Waseca*, 122 Minn. 348, 142 N. W. 319, 46 L. R. A. (N. S.) 347. But see *Irvine v. Greenwood*, 89 S. C. 511, 72 S. E. 228, 36 L. R. A. (N. S.) 363; *Palestine v. Siler*, 225 Ill. 630, 80 N. E. 345, 8 L. R. A. (N. S.) 205, authority to perform the service for private benefit must be shown; *Greenville v. Pitts*, 102 Tex. 1, 107 S. W. 50, 14 L. R. A. (N. S.) 979, 132 Am. St. Rep. 843. See, also, §§ 200, 267.



thority to maintain such a plant is conferred on a board of trustees instead of directly on a city;<sup>148</sup> nor does the establishment, by the legislature, of a commission to have charge of the electric light, water, and sewer system of a city, create a separate corporation, for whose negligent act the city is not responsible.<sup>149</sup>

§ 85a. **Use of force to set or remove poles on land.**—It seems that the question whether persons in the erection of telegraph, telephone, or electric poles have the right to overcome resistance by force depends on the place where they are to be erected. For instance, if the poles are being erected on land owned by and in possession of the company erecting same, its employés would be warranted in using reasonable force to overcome the resistance of a stranger who might enter thereon for the purpose of preventing the erection of the poles.<sup>150</sup> But the rule would be otherwise if the poles were being erected on the private property of another under a previous license from him.<sup>151</sup> The same rule would apply to the erection of poles in the highway under a license from the state or municipality.<sup>152</sup> And where poles are erected upon the property of another, without authority, and which tend to interfere with the proper use of such property, the owner thereof would not be liable for cutting down such poles after having given reasonable notice to the company to remove them.<sup>153</sup> However, the owner of the

<sup>148</sup> *Davoust v. Alameda*, 149 Cal. 69, 84 Pac. 760, 9 Ann. Cas. 847, 5 L. R. A. (N. S.) 536.

<sup>149</sup> *Fisher v. New Bern*, 140 N. C. 506, 53 S. E. 342, 111 Am. St. Rep. 857, 5 L. R. A. (N. S.) 542; *Young v. Gravenhurst*, 24 Ont. L. Rep. 467, Ann. Cas. 1912B, 812.

<sup>150</sup> See notes to *Slingerland v. Gillespie*, 1 Ann. Cas. 886, and *Hannaballson v. Sessions*, 93 Am. St. Rep. 250.

<sup>151</sup> The general rule is that one having the right to enter on another's land has no right to overcome the latter's resistance by violence constituting a breach of the peace. See the note to *Miller-Brent Lumber Co. v. Stewart*, 21 Ann. Cas. 1149.

<sup>152</sup> In *Souther v. Northwestern Tel. Ex. Co.*, 118 Minn. 102, 136 N. W. 571, 45 L. R. A. (N. S.) 601, Ann. Cas. 1913E, 472, it was held that, where a telephone company had a license from a city to place a telephone pole upon a boulevard upon which a homestead abutted, and its servants, when ordered by the wife of the owner of the homestead to desist from digging a hole in which to place a telephone pole, at first departed, but later returned, and though the said wife of such owner was in possession, and was still urging that they had no right to do so, proceeded to dig the hole and set up the pole, notwithstanding her objection and resistance, the said company was liable for any injury inflicted upon her by the wanton negligence of its servants during such attempt.

<sup>153</sup> *Maryland Tel., etc., Co. v. Ruth*, 106 Md. 644, 68 Atl. 358, 14 L. R. A. (N. S.) 427, 124 Am. St. Rep. 506, 14 Ann. Cas. 576.



property may, by estoppel, be denied the privilege of exercising this right.<sup>154</sup>

<sup>154</sup> West. U. Tel. Co. v. Bullard, 67 Vt. 272, 31 Atl. 286; Heck v. Greenwood Tel. Co., 35 Ind. App. 244, 73 N. E. 960; Halleran v. Bell Tel. Co., 64 App. Div. 41, 71 N. Y. Supp. 685, affirmed 177 N. Y. 533, 69 N. E. 1124. In St. Louis, etc., R. Co. v. Batesville, etc., Tel. Co., 80 Ark. 499, 97 S. W. 660, an action was brought by a telephone company against a railroad company to compel the removal by the latter of a number of miles of telegraph lines from the railroad right of way, the complaint charging that the railroad company, while laying and constructing its railway and telegraph line, unlawfully, willfully, and intentionally cut, tore down, and destroyed a large number of telephone poles and wires where the same touched the right of way of the railway company. It appeared that the telephone company had obtained a right of way over private land by verbal consent of the owner and along a highway under authority granted by the statute, and that its line had been lawfully constructed. Subsequently the railroad was constructed along the way occupied by the telephone line, its right of way having been acquired by purchase and conveyance from the landowners. The telephone line was constructed and maintained so as not to render dangerous the operation of the railroad, and not to interfere therewith, and was not a nuisance along the highway or right of way. It was held that the railroad company had no right, after repeated demands upon the telephone company to remove its line from its right of way, to remove the line itself, and thereby destroy its utility. Compare West. U. Tel. Co. v. Pennsylvania R. Co., 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517.

## CHAPTER V

## CONSTRUCTION AND MAINTENANCE OF TELEGRAPH AND TELEPHONE LINES

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§ 86. In streets—in general.—A municipality is a part of the government and exercises such powers only as are expressly granted in its charter, or such as are necessarily implied to carry out those expressly given.<sup>1</sup> Legislative powers may be and are usually delegated to municipalities, and, among such powers, one is the right to grant to telegraph, telephone, and electric companies the right to the use of the streets for their respective purposes.<sup>2</sup> As one of its delegated authorities, a municipality may pass ordinances for the betterment of its internal society and business, provided they be consistent with its charter and laws of the state. For instance, the manner in which the streets are kept and maintained is left almost entirely to the municipal control,<sup>3</sup> and yet the streets do not belong to the municipality nor to the citizens therein, but to the public.<sup>4</sup> They are public thoroughfares over and along which all citizens have the same right to travel; and where the powers have not been delegated to the municipality, the state should and does have them under the same control and general supervision as it has other public highways.<sup>5</sup> The state has such control over the streets and public highways as to prevent them from being obstructed or used in any manner which would incommode public travel.<sup>6</sup> The state

<sup>1</sup> Whiting v. West Point, 88 Va. 905, 14 S. E. 698, 29 Am. St. Rep. 750, 15 L. R. A. 860, note; Wilson v. Beyers, 5 Wash. 303, 32 Pac. 90, 34 Am. St. Rep. 858; South Covington, etc., R. Co. v. Berry, 93 Ky. 43, 18 S. W. 1026, 40 Am. St. Rep. 161, 15 L. R. A. 604n; Phillips v. Denver, 19 Colo. 179, 34 Pac. 902, 41 Am. St. Rep. 230; Champer v. Greencastle, 138 Ind. 339, 35 N. E. 14, 46 Am. St. Rep. 390, 25 L. R. A. 768, note.

<sup>2</sup> Southern Bell Tel., etc., Co. v. Mobile (C. C.) 162 Fed. 523; Morristown v. East Tennessee Tel. Co., 115 Fed. 304, 53 C. C. A. 132; Plattsmouth v. Nebraska Tel. Co., 80 Neb. 460, 114 N. W. 588, 14 L. R. A. (N. S.) 654, 127 Am. St. Rep. 779. See § 79. See also, East Grand Forks v. Luck, 97 Minn. 373, 107 N. W. 393, 7 Ann. Cas. 1015, 6 L. R. A. (N. S.) 198; People v. Squire, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893; Salem v. Anson, 40 Or. 339, 67 Pac. 190, 91 Am. St. Rep. 485, 56 L. R. A. 169.

<sup>3</sup> See § 88. See, also, note to McCormick v. District of Columbia, 54 Am. Rep. 291.

*One company cannot grant license to another company.*—East Tennessee Tel. Co. v. Paris Elec. Co., 156 Ky. 762, 162 S. W. 530, Ann. Cas. 1915C, 543.

<sup>4</sup> See § 87.

<sup>5</sup> See §§ 76, 96.

<sup>6</sup> See § 79.

may grant the license to any public enterprise which has an interest to perform toward the government to use the streets for the purpose of carrying on its business; but there must not be such a use of the license as would interfere with public travel. The communication of news by means of the telegraph and telephone, traveling by means of the streets cars, and the lighting of streets by electricity or otherwise, are public uses for which the streets may be used, and for the purpose of carrying out such business and public enterprises certain parts of the streets may be used for wires, poles, and other appliances.<sup>7</sup> The manner in which this right is exercised is usually under the police power of the municipality.<sup>8</sup>

§ 87. **Same—interest acquired in streets.**—Statutes authorizing a corporation to construct lines of wires for telegraph, telephone, or electric lighting purposes along and upon the public streets, by the erection of the necessary fixtures, including posts, piers, and abutments for maintaining wires, do not grant any interest in such streets.<sup>9</sup> At most, they only confer a license to enter thereon for the purposes named, and merely determine that one of the purposes for which the streets may be used is the erection of poles and stringing of wires for such business, and that such use is a public one, not inconsistent with the use of the street for general street purposes.<sup>10</sup> By the enactment of such statutes, the state does not divest itself of its control of the streets for the public welfare. Such grants do not abdicate its power over the public streets, nor in any way curtail its police power to be exercised for the general welfare of the public.<sup>11</sup> So, if the poles and wires become a serious obstruction and nuisance in the streets, the legislature may take such action and make such provisions by law as are needful to remove the nuisance and restore the utility of the streets for public purposes.<sup>12</sup>

<sup>7</sup> See chapter 11. See, also, following sections in this chapter. See, also, *State v. Weber*, 88 Kan. 175, 127 Pac. 536, 43 L. R. A. (N. S.) 1033; *Platts-mouth v. Nebraska Tel. Co.*, 80 Neb. 460, 114 N. W. 588, 14 L. R. A. (N. S.) 654, 127 Am. St. Rep. 779.

<sup>8</sup> See § 88. See *Portland v. West. U. Tel. Co.*, 75 Or. 37, 146 Pac. 148, L. R. A. 1915D, 260.

<sup>9</sup> *American, etc., Tel. Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454, note; *Kibbie Tel. Co. v. Landphere*, 151 Mich. 309, 115 N. W. 244, 16 L. R. A. (N. S.) 689.

<sup>10</sup> *Id.* See, also, § 90. See, also, *East Tennessee Tel. Co. v. Paris Elec. Co.*, 156 Ky. 762, 162 S. W. 530, Ann. Cas. 1915C, 543.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* See, also, § 225. See *West. U. Tel. Co. v. New York (C. C.)* 38 Fed. 552, 3 L. R. A. 449; *Atty. Gen. v. Walworth L., etc., Co.*, 157 Mass. 86, 31 N. E. 482, 16 L. R. A. 398.



§ 88. **City control in the erection and construction of.**—While the grant to telegraph, telephone or electric light companies to use the streets for their respective purposes is derived from the state<sup>13</sup>—which also partly controls the manner of their use—the city may control the erection, construction, and maintenance of these companies' lines as shall best secure the public safety, convenience, and freedom in the use of the streets.<sup>14</sup> The design is to invest these companies with the right to use the streets of an incorporated town for the purpose of erecting their poles therein, subject to such municipal control as shall be necessary to secure the public safety, convenience, and freedom in the use of the streets.<sup>15</sup> Thus municipal authorities may say what streets shall be used, at what points in the streets the poles shall be erected, and how they shall be planted and secured, but they have no power to lay an embargo.<sup>16</sup> They may adopt regulations fixing the elevation at which the wires shall cross the streets; and they may also prescribe such other precautions as may be reasonably necessary to the safety of travel. They have the right to regulate, but not to interdict, and their regulation to be valid must be reasonable and fair.<sup>17</sup>

§ 89. **Place of location of line in streets.**—A municipality can not exclude a telegraph, telephone, or electric company from its streets where the right has been acquired from the legislature,<sup>18</sup> but it may make reasonable and proper regulations as to the manner in which such right may be exercised.<sup>19</sup> This power of the mu-

<sup>13</sup> See § 86.

<sup>14</sup> See following sections.

<sup>15</sup> *Barber v. Ropbury*, 11 Allen (Mass.) 320; Angell on Highways, § 223. See, also, § 87.

<sup>16</sup> See § 89.

<sup>17</sup> *American U. Tel. Co. v. Town of Harrison*, 31 N. J. Eq. 627.

<sup>18</sup> See § 79.

<sup>19</sup> *Barhite v. Home Tel. Co.*, 50 App. Div. 25, 63 N. Y. Supp. 659; *Philadelphia v. West U. Tel. Co.*, 11 Phila. (Pa.) 327, 2 Wkly. Notes Cas. 455; *State v. Milwaukee*, 132 Wis. 615, 113 N. W. 40; *Marshfield v. Wisconsin Tel. Co.*, 102 Wis. 604, 78 N. W. 735, 44 L. R. A. 565. See § 90 et seq. *Conrad v. Springfield Consol. R. Co.*, 240 Ill. 12, 88 N. E. 180, 130 Am. St. Rep. 257; *City of Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214; *Clements v. Louisiana Electric Light Co.*, 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348; *Moren v. New Orleans Ry. & Light Co.*, 125 La. 944, 52 South. 106, 136 Am. St. Rep. 344; *Suburban Light & Power Co. v. Aldermen of Boston*, 153 Mass. 200, 26 N. E. 447, 10 L. R. A. 497; *State ex rel. Laclede Gaslight Co. v. Murphy*, 130 Mo. 10, 31 S. W. 594, 31 L. R. A. 798; *Mize v. Rocky Mt. Bell Tel. Co.*, 38 Mont. 521, 100 Pac. 971, 129 Am. St. Rep. 659, 16 Ann. Cas. 1189; *Palmer v. Larchmont Elec. Co.*, 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672; *Mitchell v. Raleigh Elec. Co.*, 129 N. C. 166, 39 S. E. 801, 55 L. R. A. 398, 85 Am. St. Rep. 735;

municipality extends as a rule to the determination of the particular spots on which poles and other fixtures shall be erected, and the manner in which wires shall be strung.<sup>20</sup> This power further extends to the designating of the particular streets upon which such poles and wires may be placed;<sup>21</sup> however, it is not necessarily under an obligation to do so.<sup>22</sup> Having this power, a municipality may entirely prohibit the erection of poles on a particular block of a particular street where good reason for such regulation exists, unless the company will thereby be cut off from persons whom it desires to reach and whom by law it is obliged to serve.<sup>23</sup> The mere fact that a route designated by a municipality for a telephone

*Salem v. Anson*, 40 Or. 339, 67 Pac. 190, 56 L. R. A. 169, 91 Am. St. Rep. 485; *State ex rel. Wisconsin Tel. Co. v. Janesville St. R. Co.*, 87 Wis. 72, 57 N. W. 970, 22 L. R. A. 759, 41 Am. St. Rep. 23; *Meck v. Nebraska Tel. Co.*, 96 Neb. 539, 148 N. W. 325.

<sup>20</sup> *Michigan*.—*Michigan Tel. Co. v. Benton Harbor*, 121 Mich. 512, 80 N. W. 386, 47 L. R. A. 104; *Michigan Tel. Co. v. St. Joseph*, 121 Mich. 502, 80 N. W. 383, 80 Am. St. Rep. 520, 47 L. R. A. 87.

*Minnesota*.—*St. Paul v. Freedy*, 86 Minn. 350, 90 N. W. 781.

*Montana*.—*State v. Red Lodge*, 30 Mont. 338, 76 Pac. 758; *Id.*, 33 Mont. 345, 83 Pac. 642.

*Missouri*.—See *State v. St. Louis*, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113; *Gannon v. Laclede Gaslight Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505.

*New Jersey*.—*Marshall v. Bayonne*, 59 N. J. Law, 101, 34 Atl. 1080; *New York, etc., Tel. Co. v. Bound Brook*, 66 N. J. Law, 168, 48 Atl. 1022; *New York, etc., Tel. Co. v. East Orange*, 42 N. J. Eq. 490, 8 Atl. 289.

*New York*.—*Utica v. Utica Tel. Co.*, 24 App. Div. 361, 48 N. Y. Supp. 916; *Carthage v. Central New York Tel., etc., Co.*, 185 N. Y. 448, 78 N. E. 165, 113 Am. St. Rep. 932, reversing 110 App. Div. 625, 96 N. Y. Supp. 919, and affirming 48 Misc. Rep. 423, 96 N. Y. Supp. 917.

*Ohio*.—*Zanesville v. Zanesville Tel., etc., Co.*, 63 Ohio St. 442, 59 N. E. 109; *Auerbach v. Cuyahoga Tel. Co.*, 9 Ohio S. & C. P. Dec. 389, 7 Ohio N. P. 633.

*Pennsylvania*.—*Central Pennsylvania Tel., etc., Co. v. Wilkes-Barre, etc., R. Co.*, 11 Pa. Co. Ct. R. 417; *New Castle v. Central Dist., etc., Tel. Co.*, 207 Pa. 371, 56 Atl. 931; *Philadelphia v. West. U. Tel. Co.*, 11 Phila. (Pa.) 327, 2 Wkly. Notes Cas. 455.

*Wisconsin*.—*State v. Sheboygan*, 111 Wis. 23, 86 N. W. 657; *Tel. Co. v. Ludlow*, 140 Wis. 510, 122 N. W. 1030.

*As to changing of grade of streets*, see *New York, etc., R. Co. v. Electric Co.*, 219 Mass. 85, 106 N. E. 566, L. R. A. 1915B, 822.

<sup>21</sup> *Jonesville v. Southern Michigan Tel. Co.*, 155 Mich. 86, 118 N. W. 736, 130 Am. St. Rep. 562, 16 Ann. Cas. 439; *Wichita v. Missouri, etc., Tel. Co.*, 70 Kan. 441, 78 Pac. 886; *Marshallfield v. Wisconsin Tel. Co.*, 102 Wis. 604, 78 N. W. 735, 44 L. R. A. 565.

<sup>22</sup> *Marshall v. Bayonne*, 59 N. J. Law, 101, 34 Atl. 1080.

<sup>23</sup> *Jonesville v. Southern Michigan Tel. Co.*, 155 Mich. 86, 118 N. W. 736, 130 Am. St. Rep. 562, 16 Ann. Cas. 439.

line is less convenient or involves large expense on the part of the company is of no consequence, so long as the company is not thereby prevented from reaching all those whom it desires to serve and who desire service from it.<sup>24</sup> The municipality may regulate the height of wires where they cross the streets, but if no regulation has been made and the wires are hung at a sufficient height so as not to interfere with travel, and the poles are not constructed in the streets, but upon private property the municipality has no right, as it has been held, to destroy them.<sup>25</sup> A requirement of these companies which should be made before legally and properly acquiring an easement in streets for its lines is that a petition should be made to the municipality asking for the easement or privilege to the use of the streets, setting out in the petition, in clear and definite language, the street or streets upon which the construction is desired to be made; the size of the poles; and such other rights as may be desired.<sup>26</sup> The municipality may require the company to submit a map showing the proposed location of each pole, and other fixtures necessarily to be made by the company.<sup>27</sup>

§ 90. **Same—cannot exclude under guise of regulation.**—A municipality cannot, under the guise of a regulation, practically exclude a telegraph, telephone, or electric company from its streets where the right to use the streets has been acquired from the legislature;<sup>28</sup> but its sole authority, in this respect, is the proper exercise of the police power to protect the public from unnecessary obstruction, inconveniences and dangers, and to determine where and in what manner the company may erect its poles and string its wires, so as to accomplish this result.<sup>29</sup> Therefore, in consequence of the fact that a municipality cannot thus abuse its powers to regulate the construction of the lines of these companies on the streets, it cannot demand of them conditions which may be unauthorized and im-

<sup>24</sup> *Id.*

<sup>25</sup> *American U. Tel. Co. v. Harrison*, 31 N. J. Eq. 627. See *Winegarner v. Edison L., etc., Co.*, 83 Kan. 67, 109 Pac. 778, 28 L. R. A. (N. S.) 677.

<sup>26</sup> *Broome v. New York, etc., Co.*, 49 N. J. Law, 624, 9 Atl. 754. 8 Cent. Rep. 589; *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 13 L. R. A. 454, 21 Am. St. Rep. 764.

<sup>27</sup> *Auerbach v. Cuyahoga Tel. Co.*, 9 Ohio S. & C. Pl. Dec. 389, 7 Ohio N. P. 633.

<sup>28</sup> *State v. Sheboygan*, 111 Wis. 23, 86 N. W. 657; *State v. Milwaukee*, 132 Wis. 615, 113 N. W. 40; *Summit Tp. v. New York, etc., Tel. Co.*, 57 N. J. Eq. 123, 41 Atl. 146.

<sup>29</sup> *Michigan Tel. Co. v. Benton Harbor*, 121 Mich. 512, 80 N. W. 386, 47 L. R. A. 104.



proper,<sup>30</sup> or refuse or fail to designate the location of poles or make other necessary regulations,<sup>31</sup> and thereby practically exclude them from operating within its jurisdiction. While the municipality may under its police power regulate the time and method under which repairs shall be made, it cannot, however, absolutely deny the right to make such repairs and thus in effect condemn the property of the company and confiscate its franchise.<sup>32</sup> The company cannot under such circumstances proceed with the work of construction;<sup>33</sup> but, after having made a proper request or application to the municipality and a reasonable time allowed for the latter to act,<sup>34</sup> the company may by mandamus or other legal proceedings compel the municipality to act.<sup>35</sup> Where, however, such actions involve the exercise of a discretion on the part of the municipality, the court will not in advance prescribe the particular action to be taken,<sup>36</sup> but they may require the municipality to adopt such regulations, and may then pass upon their validity.<sup>37</sup> The legislature cannot delegate the authority to a court to designate the route or mode of constructing a telegraph or telephone line.<sup>38</sup>

<sup>30</sup> *Summit Tp. v. New York, etc., Tel. Co.*, 57 N. J. Eq. 123, 41 Atl. 146; *Michigan Tel. Co. v. Benton Harbor*, 121 Mich. 512, 80 N. W. 386, 47 L. R. A. 104; *State v. Central U. Tel. Co.*, 14 Ohio Cir. Ct. R. 273, 7 O. C. D. 536; *State v. Sheboygan*, 111 Wis. 23, 86 N. W. 657.

<sup>31</sup> *State v. Red Lodge*, 30 Mont. 338, 76 Pac. 758; *Michigan Tel. Co. v. St. Joseph*, 121 Mich. 502, 80 N. W. 383, 80 Am. St. Rep. 520, 47 L. R. A. 87; *State v. Sheboygan*, 111 Wis. 23, 86 N. W. 657.

<sup>32</sup> *Matter of Seaboard Tel., etc., Co.*, 68 App. Div. 283, 74 N. Y. Supp. 15.

<sup>33</sup> *Marshfield v. Wisconsin Tel. Co.*, 102 Wis. 604, 78 N. W. 735, 44 L. R. A. 565; *St. Paul v. Freedy*, 86 Minn. 350, 90 N. W. 781.

<sup>34</sup> *Marshfield v. Wisconsin Tel. Co.*, 102 Wis. 604, 78 N. W. 735, 44 L. R. A. 565. The request or application must be a proper one for action which it is the duty of the municipal authorities to take. *State v. Red Lodge*, 33 Mont. 345, 83 Pac. 642; *State v. Milwaukee*, 132 Wis. 615, 113 N. W. 40.

<sup>35</sup> *St. Paul v. Freedy*, 86 Minn. 350, 90 N. W. 781; *Michigan Tel. Co. v. St. Joseph*, 121 Mich. 502, 80 N. W. 383, 80 Am. St. Rep. 520, 47 L. R. A. 87; *New York, etc., Tel. Co. v. Bound Brook*, 66 N. J. Law, 168, 48 Atl. 1022; *State v. Red Lodge*, 30 Mont. 338, 76 Pac. 758; *Matter of Seaboard Tel., etc., Co.*, 68 App. Div. 283, 74 N. Y. Supp. 15; *Com. v. Warwick*, 185 Pa. 623, 40 Atl. 93; *State v. Sheboygan*, 111 Wis. 23, 86 N. W. 657.

<sup>36</sup> *State v. Milwaukee*, 132 Wis. 615, 113 N. W. 40. See, also, *State v. Red Lodge*, 30 Mont. 338, 76 Pac. 758, holding that the effect of a mandamus proceedings is merely to compel action, and not to interfere with the discretionary powers of the municipality as to any particular lawful and reasonable regulations.

<sup>37</sup> *Michigan Tel. Co. v. St. Joseph*, 121 Mich. 502, 80 N. W. 383, 80 Am. St. Rep. 520, 47 L. R. A. 87.

<sup>38</sup> *Zanesville v. Zanesville Tel., etc., Co.*, 63 Ohio St. 442, 59 N. E. 109; *New York, etc., Tel. Co. v. Bound Brook*, 66 N. J. Law, 168, 48 Atl. 1022.



§ 91. **Same—electrical companies.**—Under some statutes, an electrical company cannot place its poles in the streets of a municipality without first obtaining from the latter a particular designation thereof;<sup>39</sup> and the company must usually exercise the right to place its poles and string its wires subject to the police power of the municipality.<sup>40</sup> The company cannot place a pole in front of property abutting on a street unless it is necessary for the better transaction of its business.<sup>41</sup> Poles may usually be erected upon obtaining the consent of the adjoining owner;<sup>42</sup> however, the consent is not always necessary.<sup>43</sup> Thus it has been held that, where a city enters into a contract with an electric light company requiring it to erect poles at designated points, the company is relieved from the necessity of obtaining the consent of the adjoining property owners.<sup>44</sup> Under the police power, a municipality has the right of designating where and how poles and wires of street railway companies shall be erected and strung.<sup>45</sup>

§ 92. **Removal or change of location of line.**—Where a telegraph, telephone, or electric company has constructed its line upon

<sup>39</sup> *Meyers v. Hudson County Electric Co.*, 60 N. J. Law, 350, 37 Atl. 618. But see *Suburban Light, etc., Co. v. Boston*, 153 Mass. 200, 26 N. E. 447, 10 L. R. A. 497, holding that a statute which made it obligatory upon a city board to designate the location of telegraph poles, and which was subsequently extended to apply to electric light companies "so far as applicable," does not necessitate any action on the part of the board as to the location of poles for the latter kind of company. See *Taylor v. Service Corp.*, 75 N. J. Eq. 371, 73 Atl. 118; *Ice, etc., Co. v. Moses* (Tex. Civ. App.) 134 S. W. 379.

<sup>40</sup> *Monongahela v. Monongahela Electric Light Co.*, 12 Pa. Co. Ct. R. 529; *Lancaster v. Edison Electric Illuminating Co.*, 8 Pa. Co. Ct. R. 178, holding that they may be required to number them and designate them with initials. See *Power Co. v. Toronto*, 24 Ont. L. R. 537, 20 Ont. W. R. 57, 3 Ont. W. N. 77; *Butler v. Cincinnati*, 25 Ohio Cir. Ct. R. 772, holding that a removal of wires by city cannot be enjoined where they were originally laid without consent.

<sup>41</sup> *Tiffany v. U. S. Illuminating Co.*, 51 N. Y. Super. Ct. 280, affirming 67 How. Prac. (N. Y.) 73. See *Gurnsey v. Power Co.*, 160 Cal. 699, 117 Pac. 906, 36 L. R. A. (N. S.) 185; *Taylor v. Service Co.*, 75 N. J. Eq. 371, 73 Atl. 118.

<sup>42</sup> *Point Pleasant Electric Light Co. v. Bayhead*, 62 N. J. Eq. 296, 49 Atl. 1108. See *Yoe v. Power Co.*, 89 S. C. 396, 71 S. E. 979. See *Souther v. Northwestern Tel. Exch. Co.*, 118 Minn. 102, 136 N. W. 571, 45 L. R. A. (N. S.) 601, Ann. Cas. 1913E, 472, must not use force.

<sup>43</sup> *Montclair Light, etc., Co. v. Montclair*, 67 N. J. Law 151, 50 Atl. 350; *Gas, etc., Co. v. Davenport*, 124 Iowa, 22, 98 N. W. 892; *Brown v. Light Co.*, 208 Pa. 453, 57 Atl. 904; *Light Co. v. Brown*, 208 Pa. 461, 57 Atl. 1135; *State v. Weber*, 88 Kan. 175, 127 Pac. 536, 43 L. R. A. (N. S.) 1033.

<sup>44</sup> *Montclair Light, etc., Co. v. Montclair*, 67 N. J. Law, 151, 50 Atl. 350.

<sup>45</sup> *Kennelly v. Jersey City*, 57 N. J. Law, 293, 30 Atl. 531, 26 L. R. A. 281.

the streets of a municipality pursuant to legislative authority, or municipal consent, the latter cannot require the entire removal of the line therefrom,<sup>46</sup> nor prevent the company from making proper extensions of its line.<sup>47</sup> And, where one of these companies has already constructed its lines upon the streets, the municipality cannot, in the exercise of its apparent power to regulate the construction and maintenance thereof, arbitrarily require the change of their location.<sup>48</sup> It is certainly not meant by this, however, that a municipality may not, under certain circumstances and in the exercise of its police powers, require a change to a new location, and of this right it cannot surrender or deny itself, either by consent or agreement.<sup>49</sup> Consequently, where the lines of these companies have become an obstruction to traffic or a menace to the public safety, or where there are other similar reasons of a public nature requiring the lines to be changed, the same may be required,<sup>50</sup> although it may involve the removal of the lines from one street to another.<sup>51</sup> In order, however, to have the power to enforce a company to change the location of its lines, there must exist a reasonable necessity for such, otherwise it could not be compelled to incur the expense in making the change.<sup>52</sup> Furthermore, where a change is warranted under the circumstances, the municipality cannot act arbitrarily or unreasonably in the method provided for effecting the change.<sup>53</sup> The fact that the company has accepted the Post Roads Act of 1866, or is engaged in interstate commerce, does not preclude

<sup>46</sup> *Wichita v. Old Colony Trust Co.*, 132 Fed. 641, 66 C. C. A. 19; *Duluth v. Duluth Tel. Co.*, 84 Minn. 486, 87 N. W. 1127; *Abbott v. Duluth (C. C.)* 104 Fed. 833, affirmed in 117 Fed. 137, 55 C. C. A. 153; *London Mills v. White*, 208 Ill. 289, 70 N. E. 313; *Southern Bell Tel., etc., Co. v. Mobile (C. C.)* 162 Fed. 523.

<sup>47</sup> *Duluth v. Duluth Tel. Co.*, 84 Minn. 486, 87 N. W. 1127.

<sup>48</sup> *Southern Bell Tel., etc., Co. v. Mobile (C. C.)* 162 Fed. 523; *Hannibal v. Missouri, etc., Tel. Co.*, 31 Mo. App. 23; *Tel. Co. v. Board of Councilmen*, 141 Ky. 588, 133 S. W. 564.

<sup>49</sup> *Michigan Tel. Co. v. Charlotte (C. C.)* 93 Fed. 11.

<sup>50</sup> *American Tel., etc., Co. v. Harborcreek Tp.*, 23 Pa. Super. Ct. 437; *American Tel., etc., Co. v. Milcreek Tp.*, 195 Pa. 643, 46 Atl. 140; *Ganz v. Ohio Postal Tel. Cable Co.*, 140 Fed. 692, 72 C. C. A. 186; *Michigan Tel. Co. v. Charlotte (C. C.)* 93 Fed. 11; *Tel. Co. v. Gainesville (Tex. Civ. App.)* 141 S. W. 1044.

<sup>51</sup> *Michigan Tel. Co. v. Charlotte (C. C.)* 93 Fed. 11.

<sup>52</sup> *Hannibal v. Missouri, etc., Tel. Co.*, 31 Mo. App. 23; *Northwestern Tel. Exch. Co. v. Minneapolis*, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175.

<sup>53</sup> *Hannibal v. Missouri, etc., Tel. Co.*, 31 Mo. App. 23; *Tel. Co. v. Board of Councilmen*, 141 Ky. 588, 133 S. W. 564.

a municipality from compelling a change of location of the line when the necessity for such change exists.<sup>54</sup>

§ 93. **Underground conduits.**—A great evil has grown up in the last few years and afflicted large cities by the multiplication of rival and competing companies organized for the purpose of distributing light, heat, water, the transportation of freight and passengers, and facilitating communication between distant points, and which require in their enterprises the occupation, not only of the surface and air above the streets, but indefinite space underground. This evil has become so great that many of the large cities are covered with a network of cables and wires attached to poles, houses, buildings, and elevated structures, bringing danger, inconvenience, and annoyance to the public. As a result of these evils,<sup>55</sup> statutes have been enacted in many of the states requiring corporations owning telegraph, telephone, electric, or other wires or cables to remove them from the surface of the streets and place them under the ground.<sup>56</sup> The state, or a municipality pursuant to legislative authority, may authorize the construction of underground conduits for such purposes,<sup>57</sup> and where the authority has been previously granted, it may be afterwards ratified by the legislature.<sup>58</sup> The

<sup>54</sup> *Michigan Tel. Co. v. Charlotte* (C. C.) 93 Fed. 11. See *New Orleans Gas-light Co. v. Hart*, 40 La. Ann. 474, 4 South. 215, 8 Am. St. Rep. 544; *Postal Tel. Cable Co. v. Chicopee*, 207 Mass. 341, 93 N. E. 927, 32 L. R. A. (N. S.) 997; *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454.

<sup>55</sup> See *People v. Squire*, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893, affirmed in 145 U. S. 175, 12 Sup. Ct. 880, 36 L. Ed. 666.

<sup>56</sup> *State v. St. Louis*, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113, statute permissive, subject to municipal consent; *Chesapeake, etc., Tel. Co. v. Baltimore*, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033, statute permissive; *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454, statute mandatory in cities having a population of five hundred thousand or over; *Bell Tel. Co. v. Owen Sound*, 8 Ont. L. Rep. 74, 4 Ont. Wkly. Rep. 69, statute permissive and subject to municipal supervision as to mode of construction. See the statutes of the several states. *Geneva v. Geneva Tel. Co.*, 30 Misc. Rep. 236, 62 N. Y. Supp. 172, holding that such a requirement is not unconstitutional as imposing taxation on such corporations without their consent or opportunity of being heard; *Missouri v. Murphy*, 170 U. S. 78, 18 Sup. Ct. 505, 42 L. Ed. 955; *Id.*, 130 Mo. 10, 31 S. W. 594, 31 L. R. A. 798; *Ex. p. Light Co.*, 34 N. Brunsw. 460. See *Tel. Cable Co. v. Worcester*, 202 Mass. 320, 88 N. E. 777; *Illum. Co. v. Grant*, 55 Hun, 222, 7 N. Y. Supp. 788.

<sup>57</sup> *State v. St. Louis*, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113; *State v. Murphy*, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 56 Am. St. Rep. 515, 34 L. R. A. 369.

<sup>58</sup> *Chesapeake, etc., Tel. Co. v. Baltimore*, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033. See *Queen City Tel. Co. v. Cincinnati*, 73 Ohio St. 64, 76 N. E. 392,



authority to construct underground conduits constitutes a valuable right,<sup>59</sup> and when granted by the legislature cannot be denied by a municipality;<sup>60</sup> and when the authority has been granted by the municipality and accepted by the company, it cannot subsequently be arbitrarily revoked,<sup>61</sup> or materially impaired or subjected to new and burdensome conditions,<sup>62</sup> although the mode of construction may be regulated by the municipality.<sup>63</sup>

**§ 94. Same—existing lines removable to conduits without impairment of contract.**—Not only may new lines of wires be required, under these statutes to be placed in underground conduits,<sup>64</sup> but existing lines to which have been granted under previous statutes permission to maintain lines upon the streets of cities may also be required to remove their lines to underground conduits.<sup>65</sup> The

holding that the probate court cannot grant to a telephone company the right to place its wires in underground conduits without municipal consent.

<sup>59</sup> *State v. St. Louis*, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113; *Chesapeake, etc., Tel. Co. v. Baltimore*, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033.

<sup>60</sup> Where a telegraph or telephone company has been authorized by statute to place its wires underground, subject only to municipal supervision as to the mode of doing the work, the latter cannot under this power arbitrarily refuse to permit the company to do so. *Bell Tel. Co. v. Owen Sound*, 8 Ont. L. Rep. 74, 4 Ont. Wkly. Rep. 69.

<sup>61</sup> *State v. St. Louis*, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113; *Chesapeake, etc., Tel. Co. v. Baltimore*, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033; *Chesapeake, etc., Tel. v. Baltimore*, 90 Md. 638, 45 Atl. 446, holding that a municipality will be enjoined from preventing the construction of an underground conduit for which it has given its consent, provided it is constructed in a proper manner under the regulation and control of the municipality as to the mode of construction. See *Allegheny County L. Co. v. Booth*, 216 Pa. 564, 66 Atl. 72, 9 L. R. A. (N. S.) 404.

<sup>62</sup> *Chesapeake, etc., Tel. Co. v. Baltimore*, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033; *State v. St. Louis*, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113, holding that, where a telegraph or telephone company has constructed an underground conduit for its wires pursuant to municipal authority, the latter will be compelled by mandamus to permit connections to be made between the conduit and adjoining buildings, provided they do not materially impair the use of the highway. On this see note 73 et seq. See *West. U. Tel. Co. v. Syracuse*, 24 Misc. Rep. 338, 53 N. Y. Supp. 690, holding that, where an underground conduit has been constructed pursuant to municipal consent, a municipality cannot authorize a different company to construct another conduit immediately over it so as to interfere with and prevent access thereto.

<sup>63</sup> See *State v. St. Louis*, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113; *Chesapeake, etc., Tel. Co. v. Baltimore*, 90 Md. 638, 45 Atl. 446.

<sup>64</sup> *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454.

<sup>65</sup> *People v. Squire*, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893, affirmed in 145 U. S. 175, 12 Sup. Ct. 880, 36 L. Ed. 666; *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454; *Gen-*



scheme of these statutes is not to annul or destroy the contract rights of such companies, but to regulate and control their exercise.<sup>66</sup> They do not purport to deny them any privileges theretofore granted, but they do require that they should be exercised with due regard to the claims of others, and in such a way that they should cease to constitute a public nuisance, and should be enjoyed in such a manner as to inconvenience and endanger the general public as little as possible.<sup>67</sup> Neither is it taking property of the company for public use;<sup>68</sup> it is simply removing from the streets a nuisance which the public authorities have the same right to remove, doing no unnecessary damage, that they have to remove any other incumbrance therefrom, and the mere fact that the company will be subjected to expense in making the removal is no answer to the right of the public, in pursuance of law, to require it to comply with the prescribed regulations.<sup>69</sup> Not only may this power emanate directly from the state, but the latter may delegate to a municipal corporation the power to make such requirements,<sup>70</sup> and of regulating the manner in which the work of excavation and construction shall be done.<sup>71</sup> Where an underground system has been adopted by a company in accordance to a grant to that effect, it may, as an incident necessary to such grant, construct conduits, terminal poles, or any such appliances as are or may be reasonably necessary as a means of benefiting itself under such system or making the same effective.<sup>72</sup> But, if the right to regulate the manner of occupation has been retained by the municipality, it may, as an incident to this right, compel the company to adopt, from time to time, any reasonable and general accepted improvements which

*eva v. Geneva Tel. Co.*, 30 Misc. Rep. 236, 62 N. Y. Supp. 172; *West. U. Tel. Co. v. New York (C. C.)* 38 Fed. 552, 3 L. R. A. 449; *State v. Janesville, etc., R. Co.*, 87 Wis. 72, 57 N. W. 970, 41 Am. St. Rep. 23, 22 L. R. A. 759.

<sup>66</sup> *People v. Squire*, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893, affirmed in 145 U. S. 175, 12 Sup. Ct. 880, 36 L. Ed. 666.

<sup>67</sup> *Id.*

<sup>68</sup> *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454.

<sup>69</sup> *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454; *People v. Squire*, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893, affirmed in 145 U. S. 175, 12 Sup. Ct. 880, 36 L. Ed. 666.

<sup>70</sup> *People v. Squire*, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893, affirmed in 145 U. S. 175, 12 Sup. Ct. 880, 36 L. Ed. 666; *Geneva v. Geneva Tel. Co.*, 30 Misc. Rep. 236, 62 N. Y. Supp. 172; *Tel. Co. v. Richmond (C. C.)* 178 Fed. 310.

<sup>71</sup> *People v. Squire*, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893, affirmed in 145 U. S. 175, 12 Sup. Ct. 880, 36 L. Ed. 666.

<sup>72</sup> *Allegheny County L. Co. v. Booth*, 216 Pa. 564, 66 Atl. 72, 9 L. R. A. (N. S.) 404.

tend to decrease the obstructions of the streets or increase the safety and convenience of the public in their use.<sup>73</sup> Where the municipality has given due notice to the company to remove its wires to conduits, but the latter refuses to make such removal, the former may then cut down and remove the company's poles and wires, and not thereby be subjected to an injunction.<sup>74</sup> Acts of Congress granting to telegraph companies the right to construct and maintain lines of telegraph through and along any of the military or post roads of the United States do not deprive the state of its control over its highways and its right to regulate their use, by the police powers, for the public welfare, and hence do not confer the right to maintain telegraph and wires above the surface of the public streets after the enactment of a statute by the state requiring them to be placed underground.<sup>75</sup>

§ 95. **Same—Independent companies may construct conduits.**—Independent companies may be authorized, by the state, or by municipalities pursuant to legislative authority, to construct subways or underground conduits to be used by telegraph, telephone, electric lighting companies, or other companies using electrical conductors,<sup>76</sup> and may require any of these companies to remove their wires into such conduits.<sup>77</sup> This is none the less an exercise of the police power because it gives to such company special privileges, but no exclusive privileges or franchises. Those companies using such underground conduits may be required to pay a reasonable rental therefor.<sup>78</sup> The municipality may itself construct subways or conduits, and require electrical companies to remove their lines to such conduits,<sup>79</sup> and refuse such companies permission to con-

<sup>73</sup> *Com. v. Warwick*, 185 Pa. 623, 40 Atl. 93; *Montreal v. Standard Light, etc., Co.*, A. C. 527, 66 L. J. P. C. 113, 77 L. T. Rep. (N. S.) 115.

<sup>74</sup> *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454.

<sup>75</sup> *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454. But see *West. U. Tel. Co. v. New York (C. C.)* 38 Fed. 552, 3 L. R. A. 449.

<sup>76</sup> *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454; *West. U. Tel. Co. v. New York (C. C.)* 38 Fed. 552, 3 L. R. A. 449; *State v. St. Louis*, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113.

<sup>77</sup> *West. U. Tel. Co. v. New York (C. C.)* 38 Fed. 552, 3 L. R. A. 449; *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454.

<sup>78</sup> See *West. U. Tel. Co. v. New York (C. C.)* 38 Fed. 552, 3 L. R. A. 449.

<sup>79</sup> *Geneva v. Geneva Tel. Co.*, 30 Misc. Rep. 236, 62 N. Y. Supp. 172; *Missouri v. Murphy*, 170 U. S. 78, 18 Sup. Ct. 505, 42 L. Ed. 955; *State v. Murphy*, 130 Mo. 10, 31 S. W. 594, 31 L. R. A. 798.

struct their own conduits,<sup>80</sup> provided the conduits already constructed or provided are adequate and suitable.<sup>81</sup> The legislature may require that independent companies contemplating constructing underground conduits shall submit to the local authorities for approval plans and specifications of the system proposed, and the work of excavation and construction shall be done under the supervision and control of such authorities.<sup>82</sup>

§ 96. **Same—municipality without authority cannot compel removal to conduits.**—While it is competent for the state to delegate its sovereign power to municipalities in regard to the construction, management, and control of telegraph, telephone, and electric companies, such surrender of sovereignty cannot be implied, but must rest on express legislation containing a clear and unqualified grant of power.<sup>83</sup> So it has been held that, under the transportation corporation law granting such companies the right to construct and maintain telegraph, telephone, or electric light lines upon, over, or under any public roads, streets, and highways, and the municipal law conferring upon the board of trustees of municipalities the power to regulate the erection of telegraph, telephone, or electric light poles, and the stringing of wires on those poles, the right of these companies to erect poles and string wires is derived from the state, however, the municipal authorities may regulate their erection, that is to say, the location of the poles and the streets to be occupied, but it has no power to require these companies to place their lines in underground conduits,<sup>84</sup> or to compel them to remove the extension of their existing lines to such conduits.<sup>85</sup> This power must be conferred upon the municipality by the state. However, contrary to this, it has been held that the municipality has the right in the exercise of the police power to order the placing of these companies' lines under ground whenever, in the exercise of a fair

<sup>80</sup> *Geneva v. Geneva Tel. Co.*, 30 Misc. Rep. 236, 62 N. Y. Supp. 172.

<sup>81</sup> *Geneva v. Geneva Tel. Co.*, 30 Misc. Rep. 236, 62 N. Y. Supp. 172; *Rochester v. Bell Tel. Co.*, 52 App. Div. 6, 64 N. Y. Supp. 804.

<sup>82</sup> *People v. Squire*, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893, affirmed in 145 U. S. 175, 12 Sup. Ct. 880, 36 L. Ed. 666; *State v. Murphy*, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 56 Am. St. Rep. 515, 34 L. R. A. 369.

<sup>83</sup> *Carthage v. Central New York, etc., Tel. Co.*, 185 N. Y. 448, 78 N. E. 165, 113 Am. St. Rep. 932, reversing 110 App. Div. 625, 96 N. Y. Supp. 919, reversing 48 Misc. Rep. 423, 96 N. Y. Supp. 917. § 86 et seq.

<sup>84</sup> *State v. Red Lodge*, 30 Mont. 338, 76 Pac. 758.

<sup>85</sup> *Carthage v. Central New York, etc., Tel. Co.*, 185 N. Y. 448, 78 N. E. 165, 113 Am. St. Rep. 932, reversing 110 App. Div. 625, 96 N. Y. Supp. 919, and 48 Misc. Rep. 423, 96 N. Y. Supp. 917.



discretion it decides that public interest requires it to be done,<sup>86</sup> but it cannot act arbitrarily in the premises.<sup>87</sup> The duty of making such removal may, however, be imposed upon these companies by agreement with a municipality in consideration of rights and privileges granted by the latter.<sup>88</sup>

§ 97. **Additional servitude—in general.**—While the legislature has authority, in the exercise of the police power, to determine whether the erection of poles and stringing of wires of a telegraph, telephone, or electric corporation along and upon streets and public highways is a public use, not inconsistent with the uses to which such highways are adopted,<sup>89</sup> yet the difficult and perplexing question which has so often puzzled the courts is whether the legislature may authorize the use of streets and highways for such purposes, without providing for the adjoining landowner to be compensated therefor. In other words, whether the erection of poles, guys, abutments and the stringing of wires of a telegraph, telephone, or electric company upon and along streets and highways, by authority of the state, is a different use than that of a public easement for travel—and that for which it was acquired from the public, in whatever manner as that by the exercise of the power of eminent domain, by prescription, by dedication or by grant—thereby creating an additional servitude to the easement, and for which the original grantor or the party in whom the fee is held or the adjoining lot or landowner is entitled to compensation. This question is by no means settled by the courts, as some hold—and that by good reason—that the construction of a line of these companies upon the highways is not an additional servitude of the easement originally granted and thereby entitling the land owner to additional compensation;<sup>90</sup> while equally as many, if not more, of the

<sup>86</sup> *Northwestern Tel. Exch. Co. v. Minneapolis*, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175.

<sup>87</sup> *Northwestern Tel. Exch. Co. v. Minneapolis*, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175. See, also, *Hudson River Tel. Co. v. Johnstown*, 37 Misc. Rep. 41, 74 N. Y. Supp. 767.

<sup>88</sup> *Baltimore v. Chesapeake, etc., Tel., Co.*, 92 Md. 692, 48 Atl. 465.

<sup>89</sup> § 86 et seq.

<sup>90</sup> *Alabama*.—*Hobbs v. Tel., etc., Co.*, 147 Ala. 393, 41 South. 1003, 7 L. R. A. (N. S.) 87, 11 Ann. Cas. 461.

*Indiana*.—*Magee v. Overshiner*, 150 Ind. 127, 49 N. E. 951, 65 Am. St. Rep. 358, 40 L. R. A. 370.

*Kansas*.—*McCann v. Tel. Co.*, 69 Kan. 210, 76 Pac. 870, 66 L. R. A. 171, 2 Ann. Cas. 156.

*Kentucky*.—*Tel., etc., Co. v. Avritt*, 120 Ky. 34, 85 S. W. 204, 27 Ky. Law Rep. 394, 8 Ann. Cas. 955.



courts, of later setting, have held otherwise.<sup>91</sup> It will now be our pleasure to discuss at some length both sides of this question, giving as briefly as possible the reasons and opinions presented by the authorities on either, and then harmonizing as nearly as it is in our power these differences.

§ 98. **Taking of property for public use—what is.**—In discussing this question, it might be well, first, to say a few words as to what is understood by taking property for public use as comprehended by the constitution when it declares that no property shall be taken for public use without first compensating the owner thereof. It may be stated as a general principle—as was very ably observed by an eminent writer<sup>92</sup>—that when the lawful rights of an individual to the possession, use, and enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, *pro tanto*, taken for public use. In early times it was held that property could be deemed to

*Louisiana.*—Irwin v. Great Southern Tel. Co., 37 La. Ann. 63.

*Massachusetts.*—Pierce v. Drew, 136 Mass. 75, 49 Am. Rep. 7.

*Michigan.*—People v. Eaton, 100 Mich. 208, 59 N. W. 145, 24 L. R. A. 721; Wyant v. Tel. Co., 123 Mich. 51, 81 N. W. 928, 81 Am. St. Rep. 155, 47 L. R. A. 497.

*Minnesota.*—Cater v. Exch. Co., 60 Minn. 539, 63 N. W. 111, 51 Am. St. Rep. 543, 28 L. R. A. 310. See Willis v. Tel., etc., Co., 37 Minn. 347, 34 N. W. 337.

*Missouri.*—Julia Bldg. Ass'n v. Bell Tel. Co., 88 Mo. 258, 57 Am. Rep. 398. See State v. St. Louis, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113; Cartwright v. Tel. Co., 205 Mo. 126, 103 S. W. 982, 12 L. R. A. (N. S.) 1125, 12 Ann. Cas. 249.

*Montana.*—Hershfield v. Rocky Mountain Bell Tel. Co., 12 Mont. 102, 29 Pac. 883.

*Ohio.*—West. U. Tel. Co. v. Champion Electric Light Co., 9 Ohio Dec. (Reprint) 510, 14 Wkly. Law Bul. 327; Auerbach v. Cuyahoga Tel. Co., 9 Ohio S. & C. P. Dec. 389, 7 Ohio N. P. 633.

*Pennsylvania.*—York Tel. Co. v. Keesey, 5 Pa. Dist. 366; Shinzel v. Tel. Co., 31 Pa. Super. Ct. 221.

*South Dakota.*—Kirby v. Citizens' Tel. Co., 17 S. D. 362, 97 N. W. 3, 2 Ann. Cas. 152.

*Tennessee.*—Frazier v. Tel. Co., 115 Tenn. 416, 90 S. W. 620, 3 L. R. A. (N. S.) 323, 112 Am. St. Rep. 846, 5 Ann. Cas. 838.

*Vermont.*—See Rugg v. Tel. Co., 66 Vt. 208, 28 Atl. 1036.

*Washington.*—Brandt v. Spokane, etc., R. Co., 78 Wash. 214, 138 Pac. 871, 52 L. R. A. (N. S.) 760.

*West Virginia.*—Maxwell v. Central Dist., etc., Tel. Co., 51 W. Va. 121, 41 S. E. 125; Lowther v. Bridgeman, 57 W. Va. 306, 50 S. E. 410.

*United States.*—Tel., etc., Co. v. Nalley (C. C.) 165 Fed. 263.

<sup>91</sup> See § 108.

<sup>92</sup> Lewis on Eminent Domain, § 56.

be taken, within the meaning of a constitutional provision that private property should not be taken for public purposes without just compensation, only when the owner was wholly deprived of its possession, use and occupation. But a more just and liberal doctrine has been long since firmly established. An actual physical taking of the property is not necessary to entitle its owner to compensation. A man's property may be taken within the meaning of this constitutional provision, although his title and possession remain undisturbed. To deprive him of the ordinary beneficial use and enjoyment of his property is in law equivalent to the taking of it, and as much a taking as though the property itself were actually taken,<sup>93</sup> yet in order for him to be able to enforce this right, his property must be directly encroached upon.<sup>94</sup>

§ 99. *Same continued—illustrations.*—The following cases may be cited as being such as fall under this constitutional provision whereby additional servitude is placed on the easement for which the landowner should be compensated: The appropriation of a country highway to the use of a steam railroad is undoubtedly the imposition of a new servitude, and amounts to the taking of the property of an abutting owner, to whom additional compensation must be made.<sup>95</sup> Where the fee of the street of a city is in the abutting owner, and not in the city,<sup>96</sup> the construction of a railroad for the purpose of transferring freight cars from the terminals of one railroad to another,<sup>97</sup> and not regarded merely as an extension of the ordinary uses to which the streets have been dedicated,<sup>98</sup> is

<sup>93</sup> Lewis on Eminent Domain, § 56; Tiedeman on Limit of Police Power, 397; Cooley on Const. Limit. (6th Ed.) 670; Hooker v. New Haven & N. Co., 14 Conn. 146, 36 Am. Dec. 477; Rigney v. City of Chicago, 102 Ill. 64; Boston & Rapbury Mill Corporation v. Newman, 12 Pick. (Mass.) 467, 23 Am. Dec. 622; Grand Rapids B. Co. v. Jarvis, 30 Mich. 308; Ashley v. Port Huron, 35 Mich. 296, 24 Am. Rep. 552; West Orange v. Field, 37 N. J. Eq. 600, 45 Am. Rep. 670; Seifert v. City of Brooklyn, 101 N. Y. 136, 4 N. E. 321, 54 Am. Rep. 664.

<sup>94</sup> Kennett Petition, 24 N. H. 139; People v. Supervisors of Oneida County, 19 Wend. (N. Y.) 102.

<sup>95</sup> Cooley on Const. Limit. (6th Ed.), 683.

<sup>96</sup> Carli v. Stillwater St. R., etc., Tel. Co., 28 Minn. 373, 10 N. W. 205, 41 Am. Rep. 290.

<sup>97</sup> Carli v. Stillwater St. R., etc., Tel. Co., 28 Minn. 373, 10 N. W. 205, 41 Am. Rep. 290.

<sup>98</sup> Carson v. Central R. Co., 35 Cal. 325; Market Street R. Co. v. Central R. Co., 51 Cal. 583; Elliott v. Fair Haven, etc., R. Co., 32 Conn. 579; Savannah, etc., R. Co. v. Mayor, etc., of Savannah, 45 Ga. 602; Brown v. Duplessis, 14 La. Ann. 842; Briggs v. Lewiston, etc., Co., 79 Me. 363, 10 Atl. 47, 1 Am. St. Rep. 316; Peddicord v. Baltimore, etc., R. Co., 34 Md. 463; Hiss v. Baltimore,

regarded as an imposition of a new servitude, for which compensation must be made to the owner.<sup>99</sup> Land taken for a street cannot be appropriated as a site for a public pound or jail without making compensation to the abutting owner;<sup>100</sup> nor for a market house;<sup>101</sup> nor for a house in which to confine tramps.<sup>102</sup>

**§ 100. When dedicated for street purposes—not an imposition.** Whenever land is taken or dedicated for a city street, it is undoubtedly appropriated for all the ordinary and usual purposes of such a street; it has been held therefore that sewers may be constructed in a street and gas and water pipes may be laid in it for the purpose of supplying the inhabitants with water and gas.<sup>103</sup> But the laying of such pipes in an ordinary country road is the imposition of an additional servitude, and compensation must, therefore, be made to the abutting owner:<sup>104</sup> this, therefore, leads us to discuss briefly the difference between a city street and a public highway—as is commonly understood—with respect to what constitutes an additional servitude on each.

**§ 101. The different uses to which streets and highways may be put.**—The uses to which streets in a city may be put are greater and more numerous than those of an ordinary road or highway in the country. With reference to the latter all that the public acquires is the easement of passage and its incidents; and hence the owner of the soil parts with this use only, retaining the soil. By virtue of this ownership he is entitled, except for the purposes of repair, to the earth, timber, and grass growing thereon, and to all minerals, quarries, and springs below the surface. But, with respect to the streets in populous places, the public convenience requires more than the mere right of way over and upon them. They may need to be graded, and therefore the municipal authorities

etc., R. Co., 52 Md. 242, 36 Am. Rep. 371; *Hinchman v. Paterson*, etc., R. Co., 17 N. J. Eq. 75, 86 Am. Dec. 252; *Mahady v. Bushwick R. Co.*, 91 N. Y. 148, 43 Am. Rep. 661.

<sup>99</sup> *Southern Pac. R. Co. v. Reed*, 41 Cal. 256; *Imlay v. Union Branch R. Co.*, 26 Conn. 249, 68 Am. Dec. 392; *Indianapolis*, etc., R. Co. v. *Hartley*, 67 Ill. 439, 16 Am. Rep. 624; *Elizabethtown*, etc., R. Co. v. *Combs*, 10 Bush (Ky.) 382, 19 Am. Rep. 67; *Williams v. N. Y. Central R. Co.*, 16 N. Y. 97, 69 Am. Dec. 651; *Ford v. Chicago*, etc., R. Co., 14 Wis. 609, 80 Am. Dec. 791.

<sup>100</sup> *State v. Mayor*, etc., of *Mobile*, 5 Port. (Ala.) 279, 30 Am. Dec. 564.

<sup>101</sup> *State v. Laverack*, 34 N. J. Law, 201.

<sup>102</sup> *Winchester v. Capron*, 63 N. H. 605, 4 Atl. 795, 56 Am. Rep. 554.

<sup>103</sup> *Crooke v. Flatbush*, etc., Co., 29 Hun (N. Y.) 245; *State v. Laverack*, 34 N. J. Law, 201.

<sup>104</sup> *Bloomfield & R. Natural Gaslight Co. v. Calkins*, 62 N. Y. 386; *Sterling's Appeal*, 111 Pa. 35, 2 Atl. 105, 56 Am. Rep. 246.

may not only change the surface, but cut down trees and dig up the earth; they may use them in improving the street; and they may make culverts, drains and sewers upon or under the surface. Pipes may also be laid under the surface when required by the various agencies adopted in civilized life, such as water, gas, electricity, steam and other things capable of that mode of distribution.<sup>105</sup>

§ 102. **Cases holding not entitled to compensation.**—In consideration of the fact that many of the state courts have differed widely on this subject—the question being *res integra* in some—we have deemed it proper to set forth as briefly as possible some of the most important opinions of the different courts in order that the reader may himself see the ground whereon the great legal thinkers have used their reason. While we are aware that it is not usual for a writer to quote at any length court opinions, yet we feel by adopting this method all who may peruse this work may be thrown in closer touch with the deep and profound judicial reasoners of our country and those who have arrived at different conclusions after incessant and untiring research. In accordance to such method we shall first take up the cases wherein it has been held that the construction of telegraph and telephone lines upon a street or public highway does not constitute an additional burden to the easement and thereby entitle the abutting landowner to additional compensation.<sup>106</sup>

§ 103. **Same continued—expansiveness of easement.**—Judge Mitchell of the Minnesota court, while considering this subject and the nature and extent of the public easement in a highway, has this to say: "If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this easement is expansive, developing and growing as civilization advances. In the most primitive state of society, the conception of a highway was merely a footpath; in a slightly more advanced state, it included the idea of a way for pack animals; and, next, a way for vehicles

<sup>105</sup> 2 Dillon, Mun. Corp. §§ 656, 688; Chesapeake, etc., Tel. Co. v. Mackenzie, 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 219. For the reason that the uses to which streets and highways may be put, the following cases hold that a telephone line on a highway is not an additional servitude: McCann v. Johnson County Tel. Co., 69 Kan. 210, 76 Pac. 870, 66 L. R. A. 171, 2 Ann. Cas. 156; Cumb. Tel. Co. v. Avritt, 120 Ky. 34, 85 S. W. 204, 8 Ann. Cas. 955; Cater v. Northwestern Tel. Ex. Co., 60 Minn. 539, 51 Am. St. Rep. 343, 63 N. W. 111, 28 L. R. A. 310; Lowther v. Bridgeman, 57 W. Va. 306, 50 S. E. 410. But, as holding to the contrary effect, see Gray v. York State Tel. Co., 92 App. Div. 89, 86 N. Y. Supp. 771. See § 93.

<sup>106</sup> See § 97, note 90, for other cases.



drawn by animals—constituting, respectively, the ‘iter,’ the ‘actus,’ and the ‘via’ of the Romans. And thus the methods of using public highways expanded with the growth of civilization, until to-day our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. Hence it has become settled that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are designed. And it is not material that these new and improved methods of use were not contemplated by the owner of the land when the easement was acquired and are more onerous to him than those then in use. \* \* \* It is now universally conceded that urban highways may be used for constructing sewers and laying pipes for the transmission of gas, water, and the like for public use. \* \* \* As a matter of fact, most of these uses were unknown when the public easement was acquired in many of the streets in the older cities. \* \* \* In our judgment, public highways, whether urban or rural, are designed as avenues of communication; and if the original conception of a highway was limited to travel and transportation of property in movable vehicles, it was because these were the only modes of communication then known; that as civilization advances, and new and improved methods of communication and transportation are developed, these are all in aid of and within the general purpose for which highways are designed. Whether it be travel, the transportation of persons and property, or the transmission of intelligence, and whether accomplished by old methods or by new ones, they are all included within the public ‘highway easement,’ and impose no additional servitude on the land, provided they are not inconsistent with the reasonably safe and practical use of the highway in other and usual and necessary modes, and provided they do not unreasonably impair the special easement of abutting owners in the streets for purposes of access, light, and air.”<sup>107</sup>

§ 104. **Same continued—new use of the easement.**—The courts of Missouri uniformly hold that the construction of telegraph and telephone wires along and upon the streets and public highways, is not a new and additional servitude thereon, but is a new use of the

<sup>107</sup> *Cater v. Northwestern Tel., etc., Co.*, 60 Minn. 539, 63 N. W. 111, 28 L. R. A. 310, 51 Am. St. Rep. 343.

easement to which these highways may be put.<sup>108</sup> One of the decisions<sup>109</sup> in that state was based on the following reasons: "These streets are required by the public to promote trade and facilitate communications in the daily transaction of business between the citizens of one part of the city with those of another, as well as to accommodate the public at large in these respects. If a citizen living or doing business on one end of Sixth street wishes to communicate with a citizen living and doing business on the other end, or at any intermediate point, he is entitled to use the street, either on foot, on horseback or in a carriage, or other vehicle, in bearing the message. The defendants in this case propose to use the streets by making the telephone poles and wires the messenger to bear such communications instantaneously and with more dispatch than any of the above methods, or any other known method of bearing oral communications. Not only would such communications be borne with more dispatch, but to the extent of the number of communications daily transmitted by it, the street would be relieved of that number of footmen, horsemen or carriages. If a thousand messages were daily transmitted by means of telephone poles, wires and other appliances used in telephoning, the street through these means would serve the same purpose, which would otherwise require the use either by a thousand footmen, horsemen or carriages to effectuate the same purpose. In this view of it the erection of telephone poles and wires for the transmission of oral messages, so far from imposing a new and additional servitude, would, to the extent of each message transmitted, relieve the street of a servitude or use by a footman, horseman or carriage. If it be true, as laid down by the authorities herein cited, that when the public acquires the right to a street, either by dedication, grant or communication, the municipality has power to appropriate it not only to such uses as are common and in vogue at the time of its acquisition, but also to such new uses as advanced civilization may suggest, as conducive to the public good, the conclusion is inevitable that the use of Sixth street in the manner and for the purpose proposed is allowable, for it cannot with any show of reason be denied that the means these appliances would afford for the instantaneous transmission of communications for the transaction of business, without resorting to the slower and common methods of bearing them, would be con-

<sup>108</sup> *Gay v. Mut. U. Tel. Co.*, 12 Mo. App. 485; *Julia Bldg. Ass'n v. Bell Tel. Co.*, 88 Mo. 258, 57 Am. Rep. 398; *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S. W. 197, 2 L. R. A. 278, 9 Am. St. Rep. 370.

<sup>109</sup> *Julia Bldg. Ass'n v. Bell Tel. Co.*, above cited.

ductive to the public good, and make the street by these means serve one of the chief purposes for which it was dedicated. But it is argued that the erection of two telephone poles, each eighteen inches at the bottom with a gradual taper to the top, would obstruct the street, and deny to the public the complete and unrestricted use of the street. This argument, I think is more specious than sound. It is true that to the extent of the space of eighteen inches each of the poles proposed to be erected would be an obstruction, but the same could be said of lamp posts erected on the streets of a city, the necessities of which might require its streets to be lighted with oil, gas or electric lights; and yet no one would be heard to complain that the lamp posts constituted such an obstruction or impediment to the free use of the streets as to demand their removal. \* \* \*

If the conclusions announced in the foregoing part of this opinion, that all the uses to which a street may properly be devoted are to be regarded as permitted by and included in the original appropriation or dedication of the street, and that the erection and maintenance of telephone poles as proposed is one of these uses, and that in digging holes through the stone slabs and stone walks in which to plant them there is no taking of private property of the abutting lot owner entitling him to compensation, are correct, it would seem logically to follow that damages resulting from such use need not be compensated for. If, by reason of the dedication the public have the right to apply the private property of the plaintiff to the use proposed, without his being entitled to compensation, how can it be that it becomes entitled to compensation for damages, following as an incident from an act which the dedicator by his dedication has authorized to be done? If the dedication of the street is sufficiently operative to allow private property in the soil of the street to be actually invaded, and physically taken for a street use without compensation, why is it not sufficiently operative, if in such taking damages ensue, to relieve the taker from the payment of such damages? If, by dedicating property for a street, the dedicator gives up his right to compensation for the uses included in the dedication, how can it be said that he does not also give up his right to compensation for damages to adjacent property not taken, resulting from the application of the street to use which by his dedication he authorized it to be put?"

§ 105. Same continued—upholding same—on highways, same rule.—It has been held by other courts that the above rule was law, and that the legislature might authorize the construction of lines of these companies upon the highways without compensating the abut-



ting landowner.<sup>110</sup> The court in one of these cases said: "When the land was taken for a highway, that which was taken was not merely the privilege of traveling over it in the then known vehicles, or using it in the then known methods for either the conveyance of property or transmission of intelligence. \* \* \* The discovery of the telegraph developed a new and valuable mode of communicating intelligence. Its use is certainly similar to, if not identical with, that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from the post box or the mail coach. \* \* \* We are therefore of the opinion that the use of a portion of a highway for the public use of companies organized under the laws of the state for the transmission of intelligence by electricity, and subject to the supervision of the local municipal authorities, which has been permitted by the legislature, is a public use similar to that for which the highway was originally taken, or to which it was originally devoted, and that the owner of the fee is entitled to no further compensation. \* \* \* That it was the intent of the statute to grant to those corporations, formed under the general incorporation laws for the purpose of transmitting intelligence by electricity, the right to construct lines of telegraph upon and along highways and public roads, upon the locations assigned them by the officers of the municipalities wherein such ways are situated, cannot be doubted. \* \* \* There remains the inquiry whether there is any objection to the statute because it does not provide a sufficient remedy for the owners of the property near to or adjoining the way who may be incidentally injured by the structures which the telegraph companies may have been permitted to erect along the line of the highway and within its limits. \* \* \* The only compensation to which such owner is entitled is that which the legislature deems just, when it permits the erection of these structures. The legislature may provide for compensation to the adjoining owners, but without such

<sup>110</sup> *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7. See, also, *Hewett v. West. U. Tel. Co.*, 4 Mackey (D. C.) 424; *Magee v. Overshiner*, 150 Ind. 127, 49 N. E. 951, 65 Am. St. Rep. 358, 40 L. R. A. 370; *Irwin v. Great Southern Tel. Co.*, 37 La. Ann. 63; *Boston v. Richardson*, 13 Allen (Mass.) 160; *People v. Eaton*, 100 Mich. 208, 59 N. W. 145, 24 L. R. A. 721n. Compare *Willis v. Erie Tel. Co.*, 37 Minn. 347, 34 N. W. 337; *Gay v. Mut. U. Tel. Co.*, 12 Mo. App. 491; *State v. St. Louis, etc., R. Co.*, 86 Mo. 288; *Hershfield v. Rocky Mt. Bell Tel. Co.*, 12 Mont. 102, 29 Pac. 883; *Kirby v. Citizens' Tel. Co.*, 17 S. D. 362, 97 N. W. 3, 2 Ann. Cas. 152; *Patton v. Chattanooga*, 108 Tenn. 197, 65 S. W. 414; *Hobbs v. Long Dist. Tel., etc., Co.*, 147 Ala. 393, 41 South. 1003, 7 L. R. A. (N. S.) 87, 11 Ann. Cas. 461.



provision there can be no legal claim to it, as the use of the highway is a lawful one."<sup>111</sup>

§ 106. **The ground upon which these cases are sustained.**—In reviewing these cases in which it is held that the abutting landowner should not have additional compensation for the construction of a line of telephone along and upon the easement, it will clearly be seen that the ground upon which such opinions are based is that they are only a new method of enjoying an old existing use, and one actually in the minds of the parties at the time the easement was acquired.<sup>112</sup> Some of the authorities, reaching the same conclusion, treat the uses of streets arising from dedication or condemnation as expansive, and not confined to uses already permitted, but as civilization advances admitting new uses.<sup>113</sup> "When land is taken," as was ably said, "or dedicated for a town street, it is unquestionably appropriated for all ordinary purposes for a town street, not merely the purposes to which such streets were formerly applied, but those demanded by new improvements and new wants. Among these purposes is the use for carriages which run on a ground track; and the preparation of important streets in large cities for their use is not only a frequent necessity which must be supposed to have been contemplated, but it is almost as much a matter of course as the grading and paving."<sup>114</sup> "When these lands were taken or granted for public highways, they were not taken or granted for such use only as might then be expected to be made of them, by the common method of travel then known, or for the transmission of intelligence by the only methods then in use, but for such methods as the improvements of the country, or the discoveries of future times, might demand."<sup>115</sup> "The discovery of the telegraph developed a new and valuable mode of communicating intelligence. Its use is certainly similar to, if not identical with, that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from

<sup>111</sup> *Pierce v. Drew*, *supra*.

<sup>112</sup> *Eichels v. Evansville St. R. Co.*, 78 Ind. 261, 41 Am. Rep. 561; *Chicago, etc., R. Co. v. Whiting, etc., R. Co.*, 139 Ind. 297, 38 N. E. 604, 26 L. R. A. 337, 47 Am. St. Rep. 264; *Lockhart v. Craig Street R. Co.*, 139 Pa. 419, 21 Atl. 26; *Detroit City R. Co. v. Mills*, 85 Mich. 634, 48 N. W. 1007.

<sup>113</sup> *Angell & Ames on Corp.* § 312; *Julia Bldg. Ass'n v. Bell Tel. Co.*, 88 Mo. 258, 57 Am. Rep. 398; *Cater v. Northwestern Tel., etc., Co.*, 60 Minn. 539, 63 N. W. 111, 28 L. R. A. 310, 51 Am. St. Rep. 343; *Detroit City R. Co. v. Mills*, 85 Mich. 634, 48 N. W. 1007.

<sup>114</sup> *Elliott on Roads and Streets*, p. 529, approving *Cooley's Const. Limit.* 556.

<sup>115</sup> *People v. Eaton*, 100 Mich. 208, 59 N. W. 145, 24 L. R. A. 721, note.

the post boy or the mail coach. It is a newly discovered method of exercising the old public easement, and all appropriate methods must have been deemed to have been paid for when the road was laid out.”<sup>116</sup>

§ 107. Same continued—rule not changed by fact that they are not things of motion.—A reason given why they are considered an additional servitude to the highways is that given by some courts which held that the poles are not in motion as are ordinary instruments of travel, but this idea was refuted by the following case: “It is said that the primary law of the street is motion. It is true motion is the law of the street, in the sense that the person or thing to be transmitted or transported must move; but it is not true in the sense that the medium or agency by or through which it is conveyed or transmitted must move. Pipes laid for the transmission of water, gas, and steam are immovable. So are the tracks of street railway, also the poles and wires of the trolley system. And it can make no difference in principle whether the immovable structure is on, under, or above the surface of the ground, for the rights of the owner of the fee are the same in either case. Subject only to the public easement for highway purposes, he remains the owner of the land upward and downward indefinitely. If the transmission of intelligence by telegraph or telephone is not included in the public easement in a highway, it would be equally an invasion of his rights of property, even if the wires were placed under the ground. If an immovable structure in a highway constitutes an additional servitude, it is not merely because it is immovable, but because it unreasonably interferes with the general use of the street by the public, or because it unreasonably impairs the special easement of abutting owners.”<sup>117</sup> “Poles and wires for electric lighting have been admitted as a proper use, on the ground that the streets are lighted and their general uses thereby made safer and more expeditious. Incidentally, the same use has been employed for supplying light to public, business, and private houses. Sewers have been admitted as not constituting an additional servitude because they afforded a means of drainage for the streets, although one use was in carrying the waste from the building of citizens. Gas mains and poles were admitted in like manner as electric lighting systems and for like uses. They were always deemed to constitute a beneficial use of the

<sup>116</sup> *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7.

<sup>117</sup> *Cater v. Northwestern, etc., Tel. Co.*, 60 Minn. 539, 63 N. W. 111, 51 Am. St. Rep. 343, 28 L. R. A. 310.

streets as in some degree aiding in the means or opportunities for conducting the affairs of the inhabitants, and in facilitating the communication indispensable to such affairs."<sup>118</sup>

§ 108. **Contrary view—additional servitude—so held.**—While the reasoning to the effect that telegraph and telephone lines constructed upon streets and country highways create no additional servitude thereon is very strong, profound and apparently uncontrovertible, yet the weight of opinion—and that more recently promulgated—holds that they do create a different use of the easement than that contemplated by the parties at the time the public acquired this right and thereby entitling the abutting landowner to be additionally compensated.<sup>119</sup> In discussing this side of the point at

<sup>118</sup> *Magee v. Overshiner*, 150 Ind. 127, 65 Am. St. Rep. 360, 49 N. E. 951, 40 L. R. A. 370.

<sup>119</sup> *Illinois*.—*Postal Tel. Cable Co. v. Eaton*, 170 Ill. 513, 49 N. E. 365, 62 Am. St. Rep. 390, 39 L. R. A. 722; *Union Electric Tel., etc., Co. v. Applequist*, 104 Ill. App. 517; *Goddard v. Chicago, etc., R. Co.*, 202 Ill. 362, 66 N. E. 1066, affirming 104 Ill. App. 536; *American Tel., etc., Co. v. Jones*, 78 Ill. App. 372; *Tel. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453; *Tel. Co. v. Dutton*, 228 Ill. 178, 81 N. E. 838, 10 L. R. A. (N. S.) 1057, 10 Ann. Cas. 464. See *Drain Dist. v. Knox*, 237 Ill. 148, 86 N. E. 636; *Burrall v. American Tel., etc., Co.*, 224 Ill. 266, 79 N. E. 705, 8 L. R. A. (N. S.) 1091.

*Maryland*.—*Chesapeake, etc., Tel. Co. v. Mackenzie*, 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 219.

*Mississippi*.—*Stowers v. Postal Tel. Cable Co.*, 68 Miss. 559, 9 South. 356, 24 Am. St. Rep. 290, 12 L. R. A. 864.

*Nebraska*.—*Bronson v. Albion Tel. Co.*, 67 Neb. 111, 93 N. W. 201, 60 L. R. A. 426, 2 Ann. Cas. 639.

*New Jersey*.—*Nicoll v. New York, etc., Tel. Co.*, 62 N. J. Law, 156, 40 Atl. 627; *Broome v. New York, etc., Tel. Co.*, 42 N. J. Eq. 141, 7 Atl. 851; *Winter v. New York, etc., Tel. Co.*, 51 N. J. Law, 83, 16 Atl. 188; *Nicoll v. New York, etc., Tel. Co.*, 62 N. J. Law, 733, 42 Atl. 583, 72 Am. St. Rep. 666; *Halsey v. Rapid Tr. St. R. Co.*, 47 N. J. Eq. 380, 20 Atl. 559. See *Blanchard v. Power Co.*, 80 N. J. Eq. 10, 83 Atl. 505.

*New York*.—*Metropolitan Tel., etc., Co. v. Colwell Lead Co.*, 50 N. Y. Super. Ct. 488; *Id.*, 67 How. Pr. (N. Y.) 365; *Andrews v. Delhi, etc., Tel. Co.*, 66 App. Div. 616, 73 N. Y. Supp. 1129, affirming 36 Misc. Rep. 23, 72 N. Y. Supp. 50; *Tiffany v. U. S. Illuminating Co.*, 51 N. Y. Super. Ct. 280, 67 How. Pr. (N. Y.) 73; *Gray v. York State Tel. Co.*, 41 Misc. Rep. 108, 83 N. Y. Supp. 920; *Eels v. Tel., etc., Co.*, 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640; *Osborne v. Tel. Co.*, 189 N. Y. 393, 82 N. E. 428; *Tel. Co. v. Forrestal*, 56 Misc. Rep. 133, 106 N. Y. Supp. 404. But see *Gannett v. Tel. Co.*, 55 Misc. Rep. 555, 106 N. Y. Supp. 3.

*North Carolina*.—*Hodges v. West. U. Tel. Co.*, 133 N. C. 225, 45 S. E. 572.

*North Dakota*.—*Donovan v. Allert*, 11 N. Dak. 289, 91 N. W. 441, 58 L. R. A. 775, 95 Am. St. Rep. 720; *Cosgriff v. Tel., etc., Co.*, 15 N. D. 210, 107 N. W. 525, 5 L. R. A. (N. S.) 1142.

*Ohio*.—*Daily v. State*, 51 Ohio St. 348, 37 N. E. 710, 46 Am. St. Rep. 578,



issue, we shall first deal with the subject when the title to the fee of the easement is in the abutting lotowner or landowner; second, when the fee is in the public; and, third, when the fee is in a third party. And while discussing each of these subordinate subjects, it shall be our most earnest endeavor to harmonize to a certain degree this very important, comprehensive, intricate and unsettled subject.

**§ 109. Same continued—what rights included in an easement.—**

Before taking up either of these subjects, it may be well to learn what are the uses to which an easement may be put in order that they may fall within the meaning of the term of public travel; or, in other words, what uses were contemplated by the parties at the time the grant was made, to which the easement might be put, and for which consideration was given? "The public easement \* \* \* is primarily a right of passage over the surface of the highway and of so using and occupying the land within it as to facilitate such passage. In this primary right are included the grading, paving, cleaning, and lighting of the highway, the construction and maintenance of street railways<sup>120</sup> with the apparatus proper for their use, and the maintenance of appliances conducive to the protection and convenience of travelers while using the way. Secondarily, the easement covers uses which, though their relation to the right of passage is remote or even fanciful, are so generally advantageous to

24 L. R. A. 724; *Callem v. Columbus, etc., Light Co.*, 66 Ohio St. 166, 64 N. E. 141, 58 L. R. A. 782; *Schaaf v. Cleveland, etc., R. Co.*, 66 Ohio St. 215, 64 N. E. 145; *Denver v. U. S. Tel. Co.*, 10 Ohio Dec. 273, 8 Ohio N. P. 666; *Smith v. Printing, etc., Co.*, 2 Ohio Cir. Ct. R. 259, 1 O. C. D. 478.

*Pennsylvania*.—*Lancaster, etc., Tr. Road v. Columbus Tel. Co.*, 18 Lanc. L. Rev. 161.

*Texas*.—*Erie Tel., etc., Co. v. Kennedy*, 80 Tex. 71, 15 S. W. 704; *Tel., etc., Co. v. Smithdeal*, 103 Tex. 128, 124 S. W. 627; *Id.* (Tex. Civ. App.) 126 S. W. 942.

*Virginia*.—*West. U. Tel. Co. v. Williams*, 86 Va. 696, 11 S. E. 106, 8 L. R. A. 429, 19 Am. St. Rep. 908.

*Washington*.—*Spokane v. Colby*, 16 Wash. 610, 48 Pac. 248.

*West Virginia*.—*Maxwell v. Tel. Co.*, 51 W. Va. 121, 41 S. E. 125.

*Wisconsin*.—*Krueger v. Wisconsin Tel. Co.*, 106 Wis. 96, 81 N. W. 1041, 50 L. R. A. 298.

*United States*.—*Pac. Postal Tel. Cable Co. v. Irvine (C. C.)* 49 Fed. 113; *Kester v. West. U. Tel. Co. (C. C.)* 108 Fed. 926.

<sup>120</sup> *Baker v. Selma Street, etc., R. Co.*, 135 Ala. 552, 33 South. 685, 93 Am. St. Rep. 42; *San Antonio, etc., R. Co. v. Limburger*, 88 Tex. 79, 30 S. W. 533, 53 Am. St. Rep. 730; *Doane v. Lake St., etc., R. Co.*, 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97, 56 Am. St. Rep. 265. It is otherwise if the railway is for the transportation of merchandise as well as passengers. *Chicago, etc., R. Co. v. Milwaukee, etc., R. Co.*, 95 Wis. 561, 70 N. W. 678, 60 Am. St. Rep. 136, 37 L. R. A. 856.



the owners of the fee, the owners of abutting property, that, rather by common consent and custom, than by logical deduction from the primary design, they are now recognized as legitimate. Such are the construction and maintenance of sewers, water pipes and gas pipes for the convenience of persons occupying neighboring lands.”<sup>121</sup> It has been held, however, that telephone companies do not fall within the meaning of an easement in its secondary sense.<sup>122</sup> “The primary intention and idea of the use of the street was for travel—moving from place to place in any way that does not interfere with the use of the street for travel in any other way. The manner or mode of travel is not restricted to those means known or in use at the time of the dedication, but may be those modes of travel that are the result of modern inventions.”<sup>123</sup> A telephone company “is a totally distinct and different kind of use from any heretofore known. It is not a mere difference in the kind of vehicle, or in their number or capacity, or in the manner, method, or means of location.”<sup>124</sup> “Whatever the means used, the object to be attained is passage over the territory embraced within the limits of the street. Whether as a pedestrian, or on a bicycle, or in a vehicle drawn by horses or other animals, or in a vehicle propelled by electricity, or in a car drawn by horses or moved by electricity, the object to be gained is moving from place to place.”<sup>125</sup>

**§ 110. When fee in abutting owner—meaning of taking property of another under constitution.**—The fee in an easement for public travel may be either in the abutting lotowner or landowner, which it most often the case;<sup>126</sup> or it may be in the public, acquired at the time the easement was obtained; or it may be in a third party, or one from whom the abutting owner acquired, directly or indi-

<sup>121</sup> *State v. Laverack*, 34 N. J. Law, 201.

<sup>122</sup> *Nicoll v. New York, etc., Tel. Co.*, 62 N. J. Law, 733, 42 Atl. 583, 72 Am. St. Rep. 666.

<sup>123</sup> *Donovan v. Allert*, 11 N. D. 289, 91 N. W. 441, 95 Am. St. Rep. 726, 58 L. R. A. 775.

<sup>124</sup> *Eels v. American Tel., etc., Co.*, 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640.

<sup>125</sup> *Donovan v. Allert*, 11 N. D. 289, 91 N. W. 441, 95 Am. St. Rep. 725, 58 L. R. A. 775.

<sup>126</sup> *Peck v. Smith*, 1 Conn. 103, 6 Am. Dec. 216; *Dovaston v. Payne*, 2 Smith's Lead. Cas. 90, where the authorities are collected. The presumption respecting ownership of the land over which a highway runs is that the adjacent proprietors each own to the middle of such highway; or, if the same person owns on both sides, that the whole road belongs to him, subject to the public easement of the right of passage in either case. *West. U. Tel. Co. v. Williams*, 86 Va. 696, 11 S. E. 106, 19 Am. St. Rep. 908, 8 L. R. A. 429.

rectly, possession of his property, exclusive of the title to the easement which was granted before the abutting owner acquired possession of his property. If the fact be conceded that the public only acquires the easement for the purpose of travel and the incidents pertaining thereto—and such as was described above—any uses other than these would be nothing more nor less than taking the property of the abutting owner without due compensation, which would be more than the state would have the power to do. The federal constitution guarantees that no private property shall be taken for public use without due compensation; and, while some of the states have embodied this same provision in their constitutional laws, most of them have enlarged on these and provided that no private property shall be taken, injured or damaged for public use without compensation. It is very clear that the private property of an individual and such as has not theretofore been granted for an easement cannot be taken against the consent of the owner or by a condemnation proceeding for public use without first compensating him for such property. This fact is too old to be discussed. It was held in early times that the owner had to be wholly deprived of the possession, use and occupation of the land, but a more just and liberal doctrine has long since been established. A man's property may be taken within the meaning of the constitutional provision, although his title and possession remains undisturbed.<sup>127</sup> It follows, then, that when the abutting owner's reversionary interest in the property on which an easement has been granted has been taken for any other use than that for which it was granted, his guaranteed rights have been disregarded; for, while his reversionary interest may appear insignificant and far-fetched, yet this should be as securely protected by the highest laws of our land as the little spot around which his dearest and most pleasant memories dwell, and upon which majestically and grandly stands the walls of his castle.

§ 111. Same continued—abutter's interest in soil—to what use he may put it.—“The abutter has the exclusive right to the soil, subject only to the easement of right of passage in the public and in the incidental right of property fitting the way for the use. Subject only to the public easement, he has all the usual rights and remedies of the owner of the freehold. He may sink a drain under the road; \* \* \* he may mine under it.”<sup>128</sup> He may maintain trespass against one who unlawfully cuts and carries away the

<sup>127</sup> Kennett's Petition, 24 N. H. 139.

<sup>128</sup> Elliott on Roads and Streets, p. 519.

grass, trees, or herbage and even against one who stands upon the sidewalk in front of his premises and uses abusive language against him, refusing to depart. He may also maintain ejectment against a railroad company which has placed its track upon his side of the street without paying or tendering damages therefor, or against an individual who has wrongfully and unlawfully encroached thereon.<sup>129</sup> He "is entitled \* \* \* to the entire use of the land, except the right which the public has to use the land and materials thereon for the purposes of building and maintaining a highway suitable for the safe passage of the travelers."<sup>130</sup> He "is entitled to free access to his house, and light and air for his house, without obstruction. If by any public purposes inconsistent with the grant to the public of the use of the street the street is obstructed in front of his lot abutting on such street, such use entitles him to compensation."<sup>131</sup> The question is, Does the construction and stringing of telephone wires along and upon a public street interfere with the free passage thereon or obstruct ingress and egress of air, light and passage to the abutting owners of property? As said before, the amount of damages or the degree or the character in which the interference or obstruction is made should have very little to do in the consideration of the question. The main question is, Is there any interference with or obstruction to the uses of the easement, or is it used for an additional purpose other than that for which it was granted?

**§ 112. Same continued—additional use of easement is for quasi-public and not for public use.**—For the reason that the public has acquired an easement over private property for the purposes of travel, is no reason why a quasi-public corporation, created for the convenience and welfare of the government, but more specially for private gain, should appropriate part of this easement for the use of such companies without compensating the owner of the fee when the consent has not already been obtained. "It is true that the use of a telegraph company is a public use. The company is a public corporation, as to which the public has rights which the law will enforce but these public rights can only be obtained by paying for them. The use, while in one sense public, is not for the public generally. It is for the private profit of the corporation. \* \* \* There is no reason in law or common justice why it should not pay

<sup>129</sup> Elliott on Roads and Streets, p. 535.

<sup>130</sup> Cole v. Drew and Wife, 44 Vt. 49, 8 Am. Rep. 363.

<sup>131</sup> Donovan v. Allert, 11 N. D. 289, 91 N. W. 441, 95 Am. St. Rep. 720, 58 L. R. A. 775.



for what it needs in the prosecution of its business.”<sup>132</sup> The streets and highways were dedicated to the public for the exclusive and unobstructed passage of its travelers, and any use or hindrance to which it might otherwise be subjected would be in violation of the grant. To use it for telephonic purposes would have this effect. “The erection of poles in the streets by telegraph or telephone companies is a permanent and exclusive occupation of the streets by such companies, to the continued exclusion of the remainder of the public, and to that extent is a continued obstruction of the street.”<sup>133</sup>

§ 113. Same continued—easement put to different use than that for which it was originally acquired.—As has been very ably said: “That the erection of a telegraph line upon a highway is an additional servitude is clear from the authorities. \* \* \* If the right acquired by the commonwealth in the condemnation of a highway is only the right to pass along over the highway for the public, then, if the untaken parts of the land are his private property, to dig up the soil is to dig up his soil; to cut down the trees is to cut down his trees; to destroy the fences is to destroy his fences; to erect any structure, to affix any pole or post, in and upon his land, is to take possession of his land; and all these interfere with his free and unrestricted use of property. If the commonwealth took this without just compensation it would be a violation of the constitution. The commonwealth cannot constitutionally grant it to another. It is true that the use of the telegraph company is a public use; that the company is a public corporation, as to which the public has rights which the law will enforce. But the public rights can only be obtained by paying for them. The use while in one sense public is not for the public generally; it is for the private profit of the corporation. It is its business enterprise, engaged in for gain. The services can only be obtained upon their being paid for. There is no reason, either in law or common justice, why it should not pay for what it needs in the prosecution of its business. Upon this burden being placed upon it, it can complain of no hardship; it is the common lot of all. If the said company has use for the private property of a citizen of this commonwealth, and it is of advantage to it to have the same, it is illogical to argue that the property is of small value to the plaintiff, and in the aggregate a great matter to the plaintiff in error. This argument is not worth considering; it

<sup>132</sup> West. U. Tel. Co. v. Williams, 86 Va. 696, 19 Am. St. Rep. 908, 11 S. E. 109, 8 L. R. A. 429.

<sup>133</sup> Jaynes v. Omaha St. R. Co., 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751.



cuts at the very root of the rights of property. It would apply with equal force to all the transactions of life. It is sufficient to say, the ægis of the constitution is over this as over all other private property rights, and there is no power which can divest it without just compensation.”<sup>134</sup>

§ 114. **When the fee is in the public—not entitled to compensation.**—There may be instances when the fee to the land over which the easement was laid out is in the public and acquired at the same time the easement was granted; then the question which presents itself for consideration is whether this affects the rights of the abutter for additional compensation; or, in other words, is the abutter entitled to additional compensation from a telegraph or telephone company for the erection of its lines along the streets, whether the fee to the easement is in the public or in himself? While a majority of the courts hold that it makes very little, if any, difference as to who owns the fee,<sup>135</sup> yet there are some which make a distinction. This distinction is shown in the following case, in which the court said: “It appeared that the poles and wires were erected by complainant under a grant from the board of supervisors so to do, but without the consent and against the protest of the defendants. The right of way granted to the supervisors was for a public road, that is to say, a way to be used by the public for ordinary travel. Where the fee of the highway is vested in the public, there is no valid legal objection to the grant by the public of a right to erect such poles and wires, without regard to the adjacent property holders; but where, as here, the fee of the highway remains in the adjacent owner, and its use for public purposes of public travel has been granted. I think it clear that every use of the highway not in the line of such travel is an additional burden, for which the proprietor of the fee is entitled to additional compensation, and which cannot be constitutionally taken from him without his consent except by proceedings regularly instituted and prosecuted according to law.”<sup>136</sup>

<sup>134</sup> West. U. Tel. Co. v. Williams, 86 Va. 696, 11 S. E. 109, 19 Am. St. Rep. 908, 8 L. R. A. 429. Chesapeake, etc., Tel. Co. v. Mackenzie, 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 219.

<sup>135</sup> Stowers v. Postal Tel. Cable Co., 68 Miss. 559, 9 South. 356, 24 Am. St. Rep. 290, 12 L. R. A. 864, note; Board of Trade Tel. Co. v. Barnett, 107 Ill. 507, 47 Am. Rep. 453; Dusenbury v. Mut. U. Tel. Co., 11 Abb. N. C. (N. Y.) 440; Metropolitan, etc., Tel. Co. v. Colwell Lead Co., 50 N. Y. Super. Ct. 488; Broome v. N. Y., etc., Tel. Co., 42 N. J. Eq., 141, 7 Atl. 851. Contra, Hewett v. West. U. Tel. Co., 4 Mackey (D. C.) 424; Pierce v. Drew, 136 Mass. 75, 49 Am. Rep. 7; Julia Bldg. Ass'n v. Bell Tel. Co., 88 Mo. 258, 57 Am. Rep. 398.

<sup>136</sup> Pacific Postal Tel. Co. v. Irvine (C. C.) 49 Fed. 113.

§ 115. **The distinction—test whether fee is in abutter or public.** While a great number of the courts, which are composed of the ablest expounders of the law of jurisprudence, have declared that the abutter's right to additional compensation is not affected by the fact that the fee to the land on which the easement has been laid out is in the public; yet we are inclined to believe and are forced to assert that it is affected to such an extent that he will not be entitled to additional compensation for such use unless it materially interferes with the easement of access to his property or passage over the streets. Suppose we take a case where the fee to the land on which is laid out an easement remains in the grantor or the abutting lotowner. Here the public only acquires the right to travel over the easement, and all other rights, titles and interest to the land are in the grantor; then if the public should lose its right in the easement, which may be done, by a relinquishment of its rights, what would become of these rights? Would they not revert to the abutting owner, and that, too, whether he acquired his interest before or after the grant of the easement? He most assuredly would. Let us suppose again that a telephone company is constructed on this easement, without the abutting owner's consent or without appropriating additional compensation to him; and the same is there at the time the public loses its easement, can it be held for a moment that the company could continue to use the easement after the title has reverted to the original owner, without making compensation to him or obtaining his consent? If it should have this right, there might be some reason in holding that it might occupy this easement for its right of way before the public easement has been lost, without giving additional compensation to the owner of the fee; but this, as we hold—and the same opinion is indulged in by most of the late courts, as we have shown—is not the case. The same plausible reason might be entertained, that a telephone company could as well continue to occupy an easement to which the public had lost its interest—and by reason of which the public interest had reverted back to the abutting owner—as this company would have to occupy other private property of the abutting owner and that over which no easement had ever been granted.

§ 116. **Same continued—when fee in the public—effect of.**—The same results would not occur should the fee be in the public.<sup>137</sup> Under these circumstances we can hardly conceive of an instance when the public would lose its fee in the land on which the ease-

<sup>137</sup> Cleveland Burial Case Co. v. Erie R. Co., 24 Ohio Cir. Ct. R. 107; Krueger v. Wisconsin Tel. Co., 106 Wis. 96, 81 N. W. 1081, 50 L. R. A. 298.

ment is laid out by any legal proceeding. It surely would not by nonuser. Then, if this is the case, the telephone company could continue to use the easement as a right of way, even after a discontinuance on the part of the public to use the easement. While it is not very clear to our mind, yet we are inclined to believe that the public might exact of these companies a compensation for the use of its easement, but the same would have to be done by a statute to that effect. When the legislature gives to telephone companies the authority to construct their poles and lines along and upon the public highways and streets, the state then at that time gives the consent for these companies to occupy these highways after they have complied with certain requirements and conditions—among which one may be for compensation. When, in fact, the construction of these lines upon a street or highway is an additional servitude thereon, the public, if it can, is the only one who can complain. It therefore follows that if the owner's easement of access to his property or his passage over the streets is not interfered with, he cannot be heard to complain. In other words, he cannot maintain an action for an injury to the soil or bring an action of ejectment; but he nevertheless has a remedy for any special injury to his rights by the authorized acts of others.<sup>138</sup> Thus merely stringing of wires before one's property is not an injury entitling him to preliminary injunction,<sup>139</sup> or he cannot complain if the wires are in a conduit laid under the sidewalk.<sup>140</sup> But should his easement to travel be obstructed or interfered with, he might demand compensation of the company, notwithstanding the fact that the fee is in the public. Thus the easement of access embraces the use of an upper-story door for receiving merchandise.<sup>141</sup> If the multiplicity of wires obstructs the free passage of air or light, or if they materially obstruct the fire department in putting out fire, whereby the property owner is damaged, he may exact of such company compensation for the uses of the streets for its posts and wires.

§ 117. **When title or fee is in third party—effect of as to compensation.**—We now come to the third and last division of this subject, that is, should the abutting owner, be compensated by a telegraph or telephone company which constructs its line of wires upon the street adjacent to his property, when the title is in some

<sup>138</sup> *Chesapeake, etc., Tel. Co. v. Mackenzie*, 74 Md. 36, 21 Atl. 691, 28 Am. St. Rep. 219.

<sup>139</sup> *Roake v. American Tel., etc., Co.*, 41 N. J. Eq., 35, 2 Atl. 618.

<sup>140</sup> *Coburn v. New Tel. Co.*, 156 Ind. 90, 59 N. E. 324, 52 L. R. A. 671.

<sup>141</sup> *Hays v. Columbiana County Tel. Co.*, 12 O. C. D. 167, 21 Ohio Cir. Ct. R. 480.



third party?<sup>142</sup> There may be instances where neither the abutting owner nor the public has acquired the fee to the land on which the easement is laid out, but that it still remains in the original owner of the property or his heirs. Under such circumstances, who, if any one, is entitled to compensation? This question, as far as it has come to our knowledge, has never been directly adjudicated.<sup>143</sup> In such instances, there may be two entitled to compensation; the original owner, and the abutter. The former for the additional burden or injury to the soil and the latter for the interference of his access to his property. The original owner or his heirs would have the same right to exact of these companies additional compensation for the use of the public easement for the construction of their lines as the abutter would have in case the fee was in the latter. His grounds for same, however, would be the fact that the use was an additional burden, and not on the ground that it was an interference with the access to his property. The abutter would have the same ground upon which to base his right for exacting compensation for the use of the public easement by a telephone company, as he would have in case the fee was in the public. In order to obtain compensation from these companies, under such circumstances, it must be shown that access to his property has been interfered with and not because there has been an injury inflicted upon the soil. Hence, if an appropriation of the street by one of these companies, even under legislative and municipal sanction, unreasonably abridges the right to use the streets as a means of ingress and egress, or otherwise, and he is thereby deprived of his right without compensation, an action will lie against such companies, guilty of usurping such unreasonable and exclusive use, for the recovery of such immediate and direct damages as he may have suffered.<sup>144</sup>

<sup>142</sup> It will be settled that the owners of lots "have a peculiar interest in the adjacent street which neither the local nor general public can pretend to claim—a private right in the nature of an incorporeal hereditament legally attached to their contiguous grounds—an incidental title to certain facilities and franchises assured to them by contract and by law, and which are as inviolable as the property in the lots themselves." *Lexington & O. R. Co. v. Applegate*, 8 Dana (Ky.) 294, 33 Am. Dec. 497; *Haynes v. Thomas*, 7 Ind. 38; *Rowan v. Portland*, 8 B. Mon. (Ky.) 232; *Le Clercq v. Gallipolis*, 7 Ohio, 217, pt. 1, 28 Am. Dec. 641; *Cincinnati v. White*, 6 Pet. 431, 8 L. Ed. 452, cited in *Elizabethtown, etc., R. Co. v. Combs*, 10 Bush (Ky.) 382, 19 Am. Rep. 67.

<sup>143</sup> *Chesapeake, etc., Tel. Co. v. Mackenzie*, 74 Md. 86, 21 Atl. 690, 28 Am. St. Rep. 219.

<sup>144</sup> *Elizabethtown, etc., R. Co. v. Combs*, 10 Bush (Ky.) 382, 19 Am. Rep. 67; *Schurmeir v. St. Paul, etc., R. Co.*, 10 Minn. 82 (Gil. 59), 88 Am. Dec. 59; *Cooley, Const. Limit.* 556.



§ 118. **Effect of legislative grant—not a nuisance.**—Although the posts and wires composing a telegraph, telephone, or electric line are an additional burden on the street, for which compensation must be made to the owner of the abutting property, yet concurrent legislative and municipal authority, granted to a company to erect its poles and suspend its wires in and over the streets of a city, will protect it from being treated as a trespasser and its works from being declared a nuisance, if they are so constructed as not to obstruct or interfere with the use of the streets by the public or the owner's right of ingress or egress to and from his abutting property.<sup>145</sup>

§ 119. **Amount of compensation to abutter.**—It being conceded that the construction of a telegraph or telephone line upon a street constitutes a new use thereof, and thereby and thereon imposing an additional burden, and it following that the abutting lotowner may be entitled to an additional compensation for such use, and for dam-

<sup>145</sup> *Kester v. West. U. Tel. Co.* (C. C.) 108 Fed. 926; *West. U. Tel. Co. v. Williams*, 86 Va. 696, 11 S. E. 109, 8 L. R. A. 429, 19 Am. St. Rep. 908; *Postal Tel. Cable Co. v. Norfolk, etc., R. Co.*, 88 Va. 920, 14 S. E. 803; *Eels v. American Tel., etc., Co.*, 65 Hun. 516, 20 N. Y. Supp. 600, affirmed 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640; *Southern Bell Tel. Co. v. Francis*, 109 Ala. 224, 19 South. 1, 55 Am. St. Rep. 930, 31 L. R. A. 193; *Falls Power Co. v. Sims*, 6 Ga. App. 749, 65 S. E. 844; *People v. Transit Development Co.*, 131 App. Div. 174, 115 N. Y. Supp. 297; *Scotfield v. Poughkeepsie*, 122 App. Div. 868, 107 N. Y. Supp. 767; *Mull v. Traction Co.*, 169 Ind. 214, 81 N. E. 637; *Townsend v. Norfolk, etc., L. Co.*, 105 Va. 22, 52 S. E. 970, 4 L. R. A. (N. S.) 87, 115 Am. St. Rep. 842, 8 Ann. Cas. 558; *Simonds v. Maine Tel., etc., Co.*, 104 Me. 440, 72 Atl. 175, 28 L. R. A. (N. S.) 942; *Hudson River Tel. Co. v. Turnpike & Ry. Co.*, 135 N. Y. 393, 32 N. E. 148, 31 Am. St. Rep. 838, 17 L. R. A. 764. Where such authority has not been given they will constitute a license. *Cumberland Tel., etc., Co. v. Mt. Vernon*, 176 Ind. 177, 94 N. E. 714; *Banks v. Highland St. Ry. Co.*, 136 Mass. 485; *Commonwealth v. Boston*, 97 Mass. 555; *Nebraska Tel. Co. v. Western Ind., etc., Tel. Co.*, 68 Neb. 772, 95 N. W. 18; *Paterson Ry. Co. v. Grundy*, 51 N. J. Eq. 213, 26 Atl. 788; *Hempstead v. Electric L. Co.*, 9 App. Div. 48, 41 N. Y. Supp. 126, 75 N. Y. St. Rep. 582; *Jacksonville, etc., Elec. Co. v. Moses* (Tex. Civ. App.) 134 S. W. 379; *Krueger v. Wisconsin Tel. Co.*, 106 Wis. 96, 81 N. W. 1041, 50 L. R. A. 298. See § 121. May become nuisance after expiration of permission to use streets. *Coverdale v. Edwards*, 155 Ind. 374, 58 N. E. 495; *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454; *Blanchard v. West. U. Tel. Co.*, 60 N. Y. 510, wire across navigable waters may become nuisance.

*Power plant.*—Whether an electric power plant is a nuisance depends upon circumstances. Smoke, noise, vibration, dirt, soot, dust, cinders, steam, ashes, bad odors, etc., may constitute such a nuisance. *Peck v. Newburgh, etc., P. Co.*, 132 App. Div. 82, 116 N. Y. Supp. 433; *Hyde Park, etc., L. Co. v. Porter*, 167 Ill. 276, 47 N. E. 206; *Pritchard v. Edison Elec. Ill. Co.*, 179 N. Y.

ages for any material injury to the easement or access and passage over the streets, the question which necessarily follows is, How much should he recover from these companies for the use of the easement, and how much should he be allowed as damages for injuries to his right in same? "The true measure of damages \* \* \* is not what a particular individual would be willing to charge for having the poles put up or remain, nor the amount some other person might consider the rental value was depreciated for the purposes of his business; but where the land of plaintiff is not taken nor his soil actually invaded, the measure of damages as adjudged in many cases is, either: (1) The extent to which the rental or usable value of the particular property has been diminished by the trespass or injury complained of;<sup>146</sup> or (2) the difference in the value of the property before the construction of the poles and its value afterwards, if the depreciation in value has been caused by the erection and maintenance of the poles."<sup>147</sup> Where there is nothing to show that any special damage has been suffered, the principle seems to be established by many respectable authorities that the abutter is entitled to recover such compensation as the use of the ground was worth during the time and for the purpose it was occupied.<sup>148</sup>

§ 120. **Damages to abutting owners—amount.**—The fact that the abutting lotowner is compensated for the new use of the street for telegraph and telephone lines will not prevent him from recovering damages for any material injury to the easement of access and passage over the street. As, for instance, if the company should erect its poles and string its wires in the premises of the abutter so as to interfere with the free access to his property or obstruct the air and light to same, he would be entitled to damages for such in-

364, 72 N. E. 243; *Townsend v. Norfolk, etc., L. Co.*, 105 Va. 22, 52 S. E. 970, 4 L. R. A. (N. S.) 87, 115 Am. St. Rep. 842, 8 Ann. Cas. 558. A dam for the creation of water power to run an electric plant may constitute a nuisance. *McMeekin v. Carolina P. Co.*, 80 S. C. 512, 61 S. E. 1020, 128 Am. St. Rep. 885.

<sup>146</sup> *Baltimore, etc., R. Co. v. Boyd*, 67 Md. 32, 10 Atl. 815, 1 Am. St. Rep. 362; *Wood v. State*, 66 Md. 61, 5 Atl. 476.

<sup>147</sup> *Shepherd v. Baltimore, etc., R. Co.*, 130 U. S. 426, 9 Sup. Ct. 598, 32 L. Ed. 970.

<sup>148</sup> *Baltimore, etc., R. Co. v. Boyd*, 67 Md. 32, 1 Am. St. Rep. 362, 10 Atl. 815; *News Co. v. Maine*, 242 Ill. 568, 90 N. E. 230, 26 L. R. A. (N. S.) 189. Compare *Tel., etc., Co. v. Cosgriff*, 19 N. D. 771, 124 N. W. 75, 26 L. R. A. (N. S.) 1171. See *Long Dist. Tel., etc., Co. v. Schmidt*, 157 Ala. 391, 47 South. 731; *Board of Trade Tel. Co. v. Darst*, 192 Ill. 47, 61 N. E. 398, 85 Am. St. Rep. 288.

jury, notwithstanding that he has already been compensated for the additional servitude of the street. And he may be allowed punitive damages when there is an element of wanton or malicious motive, or such reckless disregard of his rights by the company, in the commission of the injury—and all repetitions thereof—as he would be entitled to.<sup>149</sup> If such are not the facts in the case, he would only be entitled to nominal damages; and the measure of which, where punitive or exemplary damages are not claimed, is the difference in the value of the property before the construction of the lines and its value afterwards, if the depreciation in value has been caused by the erection of the poles.<sup>150</sup> It is not necessary that the abutting owner should give affirmative proof of his having sustained any particular amount of damages;<sup>151</sup> for any unauthorized entry upon another's land is a trespass, and, whether the owner suffers substantial injury or not, he at least sustains a legal injury, which entitles him to some damages, though they may be very small under some circumstances.<sup>152</sup>

§ 121. Remedies of adjoining lot owner—when a nuisance.—When a telephone, telegraph or electric company constructs its lines along and upon a street without first having obtained the consent of the legislative authority, the occupation thereof becomes unlawful and amounts to a public nuisance,<sup>153</sup> and the abutter may enjoin the company or bring an action of damages against it; but in determining the nature of the case to be brought, the circumstances in the particular cases must first be considered. The remedy may be by an action of ejectment, an injunction, or by an ac-

<sup>149</sup> *Ashby v. White*, 2 Ld. Raym. 955; *Millor v. Spaterman*, 1 Saund., note 2, p. 346a; *Taylor v. Herniker*, 12 Ad. & E. 488; *Dixon v. Clow*, 24 Wend. (N. Y.) 188; *Baltimore, etc., R. Co. v. Boyd*, 67 Md. 32, 10 Atl. 815, 1 Am. St. Rep. 362; *Woods v. State*, 66 Md. 61, 5 Atl. 476.

<sup>150</sup> *Shepherd v. Baltimore, etc., R. Co.*, 130 U. S. 426, 9 Sup. Ct. 598, 32 L. Ed. 970; *Chesapeake, etc., R. Co. v. Mackenzie*, 74 Md. 36, 28 Am. St. Rep. 227, 21 Atl. 690; *Erie Tel. Co. v. Kennedy*, 80 Tex. 71, 15 S. W. 704. See *Postal Tel. Cable Co. v. Bruen* (Sup.) 39 N. Y. Supp. 220, where the erection of poles one hundred and fifty feet apart was held to give a right to nominal damages.

<sup>151</sup> *McConnel v. Kibbe*, 33 Ill. 175, 85 Am. Dec. 265; *Attwood v. Fricot*, 17 Cal. 37, 76 Am. Dec. 567.

<sup>152</sup> *Ashby v. White*, 2 Ld. Raym. 955; *Millor v. Spaterman*, 1 Saund., note 2, p. 346a; *Taylor v. Henriker*, 12 Ad. & E. 488; *Dixon v. Clow*, 24 Wend. (N. Y.) 188; *Baltimore, etc., R. Co. v. Boyd*, 67 Md. 32, 10 Atl. 815, 1 Am. St. Rep. 365.

<sup>153</sup> *East Tenn. Tel. Co. v. Russellville*, 106 Ky. 667, 51 S. W. 308, 21 Ky. Law Rep. 305; *Bland v. Cumberland Tel., etc., Co.* (Ky.) 109 S. W. 1180. See § 118, and cases cited thereunder.



tion for damages. If the fee to the land on which the easement is laid out is in the abutting owner, and the company constructs a line of wires thereon without his consent or without compensating him therefor, he may have the same removed, in case they have not progressed too far in the construction of same, by an action of ejectment.<sup>154</sup> The state only acquires a right of passage to the easement; and all the other rights and interest to the soil, except such easement, remain in the abutting owner. Any use to which the easement might be placed other than such as would fall under the right of passage would be an additional servitude to the land for which additional compensation would have to be made, and it is pretty generally held that a telegraph or telephone line upon the easement is an additional burden and one not contemplated at the time the grant was given; so this additional burden, as any other trespass, could be removed by an action of ejectment. "I see no ground," as was ably observed by Lord Mansfield, "why the owner of the soil may not bring ejectment as well as trespass. \* \* \* 'Tis true, he must recover the land subject to the way; but surely he ought to have a special remedy to recover the land itself, notwithstanding its being subject to an easement upon it."<sup>155</sup> As the public only acquires an easement of travel over the land, the abutting owner thereof has the same remedies to remove all intruders, trespassers and obstructions therefrom as he would have should they be on his private property. When any of these injuries are on any of his private property without his consent, he might have the same removed by ejectment; so the same remedy could be exercised when they had encroached upon his other property upon which an easement had been laid out, and this, too, notwithstanding the fact that the same was granted before he acquired the title to the abutting property.<sup>156</sup> It has been held that an action of injunc-

<sup>154</sup> *Postal Cable Tel. Co. v. Eaton*, 170 Ill. 513, 49 N. E. 365, 62 Am. St. Rep. 390, 39 L. R. A. 722; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453; *West. U. Tel. Co. v. Williams*, 86 Va. 696, 19 Am. St. Rep. 908, 11 S. E. 109, 8 L. R. A. 429. Purchaser succeeds to right of vendor. *Postal Tel. Cable Co. v. Eaton*, supra.

<sup>155</sup> *Goodtitle v. Alker*, 1 Burr. 133; *Cooper v. Smith*, 9 Serg. & R. (Pa.) 26, 11 Am. Dec. 658; *Alden v. Murdock*, 13 Mass. 256; *Bissell v. N. Y. C. R. Co.*, 23 N. Y. 61; *Carpenter v. Oswego, etc., R. Co.*, 24 N. Y. 655; *Jersey City v. Fitzpatrick*, 30 N. J. Eq. 97; *Perry v. New Orleans, etc., R. Co.*, 55 Ala. 413, 28 Am. Rep. 740, all cited in *Terre Haute, etc., Co. v. Rodel*, 89 Ind. 128, 46 Am. Rep. 164. See, also, *Robert v. Sadler*, 104 N. Y. 229, 10 N. E. 428, 58 Am. Rep. 498, and notes thereunder.

<sup>156</sup> *Postal Tel. Cable Co. v. Eaton*, 170 Ill. 573, 49 N. E. 365, 62 Am. St. Rep. 390, 39 L. R. A. 722.



tion will lie,<sup>157</sup> but in either instance the abutting owner might be estopped to prosecute such actions where he had apparently acquiesced in the construction of the lines.<sup>158</sup> The company would be allowed an opportunity to perfect its rights by instituting condemnation proceedings.

§ 122. **Same continued—ignorance of rights.**—The same state of facts will exist notwithstanding that the company erects its poles and stretches wires along the streets with the belief that it had the legal right so to do, but without obtaining the consent of the abutting owner or seeking to acquire his rights by negotiation or condemnation proceedings.<sup>159</sup> *Ignorantia juris neminem excusat*, is an old maxim and is founded on the presumption that every one who is competent to act for himself is bound to know the law.<sup>160</sup> It is presumed that every company has investigated the law applicable to its right in constructing a line of wires upon the easement, and if it has not and afterwards learns that it has no right to make such construction, the company will be held liable just the same.

§ 123. **Same continued—action for damages.**—Another remedy which an abutting owner may maintain against a company for constructing, without his consent, a line of wires upon the easement, is by an action of damages. This method is generally exercised when the abutter's easement of access is interfered with. In these actions it is no defense that the company has obtained legislative authority, for it is generally in such cases that these actions are brought. Damages would be the proper action where the company has been in operation for some time; as the abutting owner would be estopped to enjoin where the company had gone to considerable expense in erecting the line, and the abutter has apparently acquiesced in the erection of same.<sup>161</sup> There may be exceptions to the rule where the maintaining of the line would become too obnoxious to the com-

<sup>157</sup> Injunction has been held to be the proper remedy in such a case. *Gray v. York St. Tel. Co.*, 41 Misc. Rep. 108, 83 N. Y. Supp. 920. See *Donovan v. Allert*, 11 N. D. 289, 91 N. W. 441, 95 Am. St. Rep. 720, 58 L. R. A. 775; *Denver v. U. S. Tel. Co.*, 10 Ohio Dec. 273.

<sup>158</sup> *Daffinger v. Pittsburg, etc., Tel. Co.*, 31 Pitts. Leg. J. N. S. (Pa.) 37, 14 York Leg. Rec. (Pa.) 46; *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1, 25 N. E. 496, 19 Am. St. Rep. 461, 11 L. R. A. 634, note.

<sup>159</sup> *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1, 25 N. E. 496, 19 Am. St. Rep. 461, 11 L. R. A. 634, note.

<sup>160</sup> Story's Eq. Juris. § 116.

<sup>161</sup> *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1, 25 N. E. 496, 19 Am. St. Rep. 461, 11 L. R. A. 634, note; *Bronson v. Albion Tel. Co.*, 67 Neb. 111, 93 N. W. 201, 60 L. R. A. 429, 2 Ann. Cas. 639; *Maxwell v. Central Dist. Tel. Co.*, 51 W. Va. 121, 41 S. E. 125; *Omaha v. Flood*, 57 Neb. 124, 77 N. W. 379.

forts of life or the enjoyment of his rights. For instance, cases may happen where the wires become so numerous as that the bulk of them obstruct the abutting owner's free access to air and light. In such cases he could recover damages for such injury and also enjoin the company from using the easement any longer for such use. Repeating again the law—the construction of a telephone line upon an easement without legislative consent becomes a public nuisance<sup>162</sup> and may be abated like any other nuisance; yet if the company has expended much capital in its construction and is nearing completion, the abutter would be estopped to enjoin further work on same, on the ground of apparent acquiescence, but this would not be any bar to his recovering compensation for the additional use to which the easement was put, and also damages for any injury to his soil, such as the digging of holes for posts, trimming trees,<sup>163</sup> cutting up hedges and throwing down fences, and also for any obstruction to the easement of access to his property. Should the use to which the company puts the easement be such as would materially, permanently and continuously injure the premises and his life and home comforts, the proper remedy would be by an action of injunction.<sup>164</sup>

§ 124. Further considered—unauthorized use of street—may be enjoined.—Where there is an unauthorized use of a street either by the company not complying with the ordinance, or by utter lack of authority to use same, it may be enjoined from carrying on further business.<sup>165</sup> The legislature or the municipality may require the company to construct its poles and wires in a certain prescribed manner, and this it must do or be subject to an injunction. As, for instance, it is often required of these companies by ordinances that the poles must be of such a size and a certain distance apart, or that

<sup>162</sup> See § 121.

<sup>163</sup> *Daily v. State*, 51 Ohio St. 348, 37 N. E. 710, 24 L. R. A. 724, 46 Am. St. Rep. 578.

<sup>164</sup> *Hay v. Columbiana County Tel. Co.*, 12 O. C. D. 167, 21 Ohio Cir. Ct. R. 480; *Broome v. N. Y.*, etc., Tel. Co., 42 N. J. Eq. 141, 7 Atl. 851; *Russ v. Penn. Tel. Co.*, 15 Pa. Co. Ct. R., 226, 3 Pa. Dist. R. 654.

<sup>165</sup> *Mut. U. Tel. Co. v. Chicago (C. C.)* 16 Fed. 309; *People v. Metropolitan Tel., etc., Co.*, 31 Hun (N. Y.) 596; *Utica v. Utica Tel. Co.*, 24 App. Div. 361, 48 N. Y. Supp. 916; *Marshfield v. Wisconsin Tel. Co.*, 102 Wis. 604, 78 N. W. 735, 44 L. R. A. 565. See, also, *Reg. v. United Kingdom Electric Tel. Co.*, 2 B. & S. 648, note 110 E. C. L. 648, note 31 L. J. M. C. 166; *Burrall v. American Tel. Co.*, 224 Ill. 266, 79 N. E. 705, 8 L. R. A. (N. S.) 1091; *Canadian, etc., R. Co. v. Moosehead Tel. Co.*, 106 Me. 363, 76 Atl. 885, 29 L. R. A. (N. S.) 703, 20 Ann. Cas. 721.

the wires must be of a certain height.<sup>166</sup> In some states there have been statutes passed which require all telephone companies doing business in cities above a certain population to place their wires under the surface;<sup>167</sup> on failure to perform any of these requirements a mandamus suit may be maintained either by the city<sup>168</sup> or an injunction suit may be maintained by an abutting lot owner who is affected by the unauthorized use,<sup>169</sup> but not at the suit of a rival company.<sup>170</sup> And the rule prevails whether the occupation of a street was never authorized or has ceased to be lawful because of the valid withdrawal of an original authority.<sup>171</sup>

**§ 125. When poles and wires of an electric light company an additional burden.**—When poles are erected and wires strung for the purpose of furnishing heat, light, or power to private persons, an additional burden is imposed on the easement entitling abutting owners to compensation therefor;<sup>172</sup> but when poles and wires are placed upon a street or highway to serve public interest, such as lighting the street or highway, no compensation need be made.<sup>173</sup>

<sup>166</sup> If the company be authorized to use poles of such a size and height as is reasonably necessary, and uses poles of greater size and height, the authority granted to it is no protection. *People v. Metropolitan Tel., etc., Co.*, 31 Hun (N. Y.) 596. See § 89.

<sup>167</sup> See § 92 et seq.

<sup>168</sup> See *People v. Squire*, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893, affirmed in 145 U. S. 175, 12 Sup. Ct. 880, 36 L. Ed. 666; *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454.

<sup>169</sup> *Irwin v. Great Southern Tel. Co.*, 37 La. Ann. 63; *Maxwell v. Central Dist., etc., Tel. Co.*, 51 W. Va. 121, 41 S. E. 125. See, also, *Donovan v. Albert*, 11 N. D. 289, 91 N. W. 441, 95 Am. St. Rep. 720, 58 L. R. A. 775.

<sup>170</sup> *Chicago Tel. Co. v. v. Northwestern Tel. Co.*, 199 Ill. 324, 65 N. E. 329, affirming 100 Ill. App. 57.

<sup>171</sup> *Mut. U. Tel. Co. v. Chicago (C. C.)* 16 Fed. 309; *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454, note.

<sup>172</sup> *Goddard v. Chicago, etc., R. Co.*, 104 Ill. App. 533; *Tuttle v. Brush Electric Illuminating Co.*, 50 N. Y. Super. Ct. 464; *Callen v. Columbus Edison Electric Light Co.*, 66 Ohio St. 166, 64 N. E. 141, 58 L. R. A. 782; *Schaaf v. Cleveland, etc., R. Co.*, 66 Ohio St. 215, 64 N. E. 145; *McLean v. Brush Electric Light Co.*, 8 Ohio Dec. (Reprint) 619, 9 Wkly. Law Bul. 65; *Haverford Electric Light Co. v. Hart*, 13 Pa. Co. Ct. R. 369; *Post v. Light, etc., Co.*, 77 Misc. Rep. 369, 136 N. Y. Supp. 401; *Brown v. Light Co.*, 138 N. C. 533, 51 S. E. 62, 107 Am. St. Rep. 554, 69 L. R. A. 631; *Andreas v. Bergen County Gas, etc., Co.*, 61 N. J. Eq. 69, 47 Atl. 555; *Gurnsey v. Northern California Power Co.*, 160 Cal. 699, 117 Pac. 906, 36 L. R. A. (N. S.) 185, and note.

<sup>173</sup> *Loeber v. Butte Gen. Electric Co.*, 16 Mont. 1, 39 Pac. 912, 50 Am. St. Rep. 468; *Palmer v. Larchmont Electric Co.*, 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672, reversing 6 App. Div. 12, 36 N. Y. Supp. 522; *Gulf Coast Ice, etc., Co. v. Bowers*, 80 Miss. 570, 32 South. 113; *People v. Thompson*, 65 How.



§ 126. **Liabilities for cutting trees overhanging sidewalks.**—A telegraph, telephone, or electric company is liable for trespassing upon the premises of an abutting owner for the purpose of cutting or trimming trees overhanging the sidewalk.<sup>174</sup> It very often be-

Prac. (N. Y.) 407; Hazlehurst v. Mayes, 84 Miss. 7, 36 South. 33, 64 L. R. A. 805; Brandt v. Spokane, etc., R. Co., 78 Wash. 214, 138 Pac. 871, 52 L. R. A. (N. S.) 760. See Post v. Light, etc., Co., 77 Misc. Rep. 369, 136 N. Y. Supp. 401; Andreas v. Bergen County Gas, etc., Co., 61 N. J. Eq. 69, 47 Atl. 555; Johnson v. Thomson-Houston Electric Co., 54 Hun, 469, 7 N. Y. Supp. 315; Tuttle v. Brush Electric Illuminating Co., 50 N. Y. Super. Ct. 464.

*Compensation for underground conduits.*—It has been held that the use of city streets for conduits for underground wires does not constitute such an additional servitude as entitles abutting owners to compensation, if such use is for the public benefit. Sears v. Crocker, 184 Mass. 586, 69 N. E. 327, 100 Am. St. Rep. 577; Souch v. East London R. Co., L. R. 16 Eq. 108, 42 L. J. Ch. 477, 21 Wkly. Rep. 590, 22 Wkly. Rep. 566. But, if the fee to the easement is in the abutting owner, and the use is for a telegraph or telephone company owned by a private company for private gain, as all of such companies are generally used, there is no reason why the abutting owner may not receive additional compensation the same as if the line of wires are strung on poles on the streets.

<sup>174</sup> Clay v. Postal Tel. Cable Co., 70 Miss. 406, 11 South. 658; West. U. Tel. Co. v. Satterfield, 34 Ill. App. 386; Memphis Bell Tel. Co. v. Hunt, 16 Lea (Tenn.) 456, 1 S. W. 159, 57 Am. Rep. 237; Roy v. Great Northwestern Tel. Co., 2 Quebec Super. Ct. 135; Barber v. Tel. Co., 105 App. Div. 154, 93 N. Y. Supp. 993; Norman Milling, etc., Co. v. Bethurem, 41 Okl. 735, 139 Pac. 830, 51 L. R. A. (N. S.) 1082, trespass ab initio; Cartwright v. Liberty Tel. Co., 205 Mo. 126, 103 S. W. 982, 12 L. R. A. (N. S.) 1125, 12 Ann. Cas. 249, must have authority from city; Board of Trade Tel. Co. v. Barnett, 107 Ill. 507, 47 Am. Rep. 453, distinction where fee is in the city or in the abutter; Bronson v. Albion Tel. Co. 67 Neb. 119, 93 N. W. 201, 60 L. R. A. 426, 2 Ann. Cas. 639, liability depending on question whether the use of the highway for poles and wires is an ordinary use, within the contemplation of the parties when the highway was dedicated or condemned, or whether it is an additional burden; Daily v. State, 51 Ohio St. 348, 37 N. E. 710, 46 Am. St. Rep. 578, 24 L. R. A. 724, partly on abutter's own land and partly on highway, entitle to compensation; Gorham v. Eastchester Elec. Co., 80 Hun, 290, 30 N. Y. Supp. 125, granting privileges to construct poles and wires does not confer authority to mutilate ornamental shade trees; McAntire v. Joplin Tel. Co., 75 Mo. App. 535, liable whether the work was carefully or negligently performed; Brown v. Asheville Elec. Co., 138 N. C. 534, 51 S. E. 62, 107 Am. St. Rep. 554, 69 L. R. A. 631, authority from city does not relieve company of liability for compensation for trees; O'Connor v. Nova Scotia Tel. Co., 22 Can. C. 278, presumed that abutter has fee to center of street; Slabaugh v. Omaha Elec. L., etc., Co., 87 Neb. 805, 128 N. W. 505, 30 L. R. A. (N. S.) 1084, limitation of action, must compensate in absence of statute or ordinance; Betz v. Kansas City Home Tel. Co., 121 Mo. App. 475, 97 S. W. 207, neither city or company has right to cut abutter's trees unless a necessity for the act exists, and the presumption is that the necessity did not exist; State v. Graeme, 130 Mo. App. 138, 108 S. W. 1131, should proceed under statute to



comes necessary in the construction of these lines in cities to cut and trim valuable and ornamental trees overhanging the sidewalk, in order to suspend the wires from post to post; in doing so, the owner thereof usually raises serious objections. The companies, then, are face to face with this question of right and power. They are generally given the power, along with their license, to cut and

have damage assessed; *Osborne v. Auburn Tel. Co.*, 189 N. Y. 393, 82 N. E. 428, liable whether has franchise or not; *Kellar v. Central Tel., etc., Co.*, 53 Misc. Rep. 523, 105 N. Y. Supp. 63, liable whether fee is in abutter and that on which tree is; to same effect see *Osborne v. Auburn Tel. Co.*, 111 App. Div. 702, 97 N. Y. Supp. 874, reversed on other grounds in 189 N. Y. 393, 82 N. E. 428; *Bathgate v. North Jersey St. R.*, 75 N. J. Law, 763, 70 Atl. 132, liable for feed wire of street car company for damaging trees; *Darling v. Newport Elec. L. Co.*, 74 N. H. 515, 69 Atl. 885, liable where requirements of statute not complied with; *Boland v. Washtenaw Home Tel. Co.*, 161 Mich. 315, 126 N. W. 425, injury to oak tree by trimming limbs whether company trimmed same before title was acquired by owner; *Russellville Home Tel. Co. v. Com.*, 33 Ky. Law Rep. 132, 109 S. W. 340, statute regulating cutting, trees located on abutter's property, but bordering on highway; *Brahan v. Meridian Home Tel. Co.*, 97 Miss. 326, 52 South. 485, city cannot authorize cutting without compensating, even though city can destroy trees where public use demands it; *Jordan v. Delaware, etc., Tel. Co.*, 1 Boyce (Del.) 107, 75 Atl. 1014, consent given by abutter so far as reasonably necessary; to same effect see *Nachand v. Cumberland Tel., etc., Co.*, 134 Ky. 257, 120 S. W. 319, and holding that recovery cannot be had unless it is shown that the trees trimmed were not an obstruction to the lines, or that more was trimmed than necessary to clean the lines; *Cumberland Tel. etc., Co. v. Martin*, 93 Miss. 505, 46 South. 247, where telephone has maintained line along highway for seven years, and during that time it has cut undergrowth interfering with the line without objection being made, not liable to one who takes property by descent for a statutory penalty for willfully cutting, where it cuts only such small growth as interferes with the line; *State v. Graeme*, 130 Mo. App. 138, 108 S. W. 1131, must be willfully and wantonly done; *Hobbs v. Long-Distance Tel. Co.*, 147 Ala. 393, 41 South. 1003, 7 L. R. A. (N. S.) 87, 11 Ann. Cas. 461, injunction will not be granted to abutter, but his remedy is at law against the company for trimming or mutilating or destroying trees.

*Contrary holding.*—There are authorities holding contrary to the text. Thus, in *Miller v. Detroit, etc., R. Co.*, 125 Mich. 171, 84 N. W. 49, 84 Am. St. Rep. 569, 51 L. R. A. 955, it was held that, where the company erecting poles and wires has been authorized to use the highway for such purpose, no liability is incurred by the removal or pruning of trees located in the highway, the title to which is in the abutting owners, when it is necessary to allow the construction and maintainance of the poles and wires. This and the following cases do not consider that the wires and poles are an additional servitude. *Wyant v. Central Tel. Co.*, 123 Mich. 51, 81 N. W. 928, 81 Am. St. Rep. 155, 47 L. R. A. 497, need not give owner an opportunity to first trim the trees; *Hazlehurst v. Mayes*, 84 Miss. 7, 36 South. 33, 64 L. R. A. 805, installation of an electric lighting plant by municipality for public use; *Meyer v. Standard Tel. Co.*, 122 Iowa, 514, 98 N. W. 300, when done reasonably and

trim such overhanging trees as may be an obstruction to the erection of their wires, but when this grant is given them, it is not understood that the owners are to be deprived of their property without the company first making or tendering them due compensation for their property; or otherwise his property would be used for public purposes without compensation, which would be in violation of the constitution.<sup>175</sup> These companies must pay to the owners of the trees such damages as they would be entitled to.<sup>176</sup> While the gravamen of an action brought for the purpose of recovering damages for the cutting of overhanging trees on the sidewalk is the trespass upon the premises of the abutting owner,<sup>177</sup> this could, however, be avoided by providing means—as by stepladders or other means—to reach the trees or limbs from the street, yet then they would nevertheless be liable if the trees were injured to any extent.<sup>178</sup> For instance, if it were necessary to cut the trees in order to lay the telephone line, this would not warrant cutting them so as

in good faith; *Slockbower v. East Orange Tp.*, 61 N. J. Law, 202, 38 Atl. 803, to be relieved, authority must be acquired by company from city; cases where such authority was given, *Southern Bell Tel. etc., Co. v. Constantine* 61 Fed. 61, 9 C. C. A. 359, *Southern Bell Tel. Co. v. Francis*, 109 Ala. 224, 19 South. 1, 55 Am. St. Rep. 930, 31 L. R. A. 193; *Dodd v. Consolidated Tr. Co.*, 57 N. J. Law, 482, 31 Atl. 980; *Barber v. Hudson River Tel. Co.*, 105 App. Div. 154, 93 N. Y. Supp. 993, written license given by owner confers authority to do only reasonable trimming.

<sup>175</sup> *Memphis Bell Tel. Co. v. Hunt*, 16 Lea (Tenn.) 456, 1 S. W. 159, 57 Am. Rep. 237. See *Moore v. Carolina, etc., P. Co.*, 163 N. C. 300, 79 S. E. 597.

<sup>176</sup> *Bronson v. Albion Tel. Co.*, 67 Neb. 111, 93 N. W. 201, 60 L. R. A. 426, 2 Ann. Cas. 639, holding that unless special circumstances authorizing such relief are shown an injunction will not be granted, but the abutting owner will be left to his remedy at law. *Tri-State Tel., etc., Co. v. Cosgriff*, 19 N. D. 771, 124 N. W. 75, 26 L. R. A. (N. S.) 1171, present, and not future, value of trees recoverable.

<sup>177</sup> Telegraph and telephone companies have no right to go upon private property for the purpose of cutting or trimming trees without the owner's consent. *Tissot v. Great Southern Tel., etc., Co.*, 39 La. Ann. 996, 3 South. 261, 4 Am. St. Rep. 248; *West. U. Tel. Co. v. Satterfield*, 34 Ill. App. 386; *Clay v. Postal Tel. Cable Co.*, 70 Miss. 406, 11 South. 658; *Cumberland Tel., etc., Co. v. Shaw*, 102 Tenn. 313, 52 S. W. 163; *Van Sieten v. Jamaica Electric Light Co.*, 45 App. Div. 1, 61 N. Y. Supp. 210, affirmed in 168 N. Y. 650, 61 N. E. 1135; *Cumberland Tel., etc., Co. v. Poston*, 94 Tenn. 696, 30 S. W. 1040; *Memphis Bell Tel. Co. v. Hunt*, 16 Lea (Tenn.) 456, 1 S. W. 159, 57 Am. Rep. 237; *Southwestern Tel., etc., Co. v. Branham* (Tex. Civ. App.) 74 S. W. 949; *Gilchrist v. Dominion Tel. Co.*, 19 N. Brunsw. 553; *Roy v. Great Northwestern Tel. Co.*, 2 Quebec Sup. Ct. 185.

<sup>178</sup> *Memphis Bell Tel. Co. v. Hunt*, 16 Lea (Tenn.) 456, 1 S. W. 159, 57 Am. Rep. 237; *Tissot v. Great Southern Tel., etc., Co.*, 39 La. Ann. 996, 3 South.

to leave in the foliage an open space from twenty-five to forty feet in circumference for the mere purpose of passing through it an almost imperceptible wire.<sup>179</sup> This, however, would not be the case if the trees had been declared a nuisance and the owners thereof had been authorized to move same. A municipality may declare them a nuisance when they obstruct travel along the streets or when the limbs prevent the sun from drying the sidewalks and thereby creating constant dampness and causing decay; but a telephone company could not abate the nuisance on its own accord.

**§ 127. Same continued—punitive damages.**—The company may commit the trespass in such a way as would entitle the lot owner to punitive or exemplary damages, as in the case where the trespass was wanton and malicious the injured party would be entitled to recover both nominal and vindictive damages. This was so held where a telephone company had authority from the city to construct a line of wires upon the streets and in making such construction attempted to cut and trim limbs on ornamental trees overhanging the sidewalk. The owners of these trees objected to their being trimmed in any manner, but in order to accomplish this work the employé stole a march on the lot owner by going to the premises late at night and then entering the premises and doing the work.<sup>180</sup> In another case the employés of the company waited until the owner of the trees, who had objected to the cutting of his trees, had gone off on a visit before the trimming was done.<sup>181</sup> The court granted damages to these injured parties for malicious and willful trespass of the company. It makes no difference if the company's agent in charge of the construction was absent at the time the trespass was committed, the company will still be liable.<sup>182</sup>

261, 4 Am. St. Rep. 248; *Southwestern Tel., etc., Co. v. Branham* (Tex. Civ. App.) 74 S. W. 949; *Roy v. Great Northwestern Tel. Co.*, 2 Quebec Sup. Ct. 135.

<sup>179</sup> *Tissot v. Great Southern Tel., etc., Co.*, 39 La. Ann. 996, 3 South. 261, 4 Am. St. Rep. 248.

*An electric light company* has no right to injure or mutilate the trees of an adjoining owner, if it can be avoided by reasonable care and proper insulation: *Van Sielen v. Jamaica Electric Light Co.*, 45 App. Div. 1, 61 N. Y. Supp. 210, affirmed in 168 N. Y. 650, 61 N. E. 1135; *Malone v. Waukesha Electric Light Co.*, 120 Wis. 485, 98 N. W. 247; *Norman Milling, etc., Co. v. Bethuren*, 41 Okl. 735, 139 Pac. 830, 51 L. R. A. (N. S.) 1082, and note.

<sup>180</sup> *Memphis Bell Tel. Co. v. Hunt*, 16 Lea (Tenn.) 456, 1 S. W. 159, 57 Am. Rep. 237.

<sup>181</sup> *Tissot v. Great Southern Tel., etc., Co.*, 39 La. Ann. 996, 3 South. 261, 4 Am. St. Rep. 248.

<sup>182</sup> *Clay v. Postal Tel. Cable Co.*, 70 Miss. 406, 11 South. 658.



§ 128. **Willful intent—question for jury.**—Punitive damages are imposed on a corporation as a means of punishment for its wrongful acts, and in order for a corporation to be guilty of a criminal wrong,<sup>183</sup> it must have had an intent to commit such wrong. Applying the rule to the present discussion, if the employés of a telegraph, telephone or electric company in good faith honestly thought from the circumstances that they had the right to cut certain trees on the premises of another, they cannot, within the meaning of the law, be held to be guilty of a crime, although they had no right or lawful authority to cut such trees; however, if they acted heedlessly, recklessly and carelessly, without honestly believing that they had the right to do so, they or rather the company for which they are working, will be liable in punitive damages, yet it is a question of fact to be decided by a jury as to whether they acted in such a way as to make the company liable for such damages.<sup>184</sup>

§ 129. **Trees on the sidewalk.**—There seems to be a difference in the effect in the trimming or cutting of trees which are growing in front of the premises of the abutter on the sidewalk, or between the sidewalk and the street, and those growing on the premises of the abutter but hanging over the sidewalk. The sidewalk and streets are for the benefit of public travel, and all obstructions thereon may be declared a nuisance and removed by abatement. In most cities and towns, there may be seen trees growing upon or on the outer edge of the sidewalk—the same having been planted either by the city or the abutter or vendor, and for the purpose of shade, ornament and health. The question may be asked: What interest has the abutter in these trees? His interest in the trees, whether they were planted by him on the sidewalk, or acquired by devolution of title to the adjacent property, is a qualified and limited ownership, subordinate to the public right to safe and convenient passage, and to the rights, powers and duties of the governing municipal body in the protection, promotion and establishing of every public use in and upon the streets in a city.<sup>185</sup> A question which might necessarily follow is this: Has the city such control over the streets as would enable it to grant to a telegraph, telephone, or electric company the power to cut or trim such trees without compensating the abutter? If the fee to the streets is in the city, it could grant this power, but should the fee be in the abutter, the city would have

<sup>183</sup> See *Russellville Home Tel. Co. v. Com.*, 109 S. W. 340, 33 Ky. Law Rep. 132.

<sup>184</sup> *Daily v. State*, 51 Ohio St. 348, 37 N. E. 710, 46 Am. St. Rep. 578, 24 L. R. A. 724.

<sup>185</sup> *Baker v. Town of Normal*, 81 Ill. 108.



no authority,<sup>186</sup> unless it were necessary and beneficial to the latter to grant such a power.<sup>187</sup> The abutter only grants to the public the right of easement and reserves to himself all other interest in the soil. So it follows that he is entitled to all that grows upon the easement such as trees and grasses, to the center of the way, and also to all minerals and other substances beneath the soil; yet in making the grant to the public it was understood that the easement would necessarily have to be put in and maintained in a passable condition. So, also, any obstruction which would interfere with travel or the convenience thereto might be abated; and where it is necessary to remove or trim these trees for public travel or for such secondary uses to which these streets might be put, the same may be done without compensating the abutting owner. It is presumed that he was amply compensated for these at the time the grant to the street was acquired. While the company would have to compensate these lot owners for cutting and trimming these trees, yet if in connection with these companies there is another contrivance, attached to the poles of the company—as a telegraph fire-alarm wire—and the same is specially for the benefit of the city, the owner would not be entitled to compensation for the injury to

<sup>186</sup> *Tissot v. Great Southern Tel., etc., Co.*, 39 La. Ann. 996, 3 South. 261, 4 Am. St. Rep. 248; *Bronson v. Albion Tel. Co.*, 67 Neb. 111, 93 N. W. 201, 60 L. R. A. 426, 2 Ann. Cas. 639; *Van Sicken v. Jamaica Electric Light Co.*, 45 App. Div. 1, 61 N. Y. Supp. 210, affirmed in 168 N. Y. 650, 61 N. E. 1135; *Memphis Bell Tel. Co. v. Hunt*, 16 Lea (Tenn.) 456, 1 S. W. 159, 57 Am. Rep. 237; *Gilchrist v. Dominion Tel. Co.*, 19 N. Bruns. 553. See *Southern Bell Tel. Co. v. Francis*, 109 Ala. 224, 19 South. 1, 55 Am. St. Rep. 930, 131 L. R. A. 193; *Wyant v. Central Tel. Co.*, 123 Mich. 51, 81 N. W. 928, 81 Am. St. Rep. 155, 47 L. R. A. 497.

*If the trees are not the owner's*, if he has planted them in front of his premises with the acquiescence of the city, he may recover for their wrongful or willful cutting. *Osborne v. Auburn Tel. Co.*, 111 App. Div. 702, 97 N. Y. Supp. 874.

<sup>187</sup> The authorities are conflicting. See *Norman, etc., Co. v. Bethurem*, 41 Okl. 735, 139 Pac. 830, 51 L. R. A. (N. S.) 1082; *Slabaugh v. Omaha, etc., P. Co.*, 87 Neb. 805, 128 N. W. 505, 30 L. R. A. (N. S.) 1084; *Bronson v. Albion Tel. Co.*, 67 Neb. 111, 93 N. W. 201, 60 L. R. A. 426, 2 Ann. Cas. 625. Some hold that the abutting owner is entitled to damages. *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453; *Bradley v. Southern New England Tel. Co.*, 66 Conn. 559, 34 Atl. 499, 32 L. R. A. 280; *Cumberland Tel., etc., Co. v. Cassidy*, 78 Miss. 666, 29 South. 762; *Cartwright v. Liberty Tel. Co.*, 205 Mo. 126, 103 S. W. 982, 12 L. R. A. (N. S.) 1125, 12 Ann. Cas. 249; *State v. Graeme*, 130 Mo. App. 138, 108 S. W. 1131; *McAntire v. Joplin Tel. Co.*, 75 Mo. App. 535; *Osborne v. Auburn Tel. Co.*, 111 App. Div. 702, 97 N. Y. Supp. 874; *Bronson v. Albion Tel. Co.*, 67 Neb. 111, 93 N. W. 201, 60 L. R. A. 426, 2 Ann. Cas. 625; *Marshall v. American Tel., etc., Co.*, 16 Pa. Super. Ct.

his said trees, caused by the construction of this fire-alarm wire,<sup>188</sup> for this is a secondary use to which the streets may be put and one contemplated at the time the grant was made.

615; *Boland v. Tel. Co.*, 161 Mich. 315, 126 N. W. 425. See *Daily v. State*, 51 Ohio St. 348, 37 N. E. 710, 46 Am. St. Rep. 578, 24 L. R. A. 724; *Tri-State Tel. Co. v. Cosgriff*, 19 N. D. 771, 124 N. W. 75, 26 L. R. A. (N. S.) 1171. Other courts hold that he is not entitled to damages. *Wyant v. Central Tel. Co.*, 123 Mich. 51, 81 N. W. 928, 81 Am. St. Rep. 155, 47 L. R. A. 497; *Southern Bell Tel. Co. v. Francis*, 109 Ala. 224, 19 South. 1, 55 Am. St. Rep. 930, 31 L. R. A. 193; *Southern Bell Tel., etc., Co. v. Constantine*, 61 Fed. 61, 9 C. C. A. 359. See, also, *West. U. Tel. Co. v. Rich*, 19 Kan. 517, 27 Am. Rep. 159; *Tri-State Tel. Co. v. Cosgriff*, *supra*, not entitled to damages for future value of trees.

<sup>188</sup> *Southern Bell Tel. Co. v. Francis*, 109 Ala. 224, 19 South. 1, 55 Am. St. Rep. 930, 31 L. R. A. 193.

## CHAPTER VI

## OVER PRIVATE PROPERTY.

- § 130. By consent.
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§ 130. By consent.—Where a telegraph, telephone, or electric company occupies the private property of an individual for the construction of a line of wires, there is no question that the landowner should be compensated for the use of his land.<sup>1</sup> There are

<sup>1</sup> *Daily v. State*, 51 Ohio St. 348, 37 N. E. 710, 24 L. R. A. 724, 46 Am. St. Rep. 578; *West. U. Tel. Co. v. Williams*, 86 Va. 696, 11 S. E. 106, 19 Am. St. Rep. 908, 8 L. R. A. 429, note; *Stowers v. Postal Tel., etc., Co.*, 68 Miss. 559, 9 South. 356, 12 L. R. A. 864, note, 24 Am. St. Rep. 290; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453; *McCormick v. Dist. of Columbia*, 4 Mackey (D. C.) 396, 54 Am. Rep. 290; *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 14; *Postal Tel. Cable Co. v. Eaton*, 170 Ill. 513, 49 N. E. 365, 62 Am. St. Rep. 390, 39 L. R. A. 722; *Magee v. Overshiner*, 150 Ind. 127, 49 N. E. 951, 40 L. R. A. 370, 65 Am. St. Rep. 358. This question is decided in *American Telephone, etc., Co. v. Pearce*, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200, where it is determined that a telegraph or telephone company is, with respect to the right to construct its lines over private property, just as much subject to the constitutional prohibition against taking private property for public use without just compensation as is a railway or any other corporation clothed with the power of taking private property for public use; and the averment that such company is proceeding, or threatens to proceed, to construct its line of poles or wires on and over the complainant's land without his leave or license, and without paying or tendering him compensation for the use of his land for this purpose, is sufficient to entitle him to an injunction. Under a license from a municipal corporation for the erection of a telephone line, or a fire-alarm telegraph, there is no authority to enter private property and cut off the limbs of trees, although they project over the line of the sidewalk on the street. *Tissot v. Great Southern Telegraph, etc.,*

two ways by which the company may legally acquire the right to occupy the lands of the individual: One is by an agreement entered into with the owner of the land, or one who has the right to manage and control it;<sup>2</sup> and the other is by a condemnation proceeding instituted by the company.<sup>3</sup> With a few exceptions, a landowner has the absolute power of making such disposition of his land as he may see fit. He may sell, rent, lease, mortgage, or make a grant or gift of it to any one, by any kind of a contract or agreement which he may in good faith voluntarily make. Therefore it necessarily follows that he may make any kind of an agreement with a telegraph, telephone, or electric company which the latter may accept for the construction of a line of wires upon and across his private property. He may sell, or give it a right of way; and in either instance the parties would be controlled by the contract or agreement made between them; and, in case the right is acquired by the means of purchase, the consideration for which may be in money value; or, in case of a telephone, it may be for the right to the use of a telephone for a period of time; or for other conveniences which the landowner may receive by reason of the line being on his premises. There are some inconveniences and liabilities attached to a company, where it enters upon the premises of an individual's property, by a mere parol license, in that the license is revocable at will;<sup>4</sup> and a transfer of the land is an implied revocation of it.<sup>5</sup> Poles and wires erected under an agreement with a landowner are subject to the lien of a prior mortgage, which included after-acquired property.<sup>6</sup>

**§ 131. By condemnation proceedings.**—The right of eminent domain may be exercised either directly by the agents of the government, or through the medium of corporate bodies, or individual enterprises,<sup>7</sup> by virtue of a delegation of the power. The right

Co., 39 La. Ann. 996, 3 South. 261, 4 Am. St. Rep. 248; *Memphis Bell Tel. Co. v. Hunt*, 16 Lea (Tenn.) 456, 1 S. W. 159, 57 Am. Rep. 237.

<sup>2</sup> *Maryland Tel., etc., Co. v. Ruth*, 106 Md. 644, 68 Atl. 358, 14 L. R. A. (N. S.) 427, 124 Am. St. Rep. 506, 14 Ann. Cas. 576, owner of the reversion of leasehold cannot give consent.

<sup>3</sup> *Wissler v. Yadkin, etc., P. Co.*, 158 N. C. 465, 74 S. E. 460, electric company.

<sup>4</sup> *Winter v. New York Tel. Co.*, 51 N. J. Law, 83, 16 Atl. 188.

<sup>5</sup> *Andrews v. Delhi, etc., Tel. Co.*, 66 App. Div. 616, 73 N. Y. Supp. 1129.

<sup>6</sup> *Monmouth County Electric Co. v. Central R. Co.* (N. J.) 54 Atl. 140. See § 24. See, also, *Central Tel. Co. v. Fisher*, 157 Iowa, 203, 138 N. W. 436, 42 L. R. A. (N. S.) 1021.

<sup>7</sup> *Crawford Elec. Co. v. Knox County Power Co.*, 110 Me. 285, 86 Atl. 119, Ann. Cas. 1914C, 933; *State v. Twin Village Water Co.*, 98 Me. 214, 56 Atl.



of eminent domain, however, can only be delegated for public purposes, as private property cannot be taken for private use.<sup>8</sup> The business of transmission of intelligence by electricity is one of a public character, to be exercised under the public control, in the same manner as the transportation of goods or passengers by railroad.<sup>9</sup> So a telegraph, telephone, or electric business is a public use authorizing the taking, under the power of eminent domain, of private property,<sup>10</sup> but such property cannot constitutionally be taken against the owner's consent without compensation,<sup>11</sup> although already devoted to a public use.<sup>12</sup> If an agreement with the landowner cannot be obtained, which is usually first required, resort must be had to the local statutes authorizing the right of condemnation. In some of the states there are general statutes existing providing for the acquisition of private property for public use on due compensation being given or tendered; and these statutes embrace, either expressly or by implication, the purposes of telegraph and telephone companies.<sup>13</sup> In other states there are

763; *Magee v. Overshiner*, 150 Ind. 127, 49 N. E. 951, 65 Am. St. Rep. 358, 40 L. R. A. 370; *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; *Haines v. Crosby*, 94 Me. 212, 47 Atl. 137.

<sup>8</sup> *Green v. Tel. Co.*, 136 N. C. 489, 49 S. E. 165, 67 L. R. A. 985, 103 Am. St. Rep. 955, 1 Ann. Cas. 349.

<sup>9</sup> *New Orleans, etc., R. Co. v. Southern, etc., Tel. Co.*, 53 Ala. 211; *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Trenton, etc., Tr. Co. v. American, etc., News Co.*, 43 N. J. Law, 381.

<sup>10</sup> *Prather v. West. U. Tel. Co.*, 89 Ind. 501; *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 120 Ala. 21, 24 South. 408; *Green v. Tel. Co.*, 136 N. C. 489, 49 S. E. 165, 67 L. R. A. 985, 103 Am. St. Rep. 955, 1 Ann. Cas. 349; *New Orleans, etc., R. Co. v. Southern, etc., Tel. Co.*, 53 Ala. 211; *Trenton, etc., Tr. Co. v. American, etc., News Co.*, 43 N. J. Law, 381; *York Tel. Co. v. Keeseey*, 5 Pa. Dist. R. 366; *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828; *Tel. Co. v. Hill*, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058; *Oury v. Goodwin*, 3 Ariz. 255, 266 Pac. 376; *Shuster v. Tel. Co.*, 34 Pa. Super. Ct. 513; *State v. Super. Ct.*, 64 Wash. 189, 116 Pac. 855; *Montana Postal Tel. Cable Co. v. Oregon Shore Line R. Co.* (D. C.) 114 Fed. 787; *Atty. Gen. v. Edison Tel. Co.*, 6 Q. B. D. 244, 50 L. J. Q. B. 145, 43 L. T. Rep. (N. S.) 697, 29 Wkly. Rep. 428. See *Union Pac. R. Co. v. Colorado Postal Tel., etc., Co.*, 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106, showing what is not a public use; *Wissler v. Yarkin, etc., P. Co.*, 158 N. C. 465, 74 S. E. 460, electric company.

<sup>11</sup> See § 52. See *Souther v. Northwestern Tel. Exch.*, 118 Minn. 102, 136 N. W. 571, Ann. Cas. 1913E, 472, 45 L. R. A. (N. S.) 601, must not use force in erecting its poles thereon.

<sup>12</sup> See § 62 et seq. See § 152.

<sup>13</sup> See *West. U. Tel. Co. v. Pennsylvania R. Co.*, 123 Fed. 33, 59 C. C. A. 113; *Ft. Worth, etc., R. Co. v. Southwestern Tel., etc., Co.*, 96 Tex. 160, 71 S. W.

statutes relating directly to telegraph and telephone companies;<sup>14</sup> and some of these expressly confer the power upon telegraph companies without mentioning the telephone, but the latter, being a new species of telegraph, presenting a change in detail, but not in substance, the right of eminent domain conferred by statutes on telegraph companies is applicable to telephone companies, although the latter is not mentioned in the statute.<sup>15</sup> This same rule would apply to the wireless telegraph or telephone company, where either desired to condemn private property for its poles, or towers. A company incorporated for the purpose of manufacturing and selling electricity for public and private lighting is not for a private use, and it could therefore exercise the right of eminent domain for the purpose of erecting and maintaining its plant, poles, and towers, and stringing its cables and wires, and could condemn private property for this purpose.<sup>16</sup> Every citizen holds his land subject

270, 60 L. R. A. 145; *Northwestern Tel. Exch. Co. v. Chicago, etc.*, R. Co., 76 Minn. 334, 79 N. W. 315; *State v. New Jersey Cent. Tel. Co.*, 53 N. J. Law, 341, 21 Atl. 460, 11 L. R. A. 664; *Gulf, etc., R. Co. v. Southwestern Tel., etc., Co.*, 18 Tex. Civ. App. 500, 45 S. W. 151; *Doty v. American Tel., etc., Co.*, 123 Tenn. 329, 130 S. W. 1053, Ann. Cas. 1912C, 167.

<sup>14</sup> See § 155.

<sup>15</sup> *American Tel., etc., Co. v. Smith*, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200; *Northwestern Tel. Exch. Co. v. Chicago, etc., R. Co.*, 76 Minn. 334, 79 N. W. 315; *Duke v. New Jersey Tel. Co.*, 53 N. J. Law, 341, 21 Atl. 460, 11 L. R. A. 664; *San Antonio, etc., R. Co. v. Southwestern Tel., etc., Co.* (Tex. Civ. App.) 56 S. W. 201; *Gulf, etc., R. Co. v. Southwestern Tel., etc., Co.*, 18 Tex. Civ. App. 500, 45 S. W. 151; *Cincinnati Inclined Plane R. Co. v. City, etc., Tel. Ass'n*, 48 Ohio St. 390, 27 N. E. 890, 29 Am. St. Rep. 559, 12 L. R. A. 534; *People's Tel., etc., Co. v. Berks, etc., Tr. Road*, 199 Pa. 411, 49 Atl. 284; *Texarkana v. Southwestern Tel., etc., Co.*, 48 Tex. Civ. App. 16, 106 S. W. 915; *Roberts v. Wisconsin Tel. Co.*, 77 Wis. 589, 46 N. W. 800, 20 Am. St. Rep. 143. *Contra, Home Tel. Co. v. Nashville*, 118 Tenn. 1, 101 S. W. 770, 11 Ann. Cas. 824. But see *Doty v. American Tel., etc., Co.*, 123 Tenn. 329, 130 S. W. 1053, Ann. Cas. 1912C, 167; *Sunset, etc., Co. v. Pomona (C. C.)* 164 Fed. 561, affirmed in 172 Fed. 829, 97 C. C. A. 251. See *Railroad, etc., Co. v. Tel., etc., Co.*, 88 Miss. 438, 41 South. 258, contrary holding; *Franklin v. Northwestern Tel. Co.*, 69 Iowa, 97, 28 N. W. 461; *San Antonio, etc., R. Co. v. Southwestern Tel., etc., Co.*, 93 Tex. 313, 55 S. W. 117, 77 Am. St. Rep. 884, 49 L. R. A. 459; *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828.

<sup>16</sup> *Goddard v. Chicago, etc., R. Co.*, 104 Ill. App. 533; *Goddard v. Chicago, etc., R. Co.*, 104 Ill. App. 526, affirmed in 202 Ill. 362, 66 N. E. 1066; *State v. Allen*, 178 Mo. 555, 77 S. W. 868; *Gulf Coast Ice, etc., Co. v. Bowers*, 80 Miss. 570, 32 South. 113; *Palmer v. Larchmont Electric Co.*, 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672, reversing 6 App. Div. 12, 39 N. Y. Supp. 522; *Tiffany v. U. S. Illuminating Co.*, 51 N. Y. Super. Ct. 280, affirming 67 How. Prac. (N. Y.) 73; *People v. Thompson*, 65 How. Prac. (N. Y.) 407; *Haverford Electric Light Co. v. Hart*, 13 Pa. Co. Ct. R. 369; *Callen v. Columbus Edison*

to this right; but it must be clearly understood that the easement should be acquired for a public use; and, should the company, attempting to exercise the right, construct the line for strictly a private use,<sup>17</sup> it may be enjoined by the landowner,<sup>18</sup> or otherwise it will be liable for an unlawful trespass.<sup>19</sup> The owner must also be compensated, for the easement, in accordance to the dam-

Electric Light Co., 66 Ohio St. 166, 64 N. E. 141, 58 L. R. A. 782; Light, etc., Co. v. Stacher, 13 Cal. App. 404, 109 Pac. 896; Nolan v. Power Co., 134 Ga. 201, 67 S. E. 656; Power Co. v. Waters, 19 Idaho, 595, 115 Pac. 682; Canal, etc., Co. v. Koochiching Co., 97 Minn. 429, 107 N. W. 405, 5 L. R. A. (N. S.) 638, 7 Ann. Cas. 1182; Canal, etc., Co. v. Pratt, 101 Minn. 197, 112 N. W. 395, 11 L. R. A. (N. S.) 105; Spratt v. Transmission Co., 37 Mont. 60, 94 Pac. 631; Light, etc., Co. v. Hobbs, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 531; McMillan v. Noyes, 75 N. H. 258, 72 Atl. 759; Matter of Power Co., 111 App. Div. 686, 97 N. Y. Supp. 853; Matter of Light, etc., Co., 49 Misc. Rep. 565, 99 N. Y. Supp. 109; Wissler v. Power Co., 158 N. C. 465, 74 S. E. 460; Power Co. v. Wissler, 160 N. C. 269, 76 S. E. 267, 43 L. R. A. (N. S.) 483, Ann. Cas. 1914C, 268; Tuttle v. Power, etc., Co., 31 Okl. 710, 122 Pac. 1102; Power Co. v. Webb, 123 Tenn. 584, 133 S. W. 1105; River Co. v. Paper Co., 83 Vt. 548, 77 Atl. 862; Miller v. Pulaski, 109 Va. 137, 63 S. E. 880, 22 L. R. A. (N. S.) 552; State v. Super. Ct., 35 Wash. 303, 77 Pac. 382; State v. Super. Ct., 52 Wash. 196, 100 Pac. 317, 21 L. R. A. (N. S.) 448; Hydro-Electric Co. v. Liston, 70 W. Va. 83, 73 S. E. 86, 40 L. R. A. (N. S.) 602; Walker v. Power Co., 160 Fed. 856, 87 C. C. A. 660, 19 L. R. A. (N. S.) 725; Postal Tel. Cable Co. v. Oregon Short Line R. Co. (C. C.) 114 Fed. 787. Compare, State v. Power Co., 39 Wash. 648, 82 Pac. 150, 2 L. R. A. (N. S.) 842, 4 Ann. Cas. 987; McMeekin v. Central Carolina Power Co., 80 S. C. 512, 61 S. E. 1020, 128 Am. St. Rep. 885; Avery v. Vermont Electric Co., 75 Vt. 235, 54 Atl. 179, 59 L. R. A. 817, 98 Am. St. Rep. 818. See Act of Congress May 14, 1896, c. 179, § 2, 29 Stat. 120; 31 Stat. 790; 36 Stat. 1253, public lands.

<sup>17</sup> Chesapeake, etc., Tel. Co. v. Manning, 186 U. S. 238, 22 Sup. Ct. 881, 46 L. Ed. 1144; Postal Tel. Cable Co. v. Chicago, etc., R. Co., 30 Ind. App. 654, 66 N. E. 919.

The right of eminent domain conferred on telegraph companies by the statutes of the state cannot be denied by defendant in a suit instituted for the condemnation of a right of way on the ground that it is only a pretended and not a real corporation. This question can only be raised by the state. Pacific Postal Tel. Cable Co. v. Irvine (C. C.) 49 Fed. 113. See Fallsburg Power, etc., Co. v. Alexander, 101 Va. 98, 43 S. E. 194, 61 L. R. A. 129, 99 Am. St. Rep. 855; Brown v. Gerald, 100 Me. 351, 61 Atl. 785, 70 L. R. A. 472, 109 Am. St. Rep. 526; Union Pacific R. Co. v. Colorado Postal Tel. Cable Co., 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106, holding not a public use; Jones v. North Georgia Elec. Co., 125 Ga. 618, 54 S. E. 85, 6 L. R. A. (N. S.) 122, 5 Ann. Cas. 526; State ex rel. Yakima Industrial Co. v. White River P. Co., 39 Wash. 648, 82 Pac. 150, 2 L. R. A. (N. S.) 842, 4 Ann. Cas. 987.

<sup>18</sup> See § 121 et seq. Doty v. American Tel., etc., Co., 123 Tenn. 329, 130 S. W. 1053, Ann. Cas. 1912C, 167. See Souther v. Northwestern Tel. Exch., 118 Minn. 102, 136 N. W. 571, Ann. Cas. 1913E, 472, 45 L. R. A. (N. S.) 601.

<sup>19</sup> Id.



ages sustained.<sup>20</sup> In the exercise of the power of eminent domain these companies have the right to condemn, cut, or remove trees near the right of way.<sup>21</sup> They may, in a proper manner, trim trees to obtain a free passage for their wires without first giving the abutting owner an opportunity to do such cutting, but the company must answer for any unnecessary, improper, or excessive cutting.<sup>22</sup>

§ 132. **General rule—conditions precedent.**—The general rule applicable in this connection, with respect to the conditions precedent to the right to condemn, the nature of the right and the procedure to be adopted are those governing condemnations generally, subject only to the modification which the inherent character of the structure under consideration demands.<sup>23</sup> And, while this subject could be more appropriately treated under the title of eminent domain, where it should be more thoroughly discussed, we shall nevertheless comment on the matter to some extent here, where it will be considered specifically with respect to the rights possessed by telegraph, telephone, and electric companies. Where these statutes have delegated to these companies the authority to exercise the power of eminent domain, they require of such companies certain precedent conditions before the right can be legally exercised; and it will be our purpose to relate these conditions.

§ 133. **Same continued—petition—contents.**—One of the conditions precedent to be performed by a telegraph, telephone, or electric company, before it can legally exercise the power of eminent domain, is that a petition be filed with the court of the county in

<sup>20</sup> § 142.

<sup>21</sup> *Power Co. v. Wissler*, 160 N. C. 269, 76 S. E. 267, 43 L. R. A. (N. S.) 483, Ann. Cas. 1914C, 268.

<sup>22</sup> *Wyant v. Central Tel. Co.*, 123 Mich. 51, 81 N. W. 928, 81 Am. St. Rep. 155, 47 L. R. A. 497; *Memphis Bell Tel. Co. v. Hunt*, 84 Tenn. 456, 1 S. W. 159, 57 Am. Rep. 237; *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *San Antonio, etc., R. Co. v. Southwestern Tel. Co.*, 93 Tex. 313, 55 S. W. 117, 77 Am. St. Rep. 884, 49 L. R. A. 459; *Darling v. Elec. Co.*, 74 N. H. 515, 69 Atl. 885.

<sup>23</sup> *Postal Tel. Cable Co. v. Oregon Short Line R. Co.* (C. C.) 104 Fed. 623; *Lockie v. Mut. U. Tel. Co.*, 103 Ill. 401; *Postal Tel. Cable Co. v. Morgan Louisiana R., etc., Co.*, 49 La. Ann. 58, 21 South. 183; *Louisville, etc., R. Co. v. Postal Tel. Cable Co.*, 68 Miss. 806, 10 South. 74; *Broome v. New York, etc., Tel. Co.*, 49 N. J. Law, 624, 9 Atl. 754; *Duke v. Central New Jersey Tel. Co.*, 53 N. J. Law, 341, 21 Atl. 460, 11 L. R. A. 664; *Coles v. Midland Tel., etc., Co.*, 67 N. J. Law, 490, 57 Atl. 448; *Nicoll v. New York, etc., Tel. Co.*, 62 N. J. Law, 733, 42 Atl. 583, 72 Am. St. Rep. 666; *Postal Tel. Cable Co. v. Norfolk, etc., R. Co.*, 87 Va. 349, 12 S. E. 613; *Doty v. American Tel., etc., Co.*, 123 Tenn. 329, 130 S. W. 1053, Ann. Cas. 1912C, 167.



or through which the line is to be constructed in which the location of the land is specified, setting forth the names of the petitioners, their residence and authority for exercising the power; the names of the owners of the lands over which the easement is sought, their residence and the interest which they have to the lands; a description of the location, termini and route of the line, and the description of the land and that part which the line is to traverse; it should give the size of the poles or towers to be used, their height, length of cross-arms and distance apart; it should ask that a notice be given and commissioners be appointed to assess the amount of damages to be awarded for such condemnation, and that the same be sworn to by the petitioners, acting in the capacity of its corporate authority. There might be mentioned other conditions to be alleged in the petition, before the power could be exercised; as, for instance, that the company has been unsuccessful in an attempt to acquire the easement by an agreement with the landowner; that the company has been legally incorporated; and that it is the most convenient and accessible land to be had by the company for the right of way. It must be in writing, and state that the taking is necessary for public use; but it is not essential in every instance to make all of such allegations, as the statute may not require such; and in fact the statutes of each state should be consulted before filing such petitions since there are different conditions required in the different states. While the petition is one of the conditions precedent to a company becoming empowered with the authority of condemning the lands for easements each of the conditions stated therein is as essential to be shown, before the right can be exercised as the petition itself.

§ 134. Same continued—name of petitioners—who may be.—Ordinarily it is necessary that the company be incorporated in order that it may have parties appointed who may have the authority to make a petition for such condemnation proceedings. It therefore follows that an unincorporated company, or one organized by individuals, for strictly private purposes, could not exercise the power of eminent domain.<sup>24</sup> We presume it is hardly necessary to discuss this requirement here, for this is a condition to be performed by all bodies aggregate before they can do any corporate acts; yet it is a condition precedent, nevertheless, and one to be performed before there can be parties to such a petition. The names and residence of such petitioners should be given in such a man-

<sup>24</sup> See §§ 67, 131.

ner as to show that they are acting for and under the authority of the company seeking the right of way. In other words, it must be clearly shown that it is the company which is seeking through these authorized representatives the right to exercise the power of eminent domain. It is not to be understood, however, that an individual cannot engage in the telegraph, telephone, or electric business;<sup>25</sup> for it has been uniformly held that in the absence of a statutory prohibition an individual may engage in the business of supplying any public utility, and if a franchise is essential, as where public streets are to be occupied, it may be granted as well to an individual as to a private corporation.<sup>26</sup>

§ 135. Same continued—name of landowners—their residence and interest in lands—several tracts or interests.—Another condition to be respected by the company before the power of eminent domain can be exercised is that the names of the landowners, their residence, and the interest which they claim to the land shall be given in the petition. The court should have some knowledge of these facts in order that it may know the party to whom notice should be given of the condemnation proceedings, and to whom damages should be awarded. In many instances the land through which the right of way is sought is held in trust for another, or is managed and under the control of a guardian, executor or ad-

<sup>25</sup> *Crawford Elec. Co. v. Knox County Power Co.*, 110 Me. 285, 86 Atl. 119, Ann. Cas. 1914C, 933; *State v. Twin Village Water Co.*, 98 Me. 214, 56 Atl. 763; *Magee v. Overshiner*, 150 Ind. 127, 49 N. E. 951, 65 Am. St. Rep. 358, 40 L. R. A. 370; *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; *Haines v. Crosby*, 94 Me. 212, 47 Atl. 137; *Bishop v. Riddle*, 51 Tex. Civ. App. 317, 113 S. W. 151. Likewise it has been held that the word "company" in an act authorizing the construction of a telegraph or telephone line includes an individual. *Lowther v. Bridgeman*, 57 W. Va. 306, 50 S. E. 410. See § 266.

<sup>26</sup> *Moran v. Ross*, 79 Cal. 159, 21 Pac. 547; *Lawrence v. Morgan Louisiana, etc.*, R. Co., 39 La. Ann. 427, 2 South. 69, 4 Am. St. Rep. 265; *People v. Erie R. Co.*, 198 N. Y. 369, 91 N. E. 849, 19 Ann. Cas. 811, 139 Am. St. Rep. 828, 29 L. R. A. (N. S.) 240; *Beveridge v. Lewis*, 137 Cal. 619, 67 Pac. 1040, 70 Pac. 1083, 92 Am. St. Rep. 188, 59 L. R. A. 581; *Memphis, etc., R. Co. v. Railroad Com.*, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. Ed. 837; *O'Neil v. Lamb*, 53 Iowa, 725, 6 N. W. 59; *McKee v. Grand Rapids, etc., S. R. Co.*, 41 Mich. 274, 1 N. W. 873, 50 N. W. 469; *Nash v. Lowry*, 37 Minn. 261, 33 N. W. 787; *Phoenix v. Gannon*, 195 N. Y. 471, 88 N. E. 1066; *Beaumont Trac. Co. v. State*, 57 Tex. Civ. App. 605, 122 S. W. 615; *Henderson v. Ogden City R. Co.*, 7 Utah, 199, 26 Pac. 286; *Farmers' Loan, etc., Co. v. Galesburg*, 133 U. S. 156, 10 Sup. Ct. 316, 33 L. Ed. 576; *Barre v. Perry*, 82 Vt. 301, 73 Atl. 574; *Freeport Waterworks Co. v. Prager*, 3 Pa. Co. Ct. R. 371.

ministrator. When such is the case, the name of the trustee, guardian, executor or administrator should be given in the petition, in his fiduciary capacity.<sup>27</sup> It often occurs in the construction of a line of wire that the land over which the right of way is sought belongs to different owners who have common interest therein, or it is in several pieces and belonging to the same owner; the question which presents itself is, can this land, in such instances, be condemned in one proceeding? It has been held that the same can be done,<sup>28</sup> and we are inclined to think that this is a good holding, because much trouble and expense which would otherwise be incurred can be avoided by bringing several suits in one. While the duties of the commissioners, in ascertaining the amount of damages to which each owner would be entitled or the amount of damages incurred on each parcel of land, would be the same, yet the result of the finding or the amount of damages assessed might be quite different, so it would be an easy matter for them to arrive at a proper and correct result in one proceeding. Therefore, where possible, this should be done.

§ 136. **Same continued—description of route.**—Another essential part of the petition is that the route of the line should be sufficiently described. As in all other proceedings to condemn private property for public use, a clear and distinct description of the land over which the right of way is to be laid out should be described so clearly and accurately as to give any one a sufficient knowledge as to its location. The beginning, ending and intermediate points of the line must be given. The statutes generally provide the manner in which the description of the route should be given; and when they do, they must be closely complied with and contain such a description of the land as that its metes and bounds may be ascertained from the public records.<sup>29</sup>

<sup>27</sup> *Western, etc., R. Co. v. West. U. Tel. Co.*, 138 Ga. 420, 75 S. E. 471, 42 L. R. A. (N. S.) 225, when state should be made party, interest involved.

<sup>28</sup> *Duke v. Central New Jersey Tel. Co.*, 53 N. J. Law, 341, 21 Atl. 460, 11 L. R. A. 664. See § 164.

<sup>29</sup> *Ames v. Union County*, 17 Or. 600, 22 Pac. 118. In a certain case a map containing the description of the route was filed with the petition. The location of each pole was indicated on the map in small circles of black ink, numbered in red ink from 1 to 27, which was the total number of poles to be erected. The distance between said poles was indicated by figures in black ink between the circles. The distance of the poles from the fence on the southerly side of the highway was indicated by figures in black ink beside each circle. The distance of the poles from the fence on the northerly side of the highway was indicated by figures on or about the center of the highway. It was held that the description conformed to all the requirements.



§ 137. **Same continued—description of poles.**—The petition should also give the size of the poles or towers to be used, their height, length of cross-arms, and distance apart. A map or drawing showing the general course of the line and the distance apart the poles or towers are located should be given to aid in the description of the route, and when such is filed with the petition it becomes a part of same; provided sufficient meaning is given to show that it is a part of the petition.<sup>30</sup> The object in giving a clear description of the route and the size and height of the towers or poles and their distance apart and the length of the cross-arms is to provide a means by which the amount of damages to be awarded may be assessed. The greater the space the line occupies the greater should be the damages awarded. In many instances, where these companies construct line of wires across private property, the owner thereof is actually deprived of only such lands as that occupied by the poles or towers; and when this is the case, the damages would seem to be small; and yet the fact must not be lost sight of that the company still retains an easement to the land, over which the wires are strung; but it is held principally for the purpose of entering thereon to maintain and make repairs on the lines. If the cross-arms are near the surface and heavily strung with wires, the landowner would be deprived of more of his land, and of course he would be entitled to a greater compensation.

§ 138. **Same continued—notice—appointment of commissioners.**—The petition should pray for notice to be given to the owner of the land, over which the easement is sought, or to the party who has this in charge, and to those who have any interest therein, in order that they may appear in court to contest the petition, or to see that proper steps have been pursued for condemning the land, or to contest the results of the commissioners. The same notice is required to be given in a case of this kind as that required in all other chancery or equity court proceedings. The petition also should pray that a commission be appointed by the court, whose duties shall be to investigate the route and determine the amount of damages to be awarded; but, in order to be better posted with respect to the duties of these commissioners, it would be well for the

Duke v. New Jersey Central Tel. Co., 53 N. J. Law, 341, 21 Atl. 460, 11 L. R. A. 664; Morrison v. American, etc., Tel. Co., 115 App. Div. 744, 101 N. Y. Supp. 140.

<sup>30</sup> Duke v. New Jersey Central Tel. Co., 53 N. J. Law, 341, 21 Atl. 460, 11 L. R. A. 664.



reader to consult the statutes of his state, as their duties are regulated thereby.<sup>31</sup>

§ 139. **Same continued—sworn to by officers.**—Most of the statutes provide that the petition should be sworn to by some one having authority to act for the corporation. In the organization of all corporations, certain corporate duties are to be performed by officers empowered to do such acts. It is generally provided in the articles of incorporation that certain officers, such as the board of directors or the president or attorney, shall have the power to bring suit for the company; and when this is the case, and it is necessary for the petition to be sworn to, only such officers or parties can swear to the petition. The form of the signature would be in the name of the corporation, by said officers or attorney.

§ 140. **Same continued—failure to acquire land by agreement with landowner.**—Many of the statutes make it incumbent upon the company to first make an attempt to acquire the right of way by an agreement with the landowner, before they resort to a condemnation proceeding.<sup>32</sup> The object of such a provision is to avoid litigation, and to expedite the construction of the line. The landowner and the company might, and generally do, arrive at a better understanding by these mutual agreements than they would under a condemnation proceeding; so to require the company to first make an attempt to acquire the right of way by these agreements would often avoid endless and constant expense and needless litigation. Where statutes require these steps, it is necessary that the petition should allege the fact that an unsuccessful attempt had been made to acquire the right of way by an agreement with the landowner, or the party having the control over the land and the person who would be a necessary party in a condemnation proceeding.

§ 141. **The interest acquired.**—When these companies construct their line of wires upon the property of private persons, they do not acquire a fee to the land, but only an easement to the right of way: <sup>33</sup> the landowner retains the right to use the land for any purpose he may see fit; provided the same does not conflict with

<sup>31</sup> See § 155.

<sup>32</sup> Doty v. American Tel., etc., Co., 123 Tenn. 329, 130 S. W. 1053, Ann. Cas. 1912C, 167. See § 67. See, also, chapter vii.

<sup>33</sup> See § 51. See, also, Union Pacific R. Co. v. Colorado Postal Tel. Cable Co., 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106.

or defeat the rights of these companies.<sup>34</sup> It is the general rule that where these easements are over other rights of way—as railroad rights of way—the company acquires no interest in the land between the poles and that over which its wires are stretched, more than to go thereon for the purpose of maintaining and repairing the line;<sup>35</sup> the owners of the first original easement may use this space for any purpose they may see fit. We see no reason why the same rule may not be applied to companies whose lines are across private property. It is true that the owner of the land should not use this strip of land in a manner that would obstruct its use, or prevent the employes of the company from entering thereon, for the purpose of the repairing and maintaining the line. He may cultivate the soil, or use it for any other purpose which would not interfere with the use of the wires; but should he cultivate or use the land for other purposes, it is done with the understanding that the company's employes may go thereon for the purpose of maintaining the lines without being guilty of trespass. Of course these employes could not enter upon and trample over any space of land they may see fit; but the width of this space should be reasonable.<sup>36</sup> The landowner is not under any obligation to keep up or protect this strip; so, where he abandons it, or leaves it unused, or uncultivated, the company can look to him for no protection over it. If it deteriorates in value or becomes worthless by his failure to keep it up, he is the loser, and the company cannot look to him for any assistance. It has been held that

<sup>34</sup> The statute does not designate the width of the strip of land that may be condemned for telegraph purposes, but only authorizes such companies to acquire such an amount of land as may be necessary, and where only one line of poles is specified in the petition, and where the evidence does not show that half a rod in width is an unreasonable amount of land, the judgment condemning that much of the land will be sustained, and will be construed to authorize the erection of but one set of poles. *Lockie v. Mutual Union Tel. Co.*, 103 Ill. 401; *Union Pac. R. Co. v. Colorado Postal Tel. Co.*, 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106, where it was further held that a strip of land half a rod in width was not too much, and that the landowner was not bound to fence his land from this strip.

<sup>35</sup> *St. Louis, etc., R. Co. v. Postal Tel. Co.*, 173 Ill. 508, 51 N. E. 382; *Chicago, etc., R. Co. v. Chicago*, 149 Ill. 457, 37 N. E. 78, and *Id.*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 76 Miss. 731, 26 South. 370, 45 L. R. A. 223; § 137.

<sup>36</sup> *Duke v. New Jersey Tel. Co.*, 53 N. J. Law, 341, 21 Atl. 460, 11 L. R. A. 664.

the landowner was not bound to fence his land from this strip, but that it may be left unused or unconnected therefrom.<sup>37</sup>

§ 142. **Measure of damages.**—It is generally very difficult to determine the exact amount of damages which should be awarded to the landowner for the right of way for a telegraph or a telephone company. He is actually deprived of only the land which the poles occupy, and may cultivate that lying between these; for this reason, the damages should be small. It has been held that the landowner is entitled to compensation where the wires are merely strung across his soil, although there is no actual occupation of the land.<sup>38</sup> It may be questioned whether or not the courts would recognize such an injury.<sup>39</sup> It appears to us that the injury to the soil is so slight that it would be a case for the application of the rule, *De minimis lex non curat*. Of course, if the wires were strung so low or near to the land as to interfere with the use of this space, the question would be quite different. In such instances, the landowner would be entitled to the value of the use of this space, of which he is deprived; but, as a general rule, the parties are not confronted with questions of this nature as the wires are almost always strung sufficiently high above the surface of the soil as to give ample room to the owner thereof to use the intervening space. In other words, the owner of the space between the poles and that over which the wires are strung is not deprived of its use; then the question is, What amount of damages would he be entitled to? The rule laid down by the courts for the measurement of damages to railroads for the construction of these lines upon their rights of way is that the measure of damages suffered by the railroad is not the value of the land embraced within the right of way between the poles and under the wires; but the damages is the extent to which the value of the use of such space by the railroad company is diminished by the use of the same by the telegraph company for its purposes.<sup>40</sup> This rule may be a means of ascertaining the measure of damages for the right of way of a telegraph

<sup>37</sup> Union Pac. R. Co. v. Colo. Postal Tel. Cable Co., 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106; Lockie v. Mut. Union Tel. Co., 103 Ill. 401.

<sup>38</sup> 28 Am. Law Reg. 69; Pollock on Torts, 281.

<sup>39</sup> Roake v. American Tel., etc., Co., 41 N. J. Eq. 35, 2 Atl. 618.

<sup>40</sup> St. Louis, etc., R. Co. v. Postal Tel. Co., 173 Ill. 508, 51 N. E. 382; Chicago, etc., R. Co. v. Chicago, 149 Ill. 457, 37 N. E. 78, and Id., 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979.

Again the court says: "The spaces over which the wires are strung from pole to pole are not taken by the telegraph company. Such damage as the construction and operation of the telegraph line causes to the spaces between



or telephone company across private property. As, for instance, the owner of the land is not to be compensated for the value of the space of land between the poles and that occupied by the said poles; but the damages to which he should be entitled is the extent to which the value of the use of the land occupied by the poles—and the spaces between them—is diminished by the use of the same by these companies.<sup>41</sup> In fact, the space between the poles is diminished approximately to nothing, and for which the damages should be small; yet, on account of the maxim, *Cujus est solum, ejus est usque ad cælum*, he should be entitled to something. There is no question that he is entitled to compensation for the use of the ground upon which the poles are erected; this is to be regulated by the size, number of poles, and the value of the ground taken.<sup>42</sup>

§ 143. **Same—electric companies.**—The same rule given in the preceding paragraph may apply to electric companies as to the measure of damages to be awarded to a private individual for the use of his property.<sup>43</sup> However, there may be more space taken

the poles the appellants are entitled to recover. The telegraph company does not acquire by the judgment of condemnation the fee to any portion of the right of way. Any construction which holds that it does acquire the fee is not sanctioned by the language of the act in relation to telegraph companies. The act does not confer the right to use the land condemned for any other purpose than for telegraph purposes. The company cannot take possession of it or use it for any other purpose than to erect telegraph poles, and to suspend wires upon them, and to maintain and repair the same. The company will have the right to enter upon that portion of the right of way which is between the telegraph poles and under its wires for the purpose of repairing its lines. But the telegraph company acquires no right to exclude the railroad company from the use of the land. The ownership of the railroad company remains as it was before, while the telegraph company merely acquires an easement upon what it condemns for the purpose of entering thereon in order to erect and repair the line." *St. Louis & C. R. Co. v. Postal Tel. Co.* (1898), 173 Ill. 508, 51 N. E. 382. See § 177 et seq.

<sup>41</sup> *Illinois Tel. News Co. v. Meine*, 242 Ill. 568, 90 N. E. 230, 26 L. R. A. (N. S.) 189. In *Postal Tel. Cable Co. v. Peyton*, 124 Ga. 746, 52 S. E. 803, 3 L. R. A. (N. S.) 333, it was held in assessing damages compensation may be awarded both for the land actually taken as well as for all consequential damages arising from the erection and maintenance of poles, wires, or other fixtures; but, before a recovery of such damages, proof must be adduced disclosing the nature and extent thereof, and furnishing data from which a reasonable and proper estimate of the amount of compensation to which the landowner is entitled may be made. See *Mutual U. Tel. Co. v. Katkamp*, 103 Ill. 420. See, also, § 119 et seq.

<sup>42</sup> *Morrison v. American, etc., Tel. Co.*, 115 App. Div. 744, 101 N. Y. Supp. 140.

<sup>43</sup> *Power plant* as damages, see *Townsend v. Light Co.*, 105 Va. 22, 52 S. E.



for the towers of the electric company than would be necessary for the poles of a telegraph or telephone company. Furthermore, the wires or cables for the electric company may, on account of their dangerous character, necessitate more, if not all, of the space between the towers; and in either instance the amount of damages would be greater than that required of telegraph and telephone companies, and so the manner in arriving at the amount therefor would be more likened to that acquired by a railroad company.

§ 144. **Same—Wireless telegraph companies.**—There is no doubt that wireless telegraph and telephone companies may condemn private property for their stations, towers, etc., provided a sufficient consideration be paid to the owner of the property thus condemned. But the difficult question, and one which will eventually present itself for solution, is whether these companies can transmit their wireless messages through the air and over and above an individual's private property without compensating him therefor? Under the maxim, *Cujus est solum, ejus est usque ad cælum*, would he not be entitled to some consideration? However, so far as this question is concerned, it might be a proper time and place for the application of the rule, *De minimis lex non curat*. But, nevertheless, would not these companies, in the exercise of this assumed right, be guilty of trespassing? Then, if this be true, would not the act of Congress<sup>44</sup> relating to "Secrecy of Messages" be unenforceable against an amateur or an individual owning a private station located on his private property where he received the messages when passing thereover?

970, 4 L. R. A. (N. S.) 87, 115 Am. St. Rep. 842, 8 Ann. Cas. 558; *Sherman, etc., Elec. Co. v. Belden*, 103 Tex. 59, 123 S. W. 119, 27 L. R. A. (N. S.) 237.

<sup>44</sup> See act given in note 233, c. 9.

## CHAPTER VII

## ON RAILROAD RIGHT OF WAY

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§ 145. **Right acquired by act of Congress.**—By act <sup>1</sup> of Congress, “Any telegraph company now organized, or which may hereafter be organized under the laws of any state of the Union, shall have the right to construct, maintain and operate lines of telegraph \* \* \* over and along any of the military or post roads of the United States, which have been or may hereafter be declared such by act of Congress, \* \* \* provided said lines shall not be so constructed as to interfere with the travel,” on such roads; and provided also “that, before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file its written acceptance with the postmaster general of the restrictions and obligations required by this act.” Congress in 1872 declared all the roads in the country which are now or may hereafter be in operation post roads.<sup>2</sup> Statutes have been enacted in most of the states which grant to telegraph and telephone companies similar rights; but these statutes are subordinate to said acts;<sup>3</sup> however, they may be resorted to for condemnation proceedings, since the same is not provided for in the former acts.<sup>4</sup> Therefore it is seen that a part of an easement which has already been granted for a public enterprise may afterwards be condemned for another easement which is to be used for another public purpose.<sup>5</sup> This act of Congress does not give these companies the right to construct a line of wires upon the right of way of a railroad company without first obtaining the consent of the railroad,<sup>6</sup> or making a contract with the original landowner,<sup>7</sup> or condemning the right of way.<sup>8</sup>

§ 146. **Additional servitude.**—When these companies have acquired the right to construct a line of wires along and upon the right of way of a railroad company, the natural inquiry is whether

<sup>1</sup> Act July 24, 1866, c. 230, 14 Stat. 221 (Comp. St. 1913, §§ 10072-10077). See § 55 et seq.

<sup>2</sup> See § 57.

<sup>3</sup> Postal Tel. Cable Co. v. Morgan's Louisiana, etc., R. Co., 49 La. Ann. 58, 21 South. 183. See § 60 et seq.

<sup>4</sup> See Postal Tel. Cable Co. v. Morgan's Louisiana, etc., R. Co., 49 La. Ann. 58, 21 South. 183. See § 69.

<sup>5</sup> See § 155.

<sup>6</sup> See §§ 67, 140, 152.

<sup>7</sup> See § 155.

<sup>8</sup> West. U. Tel. Co. v. Ann Arbor R. Co., 90 Fed. 379, 33 C. C. A. 113; Postal Tel. Cable Co. v. Southern R. Co. (C. C.) 89 Fed. 190; Postal Tel. Cable Co. v. Norfolk, etc., R. Co., 88 Va. 920, 14 S. E. 803. See §§ 67, 140. See Western, etc., R. Co. v. West. U. Tel. Co., 138 Ga. 420, 75 S. E. 471, 42 L. R. A. (N. S.) 225.

or not it is an additional servitude to the property; if so, who are entitled to compensation, and how much? The general rule is that the construction of a telegraph or telephone line along and upon the right of way of a railroad—unless the same is constructed by the latter in good faith, and for its own benefit—is an additional burden to the easement, for which the owner of the fee, and also the first and original owner of the easement, shall be compensated.<sup>9</sup> In many cases the fee in the right of way remains in the original landowner, while there is merely an easement granted to the railroad which will revert to the former on the relinquishment of the easement. Therefore, when this is the case, the owner of the land over which the line is to be built should always be compensated for the additional burden;<sup>10</sup> and yet it is not meant by this that the railroad is prevented from also recovering from these companies compensation for the use of the roadbed.<sup>11</sup> The right of ways granted to railroad companies are similar to the license granted by an abutting street owner to the use of the land on which the street is constructed; and as has been seen, the owner should receive additional compensation for all additional burdens placed on the street.<sup>12</sup> In some instances the railroad company acquires the fee to the easement: and, when such is the case, the land acquired in such grant becomes its private property just the same as land acquired by any

<sup>9</sup> *West. U. Tel. Co. v. American U. Tel. Co.*, 9 Biss. 72, Fed. Cas. No. 17,444; *American Tel., etc., Co. v. Pearce*, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200, note; *Phillips v. Postal Tel. Cable Co.*, 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868; *New Orleans, etc., R. Co. v. Southern, etc., Tel. Co.*, 53 Ala. 211; *Pensacola Tel. Co. v. West. U. Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708; *Southwestern R. Co. v. Southern, etc., Tel. Co.*, 46 Ga. 43, 12 Am. Rep. 585; *Montana Postal Tel. Cable Co. v. Oregon Short Line R. Co.* (C. C.) 114 Fed. 787; *Atlantic, etc., Tel. Co. v. Chicago, etc., R. Co.*, 2 Fed. Cas. No. 632, 6 Biss. 158; *R. Co. v. Tel. Co.*, 106 Me. 363, 76 Atl. 885, 29 L. R. A. (N. S.) 703, 20 Ann. Cas. 721. See, also, *West. U. Tel. Co. v. American Tel. Co.*, 29 Fed. Cas. No. 17,444, 9 Biss. 72. See § 62 et seq. See § 102 et seq. See § 142. See *Hodges v. West. U. Tel. Co.*, 133 N. C. 225, 45 S. E. 572; *West. U. Tel. Co. v. Rich*, 19 Kan. 517, 27 Am. Rep. 159; *St. Louis, etc., R. Co. v. Bell Tel. Co.*, 134 Mo. App. 406, 114 S. W. 586; *West. U. Tel. Co. v. Nashville, etc., R. Co.*, 133 Tenn. 691, 182 S. W. 254.

<sup>10</sup> *Prather v. Jeffersonville, etc., R. Co.*, 52 Ind. 16; *American Tel., etc., Co. v. Pearce*, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200; *Hodges v. West. U. Tel. Co.*, 133 N. C. 225, 45 S. E. 572; *Phillips v. Postal Tel. Cable Co.*, 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868; *Kansas, etc., R. Co. v. Le Flore*, 49 Fed. 119, 1 C. C. A. 192, reversing (C. C.) 46 Fed. 546; *Kansas, etc., R. Co. v. Payne*, 49 Fed. 114, 1 C. C. A. 183. See §§ 64, 147.

<sup>11</sup> See § 62 et seq.; § 152. See cases cited in note 9, upholding this proposition.

<sup>12</sup> See § 108 et seq.



individual; and it has the same interest in and can dispose of it just the same as any individual. It would be unconstitutional to permit a telegraph or telephone company to condemn the right of way of a railroad company, when the fee was in the latter, or to use its premises for a line of wires without first compensating the railroad company, since it would be taking private property without due compensation.<sup>13</sup>

§ 147. **Subsequent purchaser may recover.**—It is not necessary that the fee in the land over which the right of way is laid out should be in the original landowner at the time the additional compensation is demanded, but a subsequent purchaser may maintain an action for damages;<sup>14</sup> however, neither the original nor subsequent owners have any right to an accounting for the rents and profits received from the telegraph or telephone company, under its contract with the railroad.<sup>15</sup>

§ 148. **When for benefit to railroad.**—There is an apparent exception to the general rule that the original landowner, when the fee is in him, shall be additionally compensated for the construction of a telegraph or telephone line along the right of way of a railroad. Thus, he would not be entitled to further compensation if the line is constructed by the railroad, in good faith, for its own use, and when it is reasonably necessary for its own use.<sup>16</sup> A telegraph or telephone line if not indispensable to a railroad company tends so much to facilitate its business that it has a right to build such a line and to use its right of way therefor;<sup>17</sup> and it may remove all obstructions thereon for the purpose of constructing the same. Although it may have but an easement in the land and that easement limited to its use for railroad purposes, yet a telegraph or telephone is so convenient, if not indispensable to the business, that it may cut down every tree and bush on the right of way, if necessary for the most efficient use of a line built by it over and upon such right of way, just as it may dig away a hill or fill up a ravine for the sake of a water tank or a station house.<sup>18</sup>

<sup>13</sup> *Southwestern R. Co. v. Southern, etc., Tel. Co.*, 46 Ga. 43, 12 Am. Rep. 585; *Canadian, etc., R. Co. v. Mooseland Tel. Co.*, 106 Me. 363, 76 Atl. 885, 29 L. R. A. (N. S.) 703; *Atlantic, etc., Tel. Co. v. Chicago, etc., R. Co.*, 2 Fed. Cas. No. 632.

<sup>14</sup> *Phillips v. Postal Tel. Cable Co.*, 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868.

<sup>15</sup> *Chicago, etc., R. Co. v. Snyder*, 120 Iowa, 532, 95 N. W. 183.

<sup>16</sup> See § 149.

<sup>17</sup> *United States v. West. U. Tel. Co. (C. C.)* 50 Fed. 28; *Id.*, 160 U. S. 53, 16 Sup. Ct. 210, 40 L. Ed. 337.

<sup>18</sup> *West. U. Tel. Co. v. Rich*, 19 Kan. 517, 27 Am. Rep. 159; *Southwestern R.*

§ 149. **Same continued—no additional burden.**—When a telegraph line is constructed by a railroad company upon its roadbed for its own use, there is no additional servitude placed thereon for which the landowner may recover additional damages, since it is merely a legitimate development of the easement originally acquired.<sup>19</sup> If the line, however, is not constructed for such a purpose, and the fee is in the abutting property owner, it will be a new servitude, putting an additional burden on the land for which the original owner of the land would be entitled to compensation.<sup>20</sup> Such use is presumed to have been contemplated in the original condemnation; and the damages resulting therefrom are part of the damages included in the assessment therefor. In other words,

*Co. v. Southern, etc., Tel. Co.*, 46 Ga. 43, 12 Am. Rep. 585; *St. Jos. & D. C. R. Co. v. Dryden*, 11 Kan. 186.

<sup>19</sup> *West. U. Tel. Co. v. Rich*, 19 Kan. 519, 27 Am. Rep. 159; *American Tel. Co. v. Pearce*, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200, note; *Adams v. Louisville, etc., R. Co.* (Miss.) 13 South. 932; *Taggart v. Newport St. R. Co.*, 16 R. I. 668; *Hodges v. West. U. Tel. Co.*, 133 N. C. 225, 45 S. E. 572.

<sup>20</sup> An abutting property owner of the fee of a railroad right of way may enjoin a telegraph and telephone company from erecting its lines on such right of way, even with the consent of the railroad company. Such right must first be condemned, and a condemnation statute which leaves the property owner to an action at law for his damages is contrary to the constitution of Maryland. The Post Roads Act of Congress gives the telegraph company no right to build such line, unless the right of way is first acquired by purchase or condemnation. *American Tel. Co. v. Pearce*, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200, note; *Phillips v. Postal Tel. Cable Co.*, 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868. A landowner who has granted a right of way to a railroad may collect damages from a telegraph company for erecting a telegraph line for commercial purposes on the railroad right of way. *Hodges v. West. U. Tel. Co.*, 133 N. C. 225, 45 S. E. 572. Where a railroad grants to a telegraph company a right of way on the railroad right of way the owner of the fee may maintain trespass. *Pitcock v. Central, etc., Tel. Co.*, 31 Pa. Super. Ct. R. 589. Where the employes of a telegraph company having a telegraph line on the railroad adjacent to the roadbed cut and destroy the property owner's fence in several places unnecessarily, he may recover exemplary damages. *West. U. Tel. Co. v. Dickens*, 148 Ala. 480, 41 South. 469. Even though a telegraph company constructs its line on a railroad right of way without condemning the right to do so as against the owner of the fee, yet the court will not give judgment of ejectment provided the company pay an amount equivalent to what the damages would have been on condemnation. *Fuselier v. Great, etc., Tel. Co.*, 50 La. Ann. 799, 24 South. 274. See *Spokane v. Colby*, 16 Wash. 610, 48 Pac. 248, holding that, where a city has condemned private property for pipes for its waterworks, it cannot construct a line of telephone over the same property, between the station and office, without paying for the additional burden. See *West. U. Tel. Co. v. Rich*, 19 Kan. 517, 27 Am. Rep. 159. See § 146, and cases cited in note 9 thereunder.

the railroad company may use its right of way, not merely for its track, but for any other building or erection which reasonably tends to facilitate its business of transporting freight and passengers; and, by such use, it in no manner transcends the purposes and extent of the easement, or exposes itself to any claim for additional damages to the original landowner.<sup>21</sup>

§ 150. **Same continued—must be in good faith.**—In order to avoid compensating the landowner again for the use of telegraph or telephone lines upon the right of way of the railroad, the same must have been constructed by the railroad, in good faith, for its own use. If it is constructed by any company other than the railroad, but the latter is to use it for the business of operating trains and is to pay the telegraph company rental for such use, or if it is to give the telegraph company the compensation which the former would be entitled to receive for the use of the right of way by the latter, or if it enters into any kind of an agreement with the telegraph or telephone company whereby the railroad company is merely to use the wires of the former in the manipulation of the trains and other business necessary for the carrying out of the public and corporate duties, and not to be an owner in any manner of the lines,<sup>22</sup> the owner of the fee would be entitled to additional compensation for the use of his land.<sup>23</sup> Should, however, the line be built jointly by the railroad and telegraph companies, or should it be constructed by these two companies as partners—and, in either instance, it is understood that the railroad company is to use the wires for its corporate purposes—the landowner would not be entitled to additional compensation from either of these companies.<sup>24</sup> If the railroad company could build by itself without liability, it would not assume any liability by building with another. Whatever it could do and would have done for its own use and benefit, and was so done, would be, so far as the landowner is concerned, *damnum absque injuria*, no matter who bore the expense; or, perhaps, more correctly speaking, it would be damages already

<sup>21</sup> West. U. Tel. Co. v. Rich, 19 Kan. 517, 27 Am. Rep. 159.

<sup>22</sup> See West. U. Tel. Co. v. West., etc., R. Co., 91 U. S. 283, 23 L. Ed. 350. The telegraph company contracted with a railroad corporation to put up a special wire for the exclusive use of the railroad, and to connect it with all the offices along the route. It was held that this contract did not amount to a sale of the wire to the railroad company, and a lessee of the road would have no right to the wire other than to use it in its telegraphic service.

<sup>23</sup> American Tel., etc., Co. v. Pearce, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200, note.

<sup>24</sup> West. U. Tel. Co. v. Rich, 19 Kan. 517, 27 Am. Rep. 159.



paid for.<sup>25</sup> The telegraph or telephone line may have been originally constructed by the railroad company for its own use but upon a transfer of such a line by the railroad company to a telegraph or telephone company the owner of the fee may claim compensation.<sup>26</sup>

§ 151. **Same continued—not taxable.**—Telegraph and telephone companies are generally taxed similarly to railroad companies; that is, they are assessed with so much taxes for every mile of their line. Statutes which provide that these companies shall be thus taxed, unless clearly expressed to that effect, will not apply to companies built by railroads for the purpose of managing its trains and not for profit.<sup>27</sup> In such cases these lines are used by the railroad companies as an indispensable part of their machinery for the safe and expeditious moving of their trains.

§ 152. **Railroad companies to be compensated.**—It is not our purpose to leave the impression that railroad companies are not to be compensated for the easement granted to telegraph or telephone companies over the former's rights of way for the construction of lines of such companies, when the fee is in the original landowner, for such is not the fact. These lines are regarded as subjecting the easement of a railroad to an additional servitude, and the company is entitled to compensation therefor.<sup>28</sup> The easement granted to railroad companies is for the purpose of constructing railway facilities thereon; but they have sufficient title in the easement to demand compensation for any additional rights of way to be con-

<sup>25</sup> *West. U. Tel. Co. v. Rich*, 19 Kan. 517, 27 Am. Rep. 159.

<sup>26</sup> *Hodges v. West. U. Tel. Co.*, 133 N. C. 225, 45 S. E. 572.

<sup>27</sup> *Adams v. Louisville, etc., R. Co. (Miss.)* 13 South. 932.

<sup>28</sup> *Atlantic, etc., Tel. Co. v. Chicago, etc., R. Co.*, 6 Biss. 158. Fed. Cas. No. 632, federal statute does not prevent; *West. U. Tel. Co. v. Atlantic, etc., Tel. Co.*, 7 Biss. 367, Fed. Cas. No. 17,445; *West. U. Tel. Co. v. American U. Tel. Co.*, 9 Biss. 72, Fed. Cas. No. 17,444; *Kester v. West. U. Tel. Co. (C. C.)* 108 Fed. 926; *Southwestern R. Co. v. Southern, etc., Tel. Co.*, 46 Ga. 43. 12 Am. Rep. 585; *American Tel., etc., Co. v. Pearce*, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200, note; *Northwestern Tel. Exch. Co. v. Chicago, etc., R. Co.*, 76 Minn. 334, 79 N. W. 315; *Louisville, etc., R. Co. v. Postal Tel. Cable Co.*, 68 Miss. 806, 10 South. 74. See, also, *Baltimore, etc., Tel. Co. v. Morgan's Louisiana, etc., R. Co.*, 37 La. Ann. 883; *Southeastern R. Co. v. European, etc., Electric Printing Tel. Co.*, 9 Exch. 363; *Phillips v. Postal Tel. Cable Co.*, 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868; *Montana Postal Tel. Cable Co. v. Oregon Short Line R. Co. (C. C.)* 114 Fed. 787; *R. Co. v. Tel. Co.*, 106 Me. 363, 76 Atl. 885, 29 L. R. A. (N. S.) 703, 20 Ann. Cas. 721, company can be enjoined; *Hodges v. West. U. Tel. Co.*, 133 N. C. 225, 45 S. E. 572; *West. U. Tel. Co. v. Rich*, 19 Kan. 517, 27 Am. Rep. 159; *West. U. Tel. Co. v. Nashville, etc., R. Co.*, 133 Tenn. 691, 182 S. W. 254.



structed thereon, as that of an easement granted to a telegraph or telephone company; to permit one of these companies to construct a line on such easement, without first compensating the railroad company, would be unconstitutional, as it would be taking property without due compensation.<sup>29</sup> The same rule applies in these cases as that of acquiring a right of way across private property, or upon the public highway—that is, the telegraph or telephone company should first try to acquire an easement along and upon the right of way of the railroad by an agreement with the latter;<sup>30</sup> but if this cannot be accomplished by contract, the telegraph or telephone company may proceed to a condemnation proceeding.<sup>31</sup>

§ 153. **Right to—must first be acquired.**—The right which a telegraph company may have to construct a line of wires on the right of way of a railroad company must first be given by either some federal<sup>32</sup> or state statute,<sup>33</sup> or by both. For instance, where a statute provides that telegraph companies may construct their lines “along and parallel to any of the railroads of the states,” it does not authorize the condemnation of a right of way by a telegraph company along and upon a right of way of a railroad company.<sup>34</sup> In Mississippi, whenever a telegraph company secures this right, it becomes the duty of the railroad to receive and transport such material, construction cars, etc., as is necessary in constructing the line, and to distribute the material along the road as the telegraph company may direct “upon such terms and conditions as may be reasonable and just.”<sup>35</sup> When the right is acquired under a federal grant, the company must file its written acceptance with the post-master general “of the restrictions and obligations required” by the statute.<sup>36</sup>

<sup>29</sup> *Southwestern R. Co. v. Southern, etc., Tel. Co.*, 46 Ga. 43, 12 Am. Rep. 585.

<sup>30</sup> *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705.

<sup>31</sup> *Louisville, etc., R. Co. v. Postal Tel. Cable Co.*, 68 Miss. 806, 10 South. 74.

<sup>32</sup> See § 55 et seq.

<sup>33</sup> See § 72 et seq.

<sup>34</sup> *Postal Tel. Cable Co. v. Norfolk, etc., R. Co.*, 88 Va. 920, 14 S. E. 803; *New York City, etc., R. Co. v. Central U. Tel. Co.*, 21 Hun (N. Y.) 261; § 73.

<sup>35</sup> *Laws Miss.* 1890, c. 63, p. 72.

<sup>36</sup> *Chicago, etc., Co. v. Pacific Mut. Tel. Co.*, 36 Kan. 113, 12 Pac. 535. In this case it was held: A telegraph company, in the exercise of eminent domain, instituted a proceeding to condemn and appropriate so much of a bridge as was necessary to support a line of magnetic telegraph proposed to be built, and for the construction, maintenance and operation of the same. The bridge was built in pursuance of state and national legislation, and spans the Missouri river at Atchison, Kan., where the river is navigable, and where

§ 154. **Interest acquired by telegraph companies.**—Telegraph or telephone companies which are constructed along and upon the right of way of a railroad company acquire no title or interest in the easement.<sup>37</sup> The fee still remains in the original landowner or the railroad company, whichever it may be; and the telegraph or telephone companies have only the right to erect their poles upon the easement, and the right of ingress and egress thereon for the purpose of keeping up the lines. It is incumbent upon the telegraph or telephone company to construct its poles and wires so as not to interfere with the moving trains,<sup>38</sup> and not to permit its lines to become dangerous to transportation along the road. The first duty which a railroad company owes to the public is to keep its roadbed in proper condition for the safety of the passengers and goods during transportation; and, in order to do this, the railroad company may make such disposition of its roadbed as may be necessary for the maintenance of same; should it become necessary to remove the poles for this purpose, it may do so without becoming liable to the telegraph or telephone company, unless the same is done negligently, carelessly or unnecessarily. In many instances the railroad may and does widen its roadbed for the purpose of laying a side track or a double track; when it does it may remove the poles of these companies or give them reasonable time or proper notice to do the same themselves at their own expense.<sup>39</sup> We mention these facts to show that a railroad company does not lose any interest or control over the easement but may make any disposition or use of it necessary for the carrying on of its business.

it divides the states of Kansas and Missouri. The company owning the bridge, claiming that the condemnation proceeding was without authority of law, brought an action to enjoin the same, and to prevent any interference with the bridge. Held that, before the telegraph company can construct its lines at the point named, it must file with the postmaster general a written acceptance of the restrictions and obligations imposed by congress in an "Act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes." See § 58.

<sup>37</sup> Postal Tel. Cable Co. v. Louisiana Western R. Co., 49 La. Ann. 1270, 22 South. 219; Mobile, etc., R. Co. v. Postal Tel. Co., 120 Ala. 21, 24 South. 408. See §§ 51, 141. See Union Pacific R. Co. v. Colorado Postal Tel. Cable Co., 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106, holding telegraph company only acquires an easement; West. U. Tel. Co. v. Penn. R. Co., 195 U. S. 540, 570, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517.

<sup>38</sup> See § 74.

<sup>39</sup> Postal Tel. Cable Co. v. Louisiana Western R. Co., 49 La. Ann. 1270, 22 South. 219; Mobile, etc., R. Co. v. Postal Tel. Co., 120 Ala. 21, 24 South. 408.

§ 155. **By condemnation.**—When a telegraph or telephone company has failed to acquire an easement over the right of way of a railroad by an agreement, the same may be acquired by a condemnation proceeding. It has long been settled that property already devoted to a public use may afterwards be condemned for another and different public use under authority from the state;<sup>40</sup> and, as lands whereon telegraph or telephone lines are to be constructed are granted to companies for public enterprises, it necessarily follows, therefore, that these companies may condemn a part of the right of way which has already been granted to a railroad company, provided in doing so the use of the way for the railroad

<sup>40</sup> Kansas, etc., *R. Co. v. Northwestern, etc., R. Co.*, 161 Mo. 288, 61 S. W. 684, 84 Am. St. Rep. 717, 51 L. R. A. 936; Butte, etc., *R. Co. v. Montana, etc., R. Co.*, 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298; Chicago, etc., *R. Co. v. Stackweather*, 97 Iowa, 159, 66 N. W. 87, 31 L. R. A. 183, 59 Am. St. Rep. 404; Little Nestucca Road Co. v. Tillamook Co., 31 Or. 1, 48 Pac. 465, 65 Am. St. Rep. 802; St. Louis, etc., *R. Co. v. Hannibal U. Depot Co.*, 125 Mo. 82, 28 S. W. 483; Kansas City v. Marsh Oil Co., 140 Mo. 458, 41 S. W. 943; Kansas City, etc., *Bell R. Co. v. Kansas City, etc., R. Co.*, 118 Mo. 599, 24 S. W. 478; Twelfth Market Street Co. v. Philadelphia, etc., *R. Co.*, 142 Pa. 589, 21 Atl. 902, 989; The Sunderland Bridge, 122 Mass. 459; Enfield Toll Bridge Co. v. Hartford, etc., *R. Co.*, 17 Conn. 40, 42 Am. Dec. 716.

In *Central Bridge Corp. v. City of Lowell*, 4 Gray (Mass.) 474, Bigelow, J., uses the following language concerning the subject in question: "Nor is the principle thus recognized any violation of justice or sound policy, nor does it in any degree tend to impair the obligation or infringe upon the sanctity of contracts. It rests on the basis that public convenience and necessity are of paramount importance and obligation, to which, when duly ascertained and declared by the sovereign authority, all minor considerations and private rights and interests must be held, in a measure and to a certain extent, subordinate. By the grant of a franchise to individuals for one public purpose, the legislatures do not forever debar themselves from giving to others new and paramount rights and privileges when required by public exigencies, although it may be necessary, in the exercise of such rights and privileges, to take and appropriate a franchise previously granted. If such were the rule, great public improvements, rendered necessary by the increasing wants of society in the development of civilization and the progress of the arts might be prevented by legislative grants which were wise and expedient in their time, but which the public necessities have outgrown and rendered obsolete. The only true rule of policy, as well as of law, is, that a grant for one public purpose must yield to another more urgent and important, and this can be effected without any infringement on the constitutional rights of the subject. If in such cases suitable and adequate provision is made by the Legislature for the compensation of those whose property or franchise is injured or taken away, there is no violation of public faith or private rights. The obligation of the contract created by the original charter is thereby recognized."



will not be destroyed or materially interfered with.<sup>41</sup> If the use by the railroad company is not materially interfered with or destroyed, this power may be exercised under a general statutory authority to condemn land,<sup>42</sup> and statutes prohibiting the taking

<sup>41</sup> *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705; *Baltimore, etc., R. Co. v. Board of Commerce*, 156 Ind. 260, 58 N. E. 837, 59 N. E. 856; *Gold v. Pittsburgh, etc., R. Co.*, 153 Ind. 232, 53 N. E. 285; *Steele v. Empsom*, 142 Ind. 397, 41 N. E. 822; *Southern Pacific R. Co. v. Southern Cal. R. Co.*, 111 Cal. 222, 43 Pac. 602; *Southwestern Tel., etc., Co. v. Gulf, etc., R. Co.* (Tex. Civ. App.) 52 S. W. 106; *St. Louis, etc., R. Co. v. Postal Tel. Co.*, 173 Ill. 521, 51 N. E. 382; *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 120 Ala. 21, 24 South. 408; *Union Pacific R. Co. v. Colorado Postal Tel. Cable Co.*, 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106; *Southwestern Tel. Co. v. Kansas City, etc., R. Co.*, 109 La. 892, 33 South. 910; *Cleveland, etc., R. Co. v. Ohio Postal Tel. Cable Co.*, 68 Ohio St. 306, 67 N. E. 890, 62 L. R. A. 941; *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 101 Tenn. 62, 46 S. W. 571, 41 L. R. A. 403; *Postal Tel. Cable Co. v. Farmville, etc., R. Co.*, 96 Va. 661, 32 S. E. 468; *Idaho Postal Tel. Cable Co. v. Oregon Short Line R. Co.* (C. C.) 104 Fed. 623, affirmed in 111 Fed. 842, 49 C. C. A. 663; *Railroad Co. v. Tel. Co.*, 138 Ga. 420, 75 S. E. 471, 42 L. R. A. (N. S.) 225; *Tel. Cable Co. v. Railroad Co.*, 30 Ind. App. 654, 66 N. E. 919; *Railroad Co. v. Tel. Co.*, 106 Me. 363, 76 Atl. 885, 29 L. R. A. (N. S.) 703, 20 Ann. Cas. 721; *Railroad Co. v. Tel. Co.*, 134 Mo. App. 406, 114 S. W. 586; *Railroad Co. v. Tel., etc., Co.*, 96 Tex. 160, 71 S. W. 270, 60 L. R. A. 145; *Cable Co. v. Railroad Co.* (C. C.) 89 Fed. 190; *Tel. Cable Co. v. Railroad Co.* (C. C.) 163 Fed. 967. See § 73 et seq.; § 131. See, also, *Western, etc., R. Co. v. West. U. Tel. Co.*, 138 Ga. 420, 75 S. E. 471, 42 L. R. A. (N. S.) 225.

<sup>42</sup> *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 120 Ala. 21, 24 South. 408; *Postal Tel. Cable Co. v. Chicago, etc., R. Co.*, 30 Ind. App. 654, 66 N. E. 919; *Postal Tel. Cable Co. v. Oregon, etc., R. Co.*, 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705. See *Railroad Co. v. Tel. Co.*, 138 Ga. 420, 75 S. E. 471, 42 L. R. A. (N. S.) 225. See § 131.

Where statutes of a state do not expressly authorize a telegraph company to condemn a right of way on a railroad right of way, yet where they authorize these companies to condemn land, or to exercise the right of eminent domain, this is sufficient to sustain condemnation for a telegraph right of way on a railroad right of way, it being shown that the railroad operations are not interfered with thereby. *Pacific Postal Tel., etc., Co. v. Oregon, etc., R. Co.* (C. C.) 163 Fed. 967; *Oregon, etc., R. Co. v. Postal Tel., etc., Co.*, 111 Fed. 842, 49 C. C. A. 663, where the circuit court of appeals said: "By section 5210 telegraph companies are given the authority to exercise the right of eminent domain. This provision, standing alone, unaffected by other statutory enactments, would confer upon a telegraph company the authority to condemn a right of way along and upon the right of way of a railroad company, provided that it did not in any way interfere with the use to which the right of way was already dedicated." *Contra*, *New York City, etc., R. v. Central Union Tel. Co.*, 21 Hun (N. Y.) 261. Under the Texas statute authorizing telegraph companies to condemn a right of way over the lands of other corpora-



of property appropriated to a public use except for "a more necessary public use" do not prevent the appropriation for telegraph purposes of a portion of a railroad right of way not occupied by the tracks the same being very generally considered "a more necessary public use."<sup>43</sup> However, statutes authorizing telegraph companies to construct their lines on the roads and highways, but not providing for compensation, give a right of way over such roads as belong to the state, but do not give the right to condemn a right of way on a railroad, such railroad not being a "highway" in that sense.<sup>44</sup> In a number of the states statutes have been enacted specially relating to condemnation of property by telegraph companies;<sup>45</sup> and, although the statute mentions telegraph com-

tions, they may condemn a right of way on a railroad right of way. *Ft. Worth, etc., R. Co. v. Southwestern, etc., Tel. Co.*, 96 Tex. 160, 71 S. W. 270, 60 L. R. A. 145. In *Northwestern, etc., Co. v. Chicago, etc., R. Co.*, 76 Minn. 334, 79 N. W. 315, it was held that a telegraph company might have the right to condemn the right of way on a railroad right of way where there was a reasonable and practical necessity for using such route, even though the statute did not expressly authorize a telegraph company to condemn a right of way on a railroad right of way, but the court held that in that case the evidence did not prove such reasonable and practical necessity.

<sup>43</sup> *Southern Pacific R. Co. v. Southern Cal. R. Co.*, 111 Cal. 221, 43 Pac. 602; *Montana Postal Tel. Cable Co. v. Oregon Short Line R. Co.* (C. C.) 114 Fed. 787; *Idaho Postal Cable Co. v. Oregon Short Line, etc., R. Co.* (C. C.) 104 Fed. 623, affirmed in 111 Fed. 842, 49 C. C. A. 663, where it was held that such a special provision is merely declaratory of the preceding general rule. *Postal Tel. Cable Co. v. Oregon, etc., R. Co.*, 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705; *St. Louis, etc., R. Co. v. Postal Tel. Co.*, 173 Ill. 521, 51 N. E. 382.

<sup>44</sup> *West. U. Tel. Co. v. Pennsylvania R. R.*, 123 Fed. 33, 59 C. C. A. 113, affirmed 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517; *New York, etc., R. Co. v. Central, etc., Tel. Co.*, 21 Hun (N. Y.) 261.

<sup>45</sup> The statutes, as may be seen, vary largely on this subject:

*Alabama*.—"A telegraph company may condemn lands for right of way not exceeding 100 feet in width." Civ. Code 1907, § 3486. But see § 3487. A foreign telegraph company may condemn. § 3884. When property already devoted to a public use may be taken for another public use. § 3867, construed in *West. U. Tel. Co. v. South & North Alabama Railroad*, 184 Ala. 66, 62 South. 788 (1913). In this state it was held that, where a statute gives to telegraph companies a right to construct their lines "along any railroads" in the state, a company may condemn the right under the general condemnation statutes of the state. *New Orleans, etc., R. Co. v. Southern, etc., Tel. Co.*, 53 Ala. 211 (1875). Condemnation of a railroad company's right of way sustained under the statute in the case of *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 120 Ala. 21, 24 South. 408, the court holding that only nominal damages need be paid. A landowner is entitled in condemnation proceedings to compensation for the space occupied by the wires as well as the ground actually occupied by the poles. He is also entitled to compensation for trees

panies only or telephone companies only, it nevertheless applies equally to telegraph and telephone companies.<sup>46</sup> A railroad com-

which will have to be cut. *Long-Dist., etc., Co. v. Schmidt*, 157 Ala. 391, 47 South. 731 (1908).

*Arizona*.—A telegraph company is not given power to condemn. *Rev. St. 1901, § 2445*.

*Arkansas*.—Kirby's Digest 1904, §§ 2934-2936. Telegraph companies may condemn a right of way on railroads. *St. Louis, etc., R. Co. v. Southwestern Tel., etc., Co.*, 121 Fed. 278, 58 C. C. A. 198. See *Railroad Co. v. Tel. Co.*, 80 Ark. 499, 97 S. W. 660.

*California*.—May condemn "real property," Code Civ. Proc. 1907, §§ 1238-1240, including property already appropriated to a less necessary public use. § 1240. Right of way and "lands" and structures thereon held for other public uses "may be connected with, crossed, or intersected." "They shall also be subject to a limited use, in common with the owner thereof." § 1240, subd. 6. A nonresident telegraph company which has accepted the Post Roads Act of Congress may condemn a right of way on a railroad. *West. U. Tel. Co. v. Superior Court*, 15 Cal. App. 679, 115 Pac. 1091, 1100, (1911). The legality of the existence of the corporation cannot be questioned, if it is a de jure or de facto corporation. *West. U. Tel. Co. v. Superior Ct.*, supra.

*Colorado*.—May condemn "any real estate or right of way or easement or other right," *Rev. St. 1908, § 2461*; also "across, upon and under any public highway," § 2451; and "over, upon, under and across all public lands," § 2452; also "over or under the lands, property, privileges, rights of way and easement of other persons and corporations," § 2455; but has no power to condemn upon a railroad right of way except to cross the same, § 2454. Land commissioners may grant a right of way across state lands. Chapter 207, Laws 1909. Under statute of 1885 a telegraph company could condemn a right of way on a railroad. *Union Pacific R. Co. v. Colorado Postal Tel., etc., Co.*, 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106. But that statute was repealed by Laws 1907, c. 175.

*Connecticut*.—May construct lines "upon any highway or across any waters," *Gen. St. 1887, § 3944*; but the consent of adjoining proprietors must be obtained, § 3945; or in lieu of such consent the consent of two of the county commissioners.

*Delaware*.—Laws 1899, c. 273, § 102, re-enacted in Laws 1903, c. 394, § 105. See Laws 1913, c. 189, p. 470.

*Florida*.—May construct lines "on or beside any public road or highway," *Gen. St. 1906, § 2820*; a railroad right of way, § 2821.

*Georgia*.—May condemn a right of way upon "lands," public highways, railroad right of way and "private lands." Code 1911, §§ 2808-2811. A foreign telegraph company may condemn a right of way on a railroad, but the statute is void if it does not provide for the compulsory payment. *Southwestern R. v. Southern, etc., Tel. Co.*, 46 Ga. 43, 12 Am. Rep. 585 (1872). The telegraph company may proceed to erect its lines, even though the rail-

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<sup>46</sup> See § 131. See, also, *R. Co. v. Tel., etc., Co.*, 88 Miss. 438, 41 South. 258. The term "public business" in § 2841, R. L. 1905, includes electric companies. *Minnesota, etc., P. Co. v. Pratt*, 101 Minn. 197, 112 N. W. 395, 11 L. R. A. (N. S.) 105.

pany cannot enjoin a condemnation proceeding by a telegraph company on the ground that the poles would be a menace to the

road company takes an appeal. *Savannah, etc., R. Co. v. Postal Tel. Cable Co.*, 115 Ga. 554, 42 S. E. 1. See, also, in general, *Savannah, etc., R. Co. v. Postal Tel. Cable Co.*, 112 Ga. 941, 38 S. E. 353; *Savannah, etc., R. Co. v. Postal Tel. Cable, etc., Co.*, 113 Ga. 916, 39 S. E. 399; *Georgia R. v. Atlantic, etc., Co. (C. C.)* 152 Fed. 991; *Atlantic, etc., R. Co. v. Postal Tel. Cable Co.*, 120 Ga. 268, 48 S. E. 15, 1 Ann. Cas. 734. See *Western & Atlantic R. v. West. U. Tel. Co.*, 138 Ga. 420, 75 S. E. 471, 42 L. R. A. (N. S.) 225; *West. U. Tel. Co. v. American U. Tel. Co.*, 65 Ga. 160, 38 Am. Rep. 781.

*Idaho*.—May construct upon any public highway or any "lands." Rev. Codes 1908, § 2833. The land commissioners may grant right over state lands. § 1637. May condemn private lands, including lands not already devoted to a more necessary public use. §§ 5210-5213. Latter statute applies to a right of way of a railroad right of way, in *Oregon, etc., R. Co. v. Postal Tel. Cable Co.*, 111 Fed. 842, 49 C. C. A. 663, affirming (C. C.) 104 Fed. 623. See *St. Paul, etc., R. v. West. U. Tel. Co.*, 118 Fed. 497, 55 C. C. A. 263; *Id. (C. C.)* 106 Fed. 243, explained in *West. U. Tel. Co. v. Pennsylvania R.*, 195 U. S. 540, 572, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517; *Great Northern R. v. West. U. Tel. Co.*, 174 Fed. 321, 98 C. C. A. 193.

*Illinois*.—May construct upon "any railroad, road, highway, street or alley \* \* \* or lands." Rev. St. 1909, c. 134, § 2. See *St. Louis, etc., R. Co. v. Postal Tel. Cable Co.*, 173 Ill. 508, 51 N. E. 382.

*Indiana*.—May condemn "real estate." Burns' Ann. St. 1908, § 5770. Statute sufficient to authorize a telegraph company to condemn a right of way on a railroad. *Postal Tel. Cable Co. v. Chicago, etc., R. Co.*, 30 Ind. App. 654, 66 N. E. 919. Where the owner stands by and allows a structure to be erected, see *McClarren v. Jefferson School Tp.*, 169 Ind. 140, 82 N. E. 73, 13 L. R. A. (N. S.) 417, 13 Ann. Cas. 978.

*Iowa*.—May construct lines upon public roads or upon "lands." Code 1897, § 2158.

*Kansas*.—May condemn "lands." Gen. St. 1909, § 1807; public roads, § 1789; "lands" of any corporation whether acquired by purchase or by provision of the charter of said corporation, § 1790.

*Kentucky*.—A foreign or domestic telegraph company may construct lines over any "public lands," "highways," and railroad right of way and structures. Ky. St. 1909, § 4679a. See *Postal, etc., Tel. Co. v. Mobile, etc., R. Co. (Ky.)* 54 S. W. 727; *West. U. Tel. Co. v. Louisville, etc., R. Co.*, Miss. U. S. Court, 1912, holding statute constitutional. See *West. U. Tel. Co. v. Louisville, etc., R. Co. (D. C.)* 201 Fed. 946 (1912).

*Louisiana*.—A foreign or domestic telegraph company may construct lines along "public roads or works" and along railroads and over public lands and "lands, privileges and servitudes" of persons and corporations. Rev. Laws 1904, § 696; *Postal Tel. Cable Co. v. Morgan's Louisiana, etc., R. Co.*, 49 La. Ann. 58, 21 South. 183. A foreign telephone must prove that it was legally organized. *Cumberland, etc., Co. v. St. Louis, etc., R. Co.*, 117 La. 199, 41 South. 492. See, also, *Postal Tel. Cable Co. v. Louisiana Western R. Co.*, 49 La. Ann. 1270, 22 South. 219; *Southwestern Tel. Co. v. Kansas City, etc., R. Co.*, 109 La. 892, 33 South. 910.

*Maine*.—May "take and hold as for public uses, land necessary for the con-



trains and tracks of the railroad company, where, according to the papers in the condemnation proceeding, the poles, even if they fell over, would not reach the nearest cross-ties, and there is already another telegraph line on the railroad right of way which does

struction and operation of its lines. Land may be so taken and damages therefor may be estimated, secured, determined and paid as in case of railroads." Rev. St. 1903, c. 55, § 11. A railroad company may enjoin a telephone company from constructing its telephone line on the former's right of way, although the railroad commissioners have granted that right and the statutes provide that if the parties cannot agree the railroad commissioners may hear the matter and make an award. *Canadian Pac. R. v. Moosehead Tel. Co.*, 106 Me. 363, 76 Atl. 885, 29 L. R. A. (N. S.) 703, 20 Ann. Cas. 721, holding, however, that condemnation, perhaps, might have been had under another statute authorizing the telephone company to take "land" for construction and operation of its line. See *Canadian, etc., R. Co. v. Moosehead Tel. Co.*, 106 Me. 363, 76 Atl. 885, 29 L. R. A. (N. S.) 703, 20 Ann. Cas. 721.

*Maryland*.—May construct lines "upon any postal roads and postal routes, roads, streets and highways" and bridges. Pub. Gen. Laws 1904, art. 23, § 324. "May acquire by condemnation any easement or interest in the land which may be necessary to give effect to the purposes for which such corporation is formed." § 366. See *Chesapeake, etc., Tel. Co. v. Mackenzie*, 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 219.

*Massachusetts*.—May construct lines "upon and along the public ways" but shall not incommode the public use of public ways. Rev. Laws 1902, c. 122, § 1. The location of poles, etc., is under the mayor and aldermen of a city or the selectmen of a town. Laws 1906, c. 117.

*Michigan*.—May construct lines on the highways "or upon or over the land of any individual—the owner of any land through which said telegraph line may pass, and the railroad corporation on whose right of way the same may be constructed, having first given consent." Comp. Laws 1897, § 6660. Any person "over or through whose lands" such line is constructed may have his damages appraised by commissioners appointed by the court, etc. Id. § 6672. Company cannot continue its line on a railroad right of way, the consent of the latter not having first been obtained. *West. U. Tel. Co. v. Ann Arbor R. Co.*, 90 Fed. 379, 33 C. C. A. 113; Id., 178 U. S. 239, 20 Sup. Ct. 867, 44 L. Ed. 1052. The conflict of authority on this subject is referred to in *West. U. Tel. Co. v. Pennsylvania R. Co.*, 195 U. S. 540, 572, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517.

*Minnesota*.—May have a right of way upon any public road, Rev. Laws 1905, § 2927; upon railroads, Id. § 2926. See *Northwestern, etc., Co. v. Chicago, etc., R. Co.*, 76 Minn. 334, 79 N. W. 315; *Minnesota Canal, etc., Co. v. Pratt*, 101 Minn. 197, 112 N. W. 395, 11 L. R. A. (N. S.) 105, construing § 2841, R. L. 1905.

*Mississippi*.—May construct lines upon highways, turnpikes, railroads, canals, and public lands, Code 1906, § 925; across railroads, § 1876. See *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 76 Miss. 731, 26 South. 370, 45 L. R. A. 223; *Louisville, etc., R. Co. v. Postal Tel. Cable Co.*, 68 Miss. 806, 10 South. 74; *Postal Tel. Cable Co. v. Alabama, etc., R. Co.*, 68 Miss. 314, 8 South. 375. Statute authorizing a foreign telephone company right to con-



not interfere with the railroad itself.<sup>47</sup> A telegraph company may acquire a right of way on a railroad or highway or private land not

denn. *Cumberland Tel., etc., Co. v. Yazoo, etc., R. Co.*, 90 Miss. 686, 44 South. 166. Private land cannot be condemned in this state by a telegraph company.

*Missouri*.—May construct lines upon roads and condemn land owned by other corporations, Rev. St. 1909, §§ 3326, 3327, provided the latter is not materially interfered with, § 2368; *Postal Tel. Cable Co. v. Southern R. Co. (C. C.)* 89 Fed. 190. See *American, etc., Co. v. St. Louis, etc., R. Co.*, 202 Mo. 656, 101 S. W. 576. Lands or other property may be condemned, § 2360, but buildings or dwellings cannot be taken, § 2366.

*Montana*.—May construct lines upon the "public roads, streets and highways," Rev. Codes 1907, § 4400; private lands, including lands not already devoted to a more necessary public use, §§ 7330-7333; a right of way on a railroad right of way in *Postal Tel. Cable Co. v. Oregon Short Line, etc., R. Co. (C. C.)* 114 Fed. 787.

*Nebraska*.—A foreign or domestic telegraph company may condemn a right of way upon public roads. *Comp. St. 1907, § 6271*. See *Bronson v. Albion Tel. Co.*, 67 Neb. 111, 93 N. W. 201, 60 L. R. A. 426, 2 Ann. Cas. 639; *Nebraska Tel. Co. v. West. U. Tel. Co.*, 68 Neb. 772, 95 N. W. 18, holding that public roads do not include streets and alleys in cities.

*Nevada*.—May condemn "real property," which includes a railroad right of way. *Laws 1907, c. 128, § 3*.

*New Hampshire*.—May construct lines "in any public highway." *Pub. St. 1901, c. 81, § 1*.

*New Jersey*.—A telegraph company may construct its lines on the highways "upon first obtaining the consent in writing of the owners of the soil \* \* \* and upon, through or over any other land, subject to the right of the owners thereof to full compensation for the same." *Laws 1909, c. 195*. The condemnation of the right to erect a telephone line on a street is not a condemnation in the usual sense of the term, inasmuch as there is no taking of property for the exclusive use of the party condemning. *Nicoll v. New York, etc., Tel. Co.*, 62 N. J. Law, 156, 40 Atl. 627, affirmed 62 N. J. Law, 733, 42 Atl. 583, 72 Am. St. Rep. 666. See *State v. American Tel., etc., Co.*, 43 N. J. Law, 381; *West. U. Tel. Co. v. Pennsylvania R. Co.*, 123 Fed. 33, 59 C. C. A. 113, affirmed in 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517.

*New Mexico*.—May condemn a right of way upon "lands or other property." *Laws 1905, c. 97, § 1*; *Union Trust Co. v. Atchison, etc., R. Co.*, 8 N. M. 327, 43 Pac. 701.

*New York*.—A telegraph company may construct its lines over "any of the public roads, streets and highways" and upon "any other land." *Trans. Corp. Law (Consol. Laws, c. 63) § 102*. However, this statute does not authorize telegraph companies to condemn the right of way of a railroad. *New York City, etc., R. Co. v. Central Union Tel. Co.*, 21 Hun (N. Y.) 261. Other lands devoted to a public use may be condemned. *Matter of City of Gloversville*, 42 Misc. Rep. 559, 87 N. Y. Supp. 612; *Matter of Rochester, etc., R. Co.*, 110

<sup>47</sup> *Georgia, etc., R. Co. v. Atlantic, etc., Co. (C. C.)* 152 Fed. 991.

only by grant or condemnation proceeding, but may also acquire it by prescription,<sup>48</sup> unless there is a statute to the contrary,<sup>49</sup> or

N. Y. 119, 17 N. E. 678; *Re New York, etc., R. Co. v. Kip*, 46 N. Y. 546, 7 Am. Rep. 385.

*North Carolina*.—May construct its lines "along any railroad or other public highway," 1 Revisal 1908, § 1571; also "the right of way over the lands, privileges and easements of other persons and corporations," § 1573. See, also, § 2575. Telegraph companies may condemn a right of way "along" a railroad. 1 Code, 1883, p. 769, §§ 2007, 2009. See *Postal Tel. Cable Co. v. Southern R. Co. (C. C.)* 89 Fed. 190; *Postal Tel. Cable Co. v. Southern R. Co. (C. C.)* 90 Fed. 30; *Southern R. Co. v. Postal Tel. Cable Co.*, 93 Fed. 393, 35 C. C. A. 366.

*North Dakota*.—May condemn a right of way, Code 1899, § 5956, upon "all real property," public lands, and "property appropriated to public use, but such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated," § 5958. All rights of way mentioned in § 5956 "are subject to a limited use in common with the owner thereof." § 5958. But it must appear, if the property is already appropriated to a public use, that the use to which it is to be applied is a more necessary public use. § 5959.

*Ohio*.—May construct lines upon "any public road," Bates, Ann. St. (6th Ed.) §§ 3454, 3461; also "any land, whether held by an individual or corporation, and whether acquired by purchase or appropriation, or in virtue of any provision in its charter," § 3456; limited to land within five feet of the outer limits of the railroad right of way, except where it is impracticable so to do, § 3459; shall not appropriate a building or yard for nor injure or destroy any fruit or ornamental tree, § 3457. Line must not interfere with the railroad business. *Cleveland, etc., Co. v. Ohio, etc., Co.*, 68 Ohio St. 306, 67 N. E. 890, 62 L. R. A. 941. A foreign telegraph company without license

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<sup>48</sup> *West. U. Tel. Co. v. Polhemus*, 178 Fed. 904, 102 C. C. A. 105, 29 L. R. A. (N. S.) 465, reversing (C. C.) 167 Fed. 231. See *Hindley v. Manhattan Ry. Co.*, 185 N. Y. 355, 78 N. E. 276.

<sup>49</sup> The following states have statutes which in general stipulate that no person, or corporation, building and maintaining telegraph, telephone or electric light or power wires or fixtures, or electrical wires, conductors or fixtures of any kind, shall, by reason of any occupation or use of any buildings or lands for the support of the wires of said person or corporation, or by reason of said wires passing over or through any buildings or lands acquire by the continuance of such use or occupation any prescriptive rights to so occupy or use the same: Connecticut, Gen. St. 1902, § 3908; Illinois, Rev. St. 1908, c. 134, § 14; Maine, Laws 1885, c. 378, § 7; Massachusetts, Rev. Laws 1902, c. 122, § 26; New Hampshire, Pub. St. 1901, c. 81, § 17; New Jersey, 3 Gen. St. 1895, p. 3462, § 25; New York, Real Prop. Law (Consol. Laws, c. 50) § 261; North Carolina, Pell's Revisal 1908, §§ 388, 389; Oregon, Bellinger & Cotton's Codes & Statutes 1902, § 5433; Pennsylvania, Purdon's Dig. 1910, vol. 4, p. 4731, § 9; Rhode Island, Gen. Laws, 1909, c. 256, § 9; Vermont P. S. 1906, § 4854; Wisconsin, Sanborn St. 1898, § 4216a.

by adverse possession,<sup>50</sup> or by equitable estoppel,<sup>51</sup> or by actual possession made permanent by decree of the court.<sup>52</sup> If the rail-

to do business in the state cannot condemn the right of way of a railroad. *Postal Tel. Cable Co. v. Cleveland, etc., R. Co.* (C. C.) 94 Fed. 234.

*Oklahoma.*—May condemn a right of way over "lands and real property" and "highways." Gen. St. 1908, § 5948. Railroads are public highways. Const. art. 9, § 6.

*Oregon.*—May condemn a right of way upon any public road, highway and street, except streets in an incorporated city or town, public lands, and "lands of private individuals," B. & C. Codes & St. 1902, § 4748; may condemn a strip not more than 25 feet wide upon "lands," Laws 1903, p. 111, and Laws 1907, p. 289; may under the last statute condemn the railroad right of way, *Pacific Postal Tel., etc., Co. v. Oregon, etc., R. Co.* (C. C.) 163 Fed. 967.

*Pennsylvania.*—May condemn a right of way "upon any of the public roads, streets, lanes or highways." *Purdon's Digest* (13th Ed. Supp.) p. 6083, § 2; *Pennsylvania, etc., Co. v. Hoover*, 209 Pa. 555, 58 Atl. 922; *West. U. Tel. Co. v. Pennsylvania, etc., R. Co.*, 123 Fed. 33, 59 C. C. A. 113, affirmed in 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517.

*Rhode Island.*—Cannot condemn a right of way except by special act of the legislature giving such power to the corporation. Const. 1892, art. 9, §§ 1, 2. A telegraph company is prohibited from placing its poles on private property except with the consent of the owner. Gen. Laws 1909, c. 345, § 58. And town or city by vote may grant rights and franchises for the use of the streets and highways for telegraph purposes. *Id.* c. 91, p. 341.

*South Carolina.*—May construct its lines upon "public lands, highways,"

<sup>50</sup> *Boyce v. Missouri, etc., R. Co.*, 168 Mo. 583, 68 S. W. 920, 58 L. R. A. 442; *Texas, etc., R. Co. v. Scott*, 77 Fed. 726, 23 C. C. A. 424, 37 L. R. A. 94; *Id.*, 94 Fed. 340, 36 C. C. A. 282, affirmed 180 U. S. 635, 21 Sup. Ct. 920, 45 L. Ed. 709.

<sup>51</sup> In *Union Pacific R. Co. v. City of Greeley*, 189 Fed. 1, 110 C. C. A. 571, it was said that: "Each of the respondents are public corporations, in whose behalf the police power of the state could be exercised to condemn a necessary part of complainant's right of way for public use to an extent which would not prevent complainant from fully performing its duty to the public, and it would seem to be a reasonable and just rule to say that property which can be acquired by the exercise of the power of eminent domain may be acquired for the same public use by the application of equitable estoppel." Ejectment does not lie on the part of a property owner; he is only entitled to recover damages. *Gurnsey v. Northern California, etc., Co.*, 160 Cal. 699, 117 Pac. 906, 36 L. R. A. (N. S.) 185. See, also, *Northern Pacific R. Co. v. Smith*, 171 U. S. 260, 18 Sup. Ct. 794, 43 L. Ed. 157; *Roberts v. Northern Pacific R. Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873; *Northern Pacific R. Co. v. Murray*, 87 Fed. 648, 31 C. C. A. 183; *Southern California Ry. v. Slauson*, 138 Cal. 342, 71 Pac. 352, 94 Am. St. Rep. 58; *Donohue v. El Paso, etc., R. Co.*, 214 U. S. 499, 29 Sup. Ct. 698, 53 L. Ed. 1060. See *Fresno v. Southern Pacific R. Co.*, 135 Cal. 202, 67 Pac. 773; *West. U. Tel. Co. v. Polhemus*, 178 Fed. 904, 102 C. C. A. 105, 29 L. R. A. (N. S.) 465, reversing (C. C.) 167 Fed. 231.

<sup>52</sup> *St. Paul, etc., R. Co. v. West. U. Tel. Co.*, 118 Fed. 497, 55 C. C. A. 263.



road is in the possession of a federal court through its receiver, a telegraph company cannot without the consent of the federal court condemn any portion of the right of way by proceedings instituted in the state court.<sup>53</sup>

**§ 156. Exception to rule.**—There are some exceptions to the general rule that land can be condemned for a public use which is

private lands and railroad right of way. Civ. Code 1902, §§ 2211, 2213; South Carolina, etc., R. Co. v. American Tel., etc., Co., 65 S. C. 459, 43 S. E. 970.

*South Dakota.*—Real property may be condemned. Civ. Code 1908, § 563, subd. 9. May condemn a right of way over "lands" belonging to the state; also streets, highways and public grounds. § 554.

*Tennessee.*—May construct lines upon highways, public or private lands, railroad right of way and railroad bridges. Shannon's Code 1896, § 1830. See Mobile, etc., R. Co. v. Postal Tel. Cable Co., 101 Tenn. 62, 46 S. W. 571, 41 L. R. A. 403. See Doty v. American, etc., Tel. Co., 123 Tenn. 329, 130 S. W. 1053, Ann. Cas. 1912C, 167, holding telegraph or telephone company may condemn private property, and the owner has the remedy at law for damages recoverable within twelve months. See West. U. Tel. Co. v. Nashville, etc., R. Co., 133 Tenn. 691, 182 S. W. 254.

*Texas.*—Telegraph and telephone companies may condemn a right of way on "lands," and this is construed as including railroad rights of way. Rev. Civ. St. 1911, arts. 1231, 1232. See Ft. Worth, etc., R. Co. v. Southwestern Tel., etc., Co., 96 Tex. 160, 71 S. W. 270, 60 L. R. A. 145; Gulf, etc., R. Co. v. Southwestern Tel., etc., Co., 18 Tex. Civ. App. 500, 45 S. W. 151; Houston, etc., R. Co. v. Postal Tel. Cable Co., 18 Tex. Civ. App. 502, 45 S. W. 179; San Antonio, etc., R. Co. v. Southwestern Tel., etc., Co. (Tex. Civ. App.) 56 S. W. 201; Texas, etc., R. Co. v. Southwestern, etc., Co. (Tex. Civ. App.) 57 S. W. 312.

*Utah.*—May condemn a right of way upon "all real property," including property already appropriated to a public use. Comp. Laws 1907, §§ 3588-3591. Postal Tel. Cable Co. v. Oregon Short Line R. Co., 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705, holding right of way of railroad may be condemned. Foreign companies may condemn where they have qualified under the laws of the state. Laws 1909, c. 20.

*Vermont.*—May construct lines upon the highways. P. S. 1906, § 4837. "A domestic telegraph, telephone or electric light company may erect and maintain its line along the sides of railroad tracks within the limits of lands owned or held by a railroad corporation on paying to it reasonable compensation therefor. If they cannot agree upon such compensation it shall be determined by commissioners residing in the vicinity of the railroad, who shall be appointed and ascertain such compensation agreeably to the provisions of law in case of land taken for railroads." § 4848.

*Virginia.*—May condemn a right of way upon "lands," Code 1904, § 1294h, cl. 3; and also a right of way "along and parallel to" railroads, §§ 1294h, 1033d; also Const. § 124 (Code 1904, p. ccxli). A statute authorizing a telegraph company to construct its lines "along and parallel to" any railroad

<sup>53</sup> West. U. Tel. Co. v. Atlantic, etc., Tel. Co., Fed. Cas. No. 17,445, 7 Biss. 367.



already being used for a public use; for instance, property cannot be taken from one corporation by another to be used for the same purpose and in the same manner for which it was used by the corporation which first appropriated it to such use and purpose.<sup>54</sup> In other words, every corporation holds property subject to the rights of the state to take it for another public use, whenever, in the discretion of the legislature, the exercise requires the use for such other purpose. This is true even as to the franchise itself of any corporation;<sup>55</sup> and, in order for one corporation to take

authorizes it to construct its line on the railroad right of way. *Postal Tel. Cable Co. v. Farmville, etc., R. Co.*, 96 Va. 661, 32 S. E. 468.

*Washington*.—May have a right of way upon a railroad right of way, public roads and lands. *Rem. & Bal. Code*, §§ 9302, 9304, and 9314. The statute requires railroads to allow a telegraph company to construct its line on and along the right of way of the railroad, and for a failure or refusal so to do the railroad company is liable for damages from \$1,000 to \$5,000 for each offense, and \$100 a day. §§ 9302, 9318.

*West Virginia*.—May condemn "private property." *Code Supp.* 1909, § 1361. See *Laws* 1901, c. 82.

*Wisconsin*.—May condemn a right of way over "any public road, highway or bridge \* \* \* or upon the land of any owner consensive thereto," *Sanborn St. Supp.* 1906, § 1778; also private alleys, § 1778a; and across railroad rights of way, chapter 631, *Laws* 1907.

*Wyoming*.—May condemn a right of way upon any road or street; *Laws* 1901, c. 31, § 1; also upon "any land" except railroad right of way, § 2.

*United States*.—See *Oregon Short Line R. Co. v. Postal Tel. Cable Co.*, 111 Fed. 842, 49 C. C. A. 663, affirming (C. C.) 104 Fed. 623; *Postal Tel. Cable Co. v. Oregon Short Line R. Co.* (C. C.) 114 Fed. 787; *St. Louis, etc., R. Co. v. Southwestern Tel., etc., Co.*, 121 Fed. 276, 58 C. C. A. 198, holding that a statute granting to telegraph and telephone companies the right to condemn a right of way along highways, railroads and post roads is constitutional.

The right is not conferred, however, by a statute authorizing the erection of fixtures and structures along and across "highways," *West. U. Tel. Co. v. Pennsylvania R. Co.*, 123 Fed. 33, 59 C. C. A. 113; or "over any public roads, streets, and highways," *New York City, etc., R. Co. v. Central Tel. Co.*, 21 Hun (N. Y.) 261; and a federal statute authorizing the construction of telegraph lines along any post roads of the United States does not confer such right without condemnation in accordance with the laws of the state there situated. *Postal Tel. Cable Co. v. Southern R. Co.* (C. C.) 89 Fed. 190.

<sup>54</sup> *Kansas, etc., R. Co. v. Northwestern, etc., Co.*, 161 Mo. 288, 61 S. W. 684, 84 Am. St. Rep. 717, 51 L. R. A. 936; *Lewis on Eminent Domain*, § 276.

<sup>55</sup> *Kansas, etc., R. Co. v. Northwestern, etc., Co.*, 161 Mo. 288, 61 S. W. 684, 84 Am. St. Rep. 717, 51 L. R. A. 936; *Twelfth Market St. Co. v. Philadelphia, etc., R. Co.*, 142 Pa. 589, 21 Atl. 902, 989; *The Sunderland Bridge*, 122 Mass. 459; *In re Opinion of the Justices*, 66 N. H. 629, 33 Atl. 1076; *New York Central, etc., R. Co. v. Metropolitan Gas Light Co.*, 63 N. Y. 326; *In re Bellona Co.*, 3 Bland (Md.) 442; *Enfield Toll Brig. Co. v. Hartford, etc.,*

the lands or franchises of another which is in actual use by the latter, the same must have been authorized by the legislature.<sup>56</sup> A telegraph or telephone company would not deprive the railroad of the use of its right of way or any part thereof; so that part which is not essential to the employment of its franchise and property, or which is not in actual use, may be condemned for telegraph lines;<sup>57</sup> provided they are so constructed as not to interfere with the free exercise of the former's franchise or with the actual operation of the road.<sup>58</sup> A somewhat different rule has been held in a few cases, where it was emphasized that the possible future needs of the railroad company must be given full consideration in determining whether any portion of its right of way may be taken from it for a telegraph line.<sup>59</sup> A railroad company acquires the right to use the right of way for such purposes, and

R. Co., 17 Conn. 40, 42 Am. Dec. 716; *Boston, etc., Co. v. Salem, etc., R. Co.*, 2 Gray (Mass.) 1.

<sup>56</sup> *Butte, etc., R. Co. v. Montana, etc., R. Co.*, 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298. See § 155.

<sup>57</sup> *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 120 Ala. 21, 24 South. 408; *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705. See § 155.

<sup>58</sup> These foregoing rules were well stated by Folger, J., in *Matter of City of Buffalo*, 68 N. Y. 167, 175, as follows: "In determining whether a power generally given is meant to have operation upon lands already devoted by legislative authority to a public purpose, it is proper to consider the nature of the prior public works, the public use to which it is applied, the extent to which that use would be impaired or diminished by the taking of such part of the land as may be demanded for the subsequent public use. If both uses may not stand together, with some tolerable interference which may be compensated for by damages paid, if the latter use, when exercised, must supersede the former, it is not to be implied from a general power given, without having in view a then existing and a particular need therefor, that the legislature meant to subject lands devoted to a public use already in exercise to one which might thereafter arise. A legislative intent that there should be such an effect will not be inferred from a gift or power in general terms. To defeat the attainment of an important public purpose to which lands have already been subjected, the legislative intent must unequivocally appear. If an implication is to be relied upon, it must appear from the face of the enactment, or from the application of it to the particular subject-matter of it, so that by reasonable intendment some especial object sought to be attained by the exercise of the power granted could not be reached in any other place or manner." *Postal Tel. Co. v. Oregon, etc., R. Co.*, 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705; *Southern Pac. R. Co. v. Southern Cal. R. Co.*, 111 Cal. 231, 43 Pac. 602. See § 154.

<sup>59</sup> *West. U. Tel. Co. v. Pennsylvania R. Co.*, 59 C. C. A. 113, 123 Fed. 33; *Id.* (C. C.) 120 Fed. 362. See, also, *St. Louis, etc., R. Co. v. Southwestern Tel., etc.*, 58 C. C. A. 198, 121 Fed. 278.

only such, as may be necessary to carry on the business for which it was incorporated. It cannot carry on any other enterprise or business of whatever nature upon its right of way, except that which is necessary to accomplish the business of railroading; but when it does become necessary to use all or a greater part of its easement, and this cannot be done while the telegraph companies remain on the right of way, the latter must give way to the railroad company, to the extent of moving its lines off of the right of way.<sup>60</sup> This fact seems to have been lost sight of in the case cited.

**§ 157. Same continued—cannot be defeated by claiming it should be on other lands.**—Such a condemnation cannot be defeated by showing that a right of way for the telegraph or telephone line may be secured over a public highway near or adjacent to the railroad, or over other property.<sup>61</sup> A railroad company can have no greater claim to its right of way than the public can have to the public highways, or an individual to his private property. So to allow such condemnation to be defeated by a railroad company on this ground would give to the railroad a greater right than is given to individuals; which would virtually take away from telegraph or telephone companies the power of exercising the right of eminent domain. If this right should be defeated by either of these parties on such showing it should be by the two latter; since there is no question that there would be less danger to the public if these lines were along the right of way of the railroads; and surely, during this day and time, it would be much more convenient and less expensive to these companies; and, at the same time, the

<sup>60</sup> See § 154.

<sup>61</sup> *Union Pacific R. Co. v. Colorado Postal Tel. Cable Co.*, 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106, holding that the legislature has vested corporations of this character with discretion in locating their lines, and so that ordinarily the courts cannot exercise supervision with respect to such matters. The discretion which the corporation may exercise in determining the route of its lines cannot be interfered with in absence of a showing of bad faith, a malicious motive, or that the taking of a particular tract sought to be condemned would entail a great loss which might readily be avoided. The inconvenience, and possible increase of the hazard of railroading would be no reason for objecting to the use of the roadbed by the telegraphic lines. *Ft. Worth, etc., R. Co. v. Southwestern Tel., etc., Co.*, 96 Tex. 160, 71 S. W. 270, 60 L. R. A. 145; *St. Louis, etc., R. Co. v. Southwestern Tel., etc., Co.*, 121 Fed. 276, 58 C. C. A. 198; *Savannah, etc., R. Co. v. Postal Tel. Cable Co.*, 115 Ga. 554, 42 S. E. 1. See *Western, etc., R. Co. v. West. U. Tel. Co.*, 138 Ga. 420, 75 S. E. 471, 42 L. R. A. (N. S.) 225, railroad stringing lines on each side of its track.



railroad companies would not be incommoded in the least in their business affairs. Furthermore, the expenses of the railroad company might be greatly reduced on account of the competition of the many lines which would likely be on the right of way.

§ 158. **Foreign telegraph, telephone, or electric companies—right to condemn.**—A corporation can have no legal existence outside of the state creating it; therefore it can transact business within the scope of its powers in other sovereignties only upon such terms and conditions as such sovereignties may provide;<sup>62</sup> and while under the general rules of comity a corporation organized in one state may be permitted to transact business in other states,<sup>63</sup> yet the power of eminent domain granted to a corporation of one state is not such a privilege as will be extended by comity alone to the corporation in its transactions in another state.<sup>64</sup> Therefore, this being the rule applicable to corporations in general, it follows that a foreign telegraph, telephone, or electric company has no power under the charter, nor is it permitted by the rule of comity alone to exercise the right of eminent domain beyond the state of its creation.<sup>65</sup> A state may confer upon a for-

<sup>62</sup> *Grangers', etc., Insurance Co. v. Kamper*, 73 Ala. 325. A telegraph company is not relieved from compliance with a statute requiring foreign corporations to comply with certain conditions for the privilege of exercising their franchises within a state because of its acceptance of the act of 1866. *State v. West. U. Tel. Co.*, 75 Kan. 609, 90 Pac. 299.

<sup>63</sup> *Empire Mills v. Alston Grocery Co.* (Tex. App.) 15 S. W. 200, 505, 12 L. R. A. 366; *Canadian Pac. R. Co. v. West. U. Tel. Co.*, 17 Canada Sup. Ct. 151; *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274; *Atchison, etc., R. Co. v. Fletcher*, 35 Kan. 236, 10 Pac. 596; *Dodge v. Council Bluffs*, 57 Iowa, 560, 10 N. W. 900; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *Miller v. Ewer*, 27 Me. 509, 46 Am. Dec. 619; *Christian Union v. Yount*, 101 U. S. 352, 25 L. Ed. 888; *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 343; *Williams v. Creswell*, 51 Miss. 817; *Baltimore, etc., R. Co. v. Glenn*, 28 Md. 287, 92 Am. Dec. 688; *Blair v. Perpetual Ins. Co.*, 10 Mo. 559, 47 Am. Dec. 129; *Ohio Life Ins., etc., Co. v. Merchants' Ins., etc., Co.*, 11 Humph. (Tenn.) 1, 53 Am. Dec. 742; *Thompson v. Waters*, 25 Mich. 214, 12 Am. Rep. 243; *Merrick v. Van Santvoord*, 34 N. Y. 208. The same may be implied unless there is an affirmative refusal. *Colwell v. Colorado Springs Co.*, 100 U. S. 55, 25 L. Ed. 547; *Id.*, 3 Colo. 82; *Christian Union v. Yount*, 101 U. S. 352, 25 L. Ed. 888; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439. See note to *Cone, etc., Co. v. Poole* (S. C.) 24 L. R. A. 289.

<sup>64</sup> *Middle Bridge Corp. v. Marks*, 26 Me. 326; *State v. Boston, etc., R. Co.*, 25 Vt. 433. Compare *Baltimore, etc., R. Co. v. P. W. & Ky. R. Co.*, 17 W. Va. 812.

<sup>65</sup> *Postal Tel. Cable v. Cleveland, etc., R. Co.* (C. C.) 94 Fed. 234; *St. Louis, etc., R. Co. v. Southwestern Tel., etc., Co.*, 58 C. C. A. 198, 121 Fed. 278; *Southwestern Tel. Co. v. Kansas City, etc., R. Co.*, 108 La. 691, 32 South. 958;



eign telegraph, telephone, or electric company the right of eminent domain<sup>66</sup> by an express grant;<sup>67</sup> and sometimes the right passes under a statutory grant of power to corporations generally;<sup>68</sup> thus where a statute provides that a foreign telegraph company may exercise the right of eminent domain as a quasi-successor of another company to which it was originally granted.<sup>69</sup> So also, such a grant may sometimes be implied.<sup>70</sup> Thus it was held that the right which had been granted to a domestic corporation would not pass to a foreign company which by deed succeeds to its rights and powers without the legislative consent: yet, if for twenty years the state had dealt with the company on the assumption that it had succeeded to all the rights of its predecessor, had advanced it a large sum of money, and had allowed it to mortgage the road and sell bonds in the market, a presumption of the assent of the legislature would prevail.<sup>71</sup>

§ 159. Same continued—consolidation or lease—agency.—It seems not an unusual thing for large telegraph and telephone companies to utilize small companies in order to carry out their busi-

West. U. Tel. Co. v. Pennsylvania R. Co. (C. C.) 120 Fed. 362, affirmed in 123 Fed. 33, 59 C. C. A. 113.

<sup>66</sup> Lewis on Eminent Domain (1888) § 242; State v. Sherman, 22 Ohio St. 434; Morris Canal, etc., Co. v. Townsend, 24 Barb. (N. Y.) 658; New York, etc., R. Co. v. Young, 33 Pa. 175; Dodge v. Council Bluffs, 57 Iowa, 560, 10 N. W. 886; Abbott v. N. Y., etc., R. Co., 145 Mass. 450, 15 N. E. 91; Gray v. St. Louis, etc., R. Co., 81 Mo. 126. See Tel. Co. v. Super. Ct., 15 Cal. App. 679, 115 Pac. 1091, 1100; Tel., etc., Co. v. R. Co., 90 Miss. 686, 44 South. 166; Pittsburg v. Liston, 70 W. Va. 83, 73 S. E. 86, 40 L. R. A. (N. S.) 602. See note 45 for statutes on subject.

<sup>67</sup> Gray v. St. Louis, etc., R. Co., 81 Mo. 126. See Hydro-Elec. Co. v. Liston, 70 W. Va. 83, 73 S. E. 86, 40 L. R. A. (N. S.) 602.

<sup>68</sup> Re Marks, 53 Hun, 633, 6 N. Y. Supp. 105.

<sup>69</sup> Abbott v. N. Y., etc., R. Co., 145 Mass. 450, 15 N. E. 91.

<sup>70</sup> The power is conferred by statutes domesticating foreign corporations on compliance with the statutory prerequisites to doing business in the domestic state (see St. Louis, etc., R. Co. v. Foltz [C. C.] 52 Fed. 627) by conferring on them the same powers as may be exercised by domestic corporations (San Antonio, etc., R. Co. v. Southwestern Tel., etc., Co., 93 Tex. 313, 55 S. W. 117, 77 Am. St. Rep. 884, 49 L. R. A. 459; Gulf, etc., R. Co. v. Southwestern Tel., etc., Co., 25 Tex. Civ. App. 488, 61 S. W. 406).

A federal statute conferring the power of eminent domain over any portion of the public domain does not give the right of eminent domain to condemn a right of way over private property. West. U. Tel. Co. v. Pennsylvania R. Co. (C. C.) 120 Fed. 362, affirming 123 Fed. 33, 59 C. C. A. 113.

<sup>71</sup> Abbott v. N. Y., etc., R. Co., 145 Mass. 450, 15 N. E. 91.

ness.<sup>72</sup> A telegraph or telephone company resulting from the consolidation or lease of companies created by different states becomes a domestic company in each of them; and the powers which each of its constituents were authorized to exercise in the particular locality descends to it. So, if its local predecessor has the right of eminent domain, the consolidated company will not be barred from exercising it because it consists in part of a foreign company.<sup>73</sup> Some of the courts have gone further, and hold that it is not necessary that there should be a consolidation, but that if it is subordinate to the foreign company, and is only to assist it in carrying out its object, the same law will be applicable.<sup>74</sup> In other words, it may be nothing more to the foreign company than a mere agent;<sup>75</sup> however, this rule has not been followed by all the courts. Thus it was held that such company will not be permitted to evade this provision, and do indirectly what it may not do directly by acquiring a right of way, through the agency of a domestic company.<sup>76</sup>

§ 160. **Must be in good faith.**—In order for a telegraph or telephone company to be endowed with the authority to condemn the right of way of a railroad company, the same must be done for itself as an incorporated concern, or as an agent for another incorporated company. Thus it was held that a private person could not condemn land for a right of way for a private business for himself or for another; but that the proceedings could be maintained only by one who is in charge of a public use, and who intends to perform a public service,<sup>77</sup> although he may exercise the

<sup>72</sup> Postal Tel. Cable Co. v. Oregon Short Line R. Co., 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705.

<sup>73</sup> Toledo, etc., R. Co. v. Dunlap, 47 Mich. 456, 11 N. W. 271; Abbott v. N. Y., etc., R. Co., 145 Mass. 450, 15 N. E. 91; Trester v. Missouri Pac. R. Co., 23 Neb. 242, 36 N. W. 502.

<sup>74</sup> Postal Tel. Cable Co. v. Oregon Short Line R. Co. (C. C.) 104 Fed. 623, affirming 49 C. C. A. 662, 111 Fed. 842; Union Pac. R. Co. v. Colorado Postal Cable Co., 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106; Postal Tel. Cable Co. v. Oregon Short Line R. Co., 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705; Day v. Postal Tel. Co., 66 Md. 354, 7 Atl. 608.

<sup>75</sup> Postal Tel. Cable Co. v. Oregon Short Line R. Co., 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705.

<sup>76</sup> State v. Scott, 22 Neb. 628, 36 N. W. 121; Trester v. Missouri Pac. R. Co., 23 Neb. 242, 36 N. W. 502; Koeing v. Chicago, etc., R. Co., 27 Neb. 699, 43 N. W. 423.

<sup>77</sup> Beveridge v. Lewis, 137 Cal. 619, 67 Pac. 1040, 70 Pac. 1083, 92 Am. St. Rep. 188, 59 L. R. A. 581. See § 131.

right as agent for some telegraph or telephone company; but, in order to do this, his agency must be stated.<sup>78</sup> A person is not in charge of a public duty if he seeks to condemn the right of way merely to sell the same to another company;<sup>79</sup> but if the articles of incorporation of the company seeking to exercise the right discloses the fact that it was organized to sell or otherwise dispose of the lines of the telegraph company which it might construct or acquire, and that this fact was in connection with other evidence in the case—as that it was a foreign corporation, and not its honest intention to operate the lines in question, except in the interest of and in connection with that corporation—does not establish in law an intent to take the property for a private use.<sup>80</sup> What a public use is is a question of law to be decided by the court,<sup>81</sup> but when and by what companies the power of eminent domain may be exercised is to be decided by the legislature.<sup>82</sup>

§ 161. **What portion of right of way may be taken.**—Where the right to condemn the right of way of a railroad company has been conferred upon a telegraph or telephone company, the power to select so much of the right of way as may be necessary for the lines is conferred by implication, subject to the limitation that its selection must not essentially interfere with the operation of the railroad.<sup>83</sup> When the power to condemn the right of way has been acquired by the telegraph or telephone company, there is generally very little dispute between the two companies as to where the line shall be constructed; provided it is not to be so near to the

<sup>78</sup> *Beveridge v. Lewis*, 137 Cal. 619, 67 Pac. 1040, 70 Pac. 1083, 92 Am. St. Rep. 188, 59 L. R. A. 581. See § 159.

<sup>79</sup> *Beveridge v. Lewis*, 137 Cal. 619, 67 Pac. 1040, 70 Pac. 1083, 92 Am. St. Rep. 188, 59 L. R. A. 581.

<sup>80</sup> *Union Pac. R. Co. v. Colorado, etc., Tel. Co.*, 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106; *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705.

<sup>81</sup> Judicial notice will be taken that a public telegraph line is a public improvement, for which property may be taken for a public use. *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 24 South. 408.

<sup>82</sup> *Chicago, etc., R. Co. v. Morehouse*, 112 Wis. 1, 87 N. W. 849, 56 L. R. A. 240, 88 Am. St. Rep. 918, and extensive note thereunder.

<sup>83</sup> *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 120 Ala. 21, 24 South. 408; *Savannah, etc., R. Co. v. Postal Tel. Cable Co.*, 112 Ga. 941, 38 S. E. 353; *Savannah, etc., R. Co. v. Postal Tel. Cable Co.*, 115 Ga. 554, 42 S. E. 1. See, also, *St. Louis, etc., R. Co. v. Southwestern Tel., etc., Co.*, 58 C. C. A. 198, 121 Fed. 278; *West., etc., R. Co. v. West. U. Tel. Co.*, 138 Ga. 420, 75 S. E. 471, 42 L. R. A. (N. S.) 225; *West. U. Tel. Co., v. Nashville, etc., R. Co.*, 133 Tenn. 691, 182 S. W. 254, holding telegraph company entitled to make selection.



track as to interfere with the running of the trains, and the carrying on of its general corporate business.<sup>84</sup> The most difficult question is, What shall be the amount of damages to be awarded? And after this has been determined, the portion of the right of way to be taken for the telegraph or telephone lines is easily solved.

§ 162. **Contract arrangements between companies—when revokable.**—A contract between a telegraph and a railroad company by which they join in defraying the expense of the construction of a line for the former on the right of way of the latter, to be operated for their joint benefit, cannot be revoked by either of the companies, even though there is no definite time fixed in the contract itself for its duration, but where from the terms thereof it was intended to be permanent and perpetual. Where such a contract exists, a court of equity may, at the instance of the telegraph company, enjoin the railroad company from terminating the contract and removing the poles.<sup>85</sup> However, the rule may be different where the relief sought is that of requiring the railroad company to specifically perform the contract, by continuing to make contributions of money and property and to exercise judgment and skill in performing its part thereof; and such contract may be terminable by reason of changed conditions imposing hardships upon the railroad by reason of its continuance.<sup>86</sup> Where the contract

<sup>84</sup> *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705; *Railway v. Petty*, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434n; *Englewood Connecting R. Co. v. Chicago, etc., R. Co.*, 117 Ill. 611, 6 N. E. 684; *O'Hare v. Railroad Co.*, 139 Ill. 151, 28 N. E. 923; *Stark v. Railroad Co.*, 43 Iowa, 501; *Peavey v. Railroad Co.*, 30 Me. 498; *Fall River Iron Works Co. v. Oil Colony, etc., R. Co.*, 5 Allen (Mass.) 222; *Railroad Co. v. Speer*, 56 Pa. 325, 94 Am. Dec. 84; *In the Matter of New York R. Co.*, 46 N. Y. 546, 7 Am. Rep. 385; *Kansas, etc., R. Co. v. Northwestern, etc., Co.*, 161 Mo. 288, 84 Am. St. Rep. 719, 61 S. W. 684, 51 L. R. A. 936; *Western, etc., R. Co. v. Western U. Tel. Co.*, 138 Ga. 420, 75 S. E. 471, 42 L. R. A. (N. S.) 225; *Canadian, etc., R. Co. v. Telephone Co.*, 106 Me. 363, 76 Atl. 885, 29 L. R. A. (N. S.) 703, 20 Ann. Cas. 721. See § 74.

<sup>85</sup> *West. U. Tel. Co. v. Pennsylvania Co.*, 129 Fed. 849, 64 C. C. A. 285, 68 L. R. A. 968, reversing (C. C.) 125 Fed. 67, further holding that the mutual covenants between such companies are a sufficient consideration under the statute of frauds for sustaining the contract, where there has been part performance of such consideration. A contract between these companies consolidating various previous contracts does not necessarily displace the previous contracts, but the same may continue after the expiration of the new contract. *West. U. Tel. Co. v. Pittsburg, etc., Ry. (C. C.)* 137 Fed. 435.

<sup>86</sup> See *Keith, Prowse & Co. v. Nat. Tel. Co.*, 2 Ch. 147, 2 Keener, 188. See 68 Am. St. Rep. 753-762, for an excellent note reviewing the cases on this subject. See, also, *Pom. Eq. Jur.* § 1402f.



amounts to a mere license to the telegraph company to the use of poles on the railroad right of way, and belonging to the latter, the same may be revoked at any time if the duration for which is not fixed.<sup>87</sup>

**§ 163. Effect of foreclosure of railroad—expiration of contract.**—It has been held that where a telegraph company has constructed a line on the right of way of a railroad, by the consent of the latter, and after it had mortgaged its property, a foreclosure of the mortgage may take away the right of the telegraph company to remain on such right of way,<sup>88</sup> but the better opinion is to the contrary.<sup>89</sup> The same rule prevails where the right of the telegraph company was merely for a term of years, and such term has expired.<sup>90</sup> In each of these instances, however, the telegraph company may proceed to condemn, if the statute provides for condemnation,<sup>91</sup> when the court may then allow the company to remain

<sup>87</sup> Where telephone wires are strung on poles owned by a railroad company on an agreement which does not run for any specific time, the telephone company's right is a revocable license only, and the wires may be removed at any time by the railroad company, but no unnecessary injury to them should be done in their removal. *West. U. Tel. Co. v. Carver* (Tex. Civ. App.) 74 S. W. 55.

<sup>88</sup> *West. U. Tel. Co. v. Ann Arbor R. R.*, 90 Fed. 379, 33 C. C. A. 113; *West. U. Tel. Co. v. Ann Arbor R. R.*, 178 U. S. 239, 20 Sup. Ct. 867, 44 L. Ed. 1052.

<sup>89</sup> A court of equity may allow the telegraph company to continue its line upon paying a reasonable and equitable consideration therefor to the purchaser at the foreclosure sale. *St. Paul, etc., Ry. v. West. U. Tel. Co.*, 118 Fed. 497, 55 C. C. A. 263, explained in *West. U. Tel. Co. v. Pennsylvania R. R.*, 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517. See *Great Northern Ry. v. West. U. Tel. Co.*, 174 Fed. 321, 98 C. C. A. 193.

<sup>90</sup> *St. Paul, etc., Ry. v. West. U. Tel. Co.*, 118 Fed. 497, 55 C. C. A. 263, holding that a grant by a railroad company to a telegraph company of a right of way "for the use and purposes" of the contract is not an absolute grant, but terminates with the contract, and the provision that the grant should apply to future extensions of the railroad gives the telegraph company a mere equitable right to such right of way on extensions. See *Great Northern Ry. v. West. U. Tel. Co.*, 174 Fed. 321, 98 C. C. A. 193.

<sup>91</sup> *Western & Atlantic R. R. v. West. U. Tel. Co.*, 138 Ga. 420, 75 S. E. 471, 42 L. R. A. (N. S.) 225. Where a telegraph company constructed its lines on the railroad right of way under a contract which is terminated, and the former commences condemnation proceedings as allowed by statute, and the latter threatens to cut down these lines, the court will enjoin the railroad company from doing so, even though the railroad claims that it wishes to construct its own line on the same location where the existing telegraph line has been constructed. Such injunction may be not only as to the telegraph line within the state where the United States court is sitting, but may also apply to lines owned by complainant in other states which connect with the

in possession pending the proceedings, or may in a litigation instituted by the railroad company to oust the telegraph company proceed to assess the damages.<sup>92</sup> But, where the railroad company requires the use of its entire right of way, the telegraph company will not be permitted to condemn a right of way thereon, especially where the statutes do not expressly authorize such condemnation. And, if this be the case, a telegraph company which has already constructed a line on a railroad right of way, but the contract right to maintain its line thereon has expired, cannot condemn nor have an injunction against the removal of its line.<sup>93</sup>

§ 164. **Exclusive right, cannot give.**—There seems to be some conflict among the courts as to whether a telegraph company can acquire, by a contract with the railroad company, an exclusive right to construct a line of wires along and upon the railroad right of way, but the great preponderance of authority is that such rights cannot be acquired.<sup>94</sup> The act of Congress<sup>95</sup>

one in the state. *West. U. Tel. Co. v. Louisville, etc., R. Co.* (D. C.) 201 Fed. 946, 951.

<sup>92</sup> *St. Paul, etc., Ry. v. West. U. Tel. Co.*, 118 Fed. 497, 55 C. C. A. 263, holding further that the court has power to appoint commissioners to assess the compensation to be paid to the railroad company for the right of way. *Great Northern Ry. v. West. U. Tel. Co.*, 174 Fed. 321, 98 C. C. A. 193, holding that where the agreement provided for half rates to be given to the railroad company that this may be deducted from the award.

<sup>93</sup> *West. U. Tel. Co. v. Pennsylvania R. R.*, 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517. Where, after the expiration of the contract, the telegraph company organizes a local company to condemn the right of way occupied by the telegraph line, the railroad company may temporarily enjoin such condemnation proceedings in its suit for a permanent injunction on the ground that the telegraph line will interfere with the railroad constructing its own telegraph line. *West. U. Tel. Co. v. Louisville, etc., R. Co.* (D. C.) 201 Fed. 946.

<sup>94</sup> *West. U. Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160, 38 Am. Rep. 781; *Union Trust Co. v. Atchison, etc., R. Co.*, 8 N. M. 327, 43 Pac. 701; *U. S. v. Union Pacific R. Co.*, 160 U. S. 1, 16 Sup. Ct. 190, 40 L. Ed. 319, reversing 59 Fed. 813, 8 C. C. A. 282, affirming (C. C.) 50 Fed. 28; *Georgia R., etc., Co. v. Atlantic Tel. Cable Co.* (C. C.) 152 Fed. 991; *Mercantile Trust Co. v. Atlantic, etc., R. Co.* (C. C.) 63 Fed. 910; *Pacific Postal Tel. Cable Co. v. West. U. Tel. Co.* (C. C.) 50 Fed. 493; *Baltimore, etc., Tel. Co. v. West. U. Tel. Co.* (C. C.) 24 Fed. 319; *West. U. Tel. Co. v. Baltimore, etc., Tel. Co.* (C. C.) 23 Fed. 12; *West. U. Tel. Co. v. Burlington, etc., R. Co.* (C. C.) 11 Fed. 1, 3 McCrary, 130; *West. U. Tel. Co. v. Kansas Pac. R. Co.* (D. C.) 4 Fed. 284;

<sup>95</sup> See U. S. Rev. St. §§ 5263, 3964 (Comp. St. 1913, §§ 10072, 7456), and chapter 772, Act Cong. Aug. 7, 1888, 25 Stat. 382 (Comp. St. 1913, §§ 10080-10086).

granting to a telegraph company the right to construct a line of wires along post roads did not give it the sole right to construct a line over the right of way, so as to exclude other companies whose lines would not interfere with those of the first company; and this act prevents the telegraph company from acquiring an exclusive grant in any manner.<sup>96</sup> If, however, the illegal provision is not so interwoven with the entire contract as to be practically inseparable, then the main contract will be upheld and the exclusive feature declared void.<sup>97</sup> Moreover, even if the whole contract is void, the court may grant time during which either company may make other arrangements.<sup>98</sup>

**§ 165. Contract with railroad company to that effect.**—This act of Congress prevents a telegraph company from acquiring the exclusive right to construct a line upon the right of way of a railroad company by a contract entered into with the latter to that effect; and yet this is not the only reason why such a contract could be held invalid. The state's right to exercise the power of eminent domain extends over every foot of land within its borders; so the title acquired by any corporation, under the power of eminent domain, is held subject to the rights of the state. As has been seen, property held by a corporation acquired under the right of

West. U. Tel. Co. v. St. Joseph, etc., R. Co. (C. C.) 3 Fed. 430, 1 McCrary, 565; West. U. Tel. Co. v. Marietta, etc., R. Co., 38 Ohio St. 24. Where the railroad acquiesces in a new telegraph company erecting its line on the railroad right of way, the old rival telegraph company, claiming an exclusive contract, cannot enjoin such construction except to prevent interference with its operation and use of its own lines. West. U. Tel. Co. v. American Union Tel. Co., 9 Biss. 72, Fed. Cas. No. 17,444; West. U. Tel. Co. v. Baltimore, etc., Tel. Co. (C. C.) 22 Fed. 133. See, also, Cumberland Tel., etc., Co. v. Morgan's Louisiana, etc., R. Co., 51 La. Ann. 29, 24 South. 803, 72 Am. St. Rep. 442.

<sup>96</sup> Union Trust Co. v. Atchison, etc., R. Co., 8 N. M. 327, 43 Pac. 701; U. S. v. Union Pac. R. Co., 160 U. S. 1, 16 Sup. Ct. 190, 40 L. Ed. 319; West. U. Tel. Co. v. Baltimore, etc., Tel. Co. (C. C.) 19 Fed. 660; West. U. Tel. Co. v. Burlington, etc., R. Co. (C. C.) 11 Fed. 1, 3 McCrary, 130.

<sup>97</sup> West. U. Tel. Co. v. Pittsburg, etc., Ry. (C. C.) 137 Fed. 435; U. S. v. Union Pac. Ry., 160 U. S. 1, 16 Sup. Ct. 190, 40 L. Ed. 319. A contract between a telegraph and railroad company is not entirely void, even though it contains an illegal provision that the railroad company should not permit any other telegraph company to build or operate a line along its road, where such provision was not the main consideration of the contract. West. U. Tel. Co. v. Pennsylvania Co., 129 Fed. 849, 64 C. C. A. 285, 68 L. R. A. 968. A grant to a telegraph company of an exclusive right of way along a railroad is void as to the exclusive part. Pacific Postal Tel. Co. v. West. U. Tel. Co. (C. C.) 50 Fed. 493.

<sup>98</sup> Central, etc., Co. v. Averill, 199 N. Y. 128, 92 N. E. 206, 32 L. R. A. (N. S.) 494, 139 Am. St. Rep. 878.



eminent domain may itself be again condemned for other public purposes; as where the right of way of a railroad company may be condemned for the right of way of another railroad company, or for the use of a line of telegraph wires. If a railroad company could acquire a right, under its condemnation proceedings, to contract with a telephone company, so as to give the latter an exclusive right to construct a line on its right of way, the state could not, of course, under such circumstances, grant the power to another company. It therefore follows that it would be divested to the extent of such property, of its power of eminent domain; but of this it cannot be divested. The natural conclusion is that the railroad can have no power to grant such exclusive right. Again, the right of way of a railroad company was acquired for certain specific purposes; and for this reason the company could not use this property for any other purpose except that for which it was acquired. It is never contemplated in the grant of such property that it will use it except for the purpose of constructing a track thereon, and for such other structures and uses necessary and incident to the operation of its road. For instance, it could not sell or encumber the property, or even construct a line of telegraph thereon, unless the same was done for the express purpose of carrying on its railroad business.<sup>99</sup> An attempt to grant to another company a power which it cannot exercise itself, or an attempt to add an unlimited franchise to one which is limited, would be nothing less than an attempt to do something beyond its power.<sup>100</sup> It has been further held that such contracts could not be held valid, as they would be

<sup>99</sup> *Railroad Co. v. Telegraph Co.*, 38 Ohio St. 24, holding also that a contract by which the railroad company transfers only a part of such general telegraphic business to a telegraph company will not be ordered to be specifically performed, inasmuch as the part to be done by the railroad is illegal. The court held that the railroad may sell to a telegraph company wires for general telegraph business. In Missouri it is held that a foreign corporation, admitted to do business in the state either by comity or by express statutory provisions, can transact only business which a domestic corporation of like character is authorized to transact, and hence a foreign railroad cannot build a telegraph line in that state. *State v. Cook*, 171 Mo. 348, 71 S. W. 829. A municipality cannot prohibit a railroad company from carrying on a telegraphic business. *Pennsylvania R. R. v. Lilly Borough*, 207 Pa. 180, 56 Atl. 412. If a railroad should carry on a commercial telegraph business, it would be liable for a failure to deliver a message. *Arkansas, etc., Ry. v. Stroude*, 77 Ark. 109, 91 S. W. 18, 113 Am. St. Rep. 130; *Hanna v. Chicago, R. I. & P. Ry. Co.*, 89 Kan. 503, 132 Pac. 154.

<sup>100</sup> *Mercantile Trust Co. v. Atlantic, etc., R. Co.* (C. C.) 63 Fed. 910.



in restraint of trade because creating monopolies which are prohibited both by the common and statutory laws.<sup>101</sup>

§ 166. **State legislation—no exclusive grant.**—Not only is a railroad company prohibited from granting exclusive privileges to a telegraph company to construct a line upon its right of way, but the right cannot be granted by state legislation.<sup>102</sup> The right acquired from the state by the telegraph companies to do business as a corporation is in the nature of a contract, carrying with it a delegated authority to condemn private and public property for a right of way; but this inherent delegated power does not carry with it immunity from future legislations. In other words, it does not enter into and become a part of the contract made between the state and the incorporators, whereby the latter acquires the right to construct and maintain a public telegraph line, so as to protect it under that clause of the constitution which prohibits the passing of a law impairing the obligation of contracts. As was very ably observed on this point by Cooley: "Any legislative bargain in restraint of the complete continuance and repeated exercise of the right of eminent domain is unwarranted and void; and that provision of the constitution of the United States which forbids the state violating the obligation of contracts could not be so construed as to render valid and effectual such a bargain, which originally was in excess of proper authority."<sup>103</sup> The right of eminent domain is an element of sovereignty, and a contract in restraint of a free exercise of this right is not obligatory on the state, and does not fall within the inhibition of the constitution of the United States.<sup>104</sup> The right to exercise the power of eminent domain is an inherent power and one from which the state cannot be divested, and it has the right to exercise this power over every foot of land, whether held by private citizens or corporations; so, if it could possibly grant an exclusive right to a telegraph company to construct its lines upon the right of way of a railroad company, it would necessarily be divested of this power.

<sup>101</sup> *West. U. Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160, 38 Am. Rep. 781; *Georgia R., etc., Co. v. Atlantic Postal Tel. Cable Co.* (C. C.) 152 Fed. 991; *St. Louis, etc., R. Co. v. Postal Tel. Cable Co.*, 173 Ill. 508, 51 N. E. 382; *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 76 Miss. 731, 26 South. 370, 45 L. R. A. 223.

<sup>102</sup> *Pensacola Tel. Co. v. West. U. Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708, affirming 2 Woods, 643, Fed. Cas. No. 10,960; *Muskogee Nat. Tel. Co. v. Hall*, 55 C. C. A. 208, 118 Fed. 382.

<sup>103</sup> *Cooley Const. Lim.* (3d Ed.) 525; *Railroad Co. v. Railroad Co.* 97 Ill. 506; *West River Bridge Co. v. Dix*, 6 How. 531, 12 L. Ed. 535.

<sup>104</sup> *Hyde Park v. Oak Woods Cemetery Association*, 119 Ill. 141, 7 N. E. 627.

**§ 167. Same continued—contra view—lines on same poles.—**

While the above is the general and accepted rule, yet there are some courts which hold that a telegraph company can acquire an exclusive privilege to construct a line of wires upon the right of way of a railroad company.<sup>105</sup> We see no reason why a contract made between a railroad and a telegraph company for exclusive rights should be void, in so far as it merely excludes competitors from the line of poles erected and used by the telegraph company.<sup>106</sup> For instance, a telegraph company may be enjoined from constructing a line of wires upon the poles of another telegraph company which has acquired from the railroad a contract to have exclusive privileges along the right of way so far as may be legally done; but there is no reason why the other company may not construct and maintain another line of poles along the track of the railroad company.<sup>107</sup> A railroad company, maintaining telegraph wires, granted to a telegraph company the right to place a wire on the poles of the former, and to establish stations and do business with points off the road, the railroad company reserving for itself the right to local business; it was held that the right granted was not exclusive, and that the railroad could put up and maintain another wire for its own use or for the use of a third party;<sup>108</sup> and it was further held, in another case, that exclusive privilege could be granted to a telegraph company between certain points.<sup>109</sup>

**§ 168. Nature of petition.—**The nature of a petition presented asking the condemnation of a portion of the right of way of a railroad company should be very similar, in most respects, to a petition filed praying the condemnation of private property or part of a

<sup>105</sup> *West. U. Tel. Co. v. Chicago, etc., R. Co.*, 86 Ill. 246, 29 Am. Rep. 28; *West. U. Tel. Co. v. Atlantic, etc., Tel. Co.*, 7 Ohio Dec. (Reprint) 163, 1 Cinc. L. Bul. 201; *West. U. Tel. Co. v. Atlantic, etc., Tel. Co.*, 5 Ohio Dec. (Reprint) 407, 5 Am. Law Rec. 429; *West. U. Tel. Co. v. Atlantic, etc., Tel. Co.*, Fed. Cas. No. 17,445, 7 Biss. 367; *Canadian Pac. R. Co. v. West. U. Tel. Co.*, 17 Can. Sup. Ct. 151; *West. U. Tel. Co. v. Marietta, etc., R. Co.*, 38 Ohio St. 24.

Holding that such a contract is not contrary to public policy, see *West. U. Tel. Co. v. Atlantic, etc., Tel. Co.*, Fed. Cas. No. 17,445, 7 Biss. 367; *West. U. Tel. Co. v. Chicago, etc., R. Co.*, 86 Ill. 246, 29 Am. Rep. 28; *Canadian Pac. R. Co. v. West. U. Tel. Co.*, 17 Can. Sup. Ct. 151.

<sup>106</sup> *West. U. Tel. Co. v. Chicago, etc., R. Co.*, 86 Ill. 246, 29 Am. Rep. 28. See *West. U. Tel. Co. v. Marietta, etc., R. Co.*, 38 Ohio St. 24.

<sup>107</sup> *West. U. Tel. Co. v. Chicago, etc., R. Co.*, 86 Ill. 246, 29 Am. Rep. 28.

<sup>108</sup> *West. U. Tel. Co. v. Marietta, etc., R. Co.*, 38 Ohio St. 24.

<sup>109</sup> *California, etc., Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398.

public highway for telegraph and telephone companies.<sup>110</sup> It will be unnecessary therefore to enumerate again the essential parts of a petition; yet some of those parts which have been spoken of heretofore may be somewhat differently alleged in a petition for the condemnation of a right of way of a railroad company. For instance, it is not necessary to give as full a description of the route of the contemplated company, or the property to be condemned, as that given in a petition praying for the condemnation of private property; because the route has already been most thoroughly described, when the property was condemned for the railroad company's right of way, and of which there are accessible records.<sup>111</sup> If the fact is alleged that the property is that of a railroad company, running between certain termini, within certain counties, setting forth the amount of ground needed for each pole, the distance of the poles from each other, and the distance they will be from the railway track, the way desired will be sufficiently described.<sup>112</sup> It need not designate the exact positions to be occupied by the poles, nor the side of the track to be used, nor that existing lines of telegraph will be displaced, nor the quantity or specific description of land to be taken.<sup>113</sup>

§ 169. **Same continued—necessity for taking.**—There seems to be some doubt prevailing among the courts as to whether the petition should allege the fact of the necessity of taking the land for the right of way; but the weight of authority—which we think to be correct—is that it is not necessary to specifically allege this fact, as the same will be implied.<sup>114</sup> There are states whose constitutions expressly require this question to be submitted to, and determined by, a jury;<sup>115</sup> and where this is the case, there can be no doubt that it must be done. There are cases, too, which, in a general way, have spoken of the question as if it were a constitutional

<sup>110</sup> See § 133.

<sup>111</sup> *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705. A railroad track is a fixed monument. *Lake Shore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 71 Ill. 40.

<sup>112</sup> *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705. See *Pacific, etc., Tel. Co. v. Chicago, etc., Bridge Co.*, 36 Kan. 118, 12 Pac. 560.

<sup>113</sup> *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 120 Ala. 21, 24 South. 408.

<sup>114</sup> *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 120 Ala. 21, 24 South. 408; *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705; *Lynch v. Forbes*, 161 Mass. 302, 37 N. E. 437, 42 Am. St. Rep. 402, and note.

<sup>115</sup> *People v. Village of Brighton*, 20 Mich. 57; *Power's Appeal*, 29 Mich. 509.



one; and that because there is no authority in the legislature to take land of a private person or corporation, except for public use, he necessarily must have the right to a judicial determination as to the necessity of the taking in any particular instance.<sup>116</sup> Whether this be true or not, it is not necessary, in the absence of a constitutional or statutory provision to that effect, to submit the question to the determination of a jury. It may doubtless be referred for decision to a court, or to commissioners appointed for that purpose by the court, and acting under its supervision and subject to its control; but, if it is not presented for such determination before the appointment of commissioners, it will be presumed to have been waived.<sup>117</sup> When the necessity, therefore, exists for the taking—whether it be alleged specifically in the petition, or whether it is implied therein—it is not a question whether there is other land to be had equally available; but the question is whether the land sought is needed for the construction of the public work.<sup>118</sup> In other words, it is not necessary to allege in the petition that the land sought to be condemned is the only available land to be had; but the reason that this particular land is sought to be condemned is sufficient averment that it is the most available to be had; and this fact, of itself, is, in our mind, a sufficient averment of the fact of the necessity of the taking of this land. There may be other lands available, but if the railroad company refuses a bona fide offer to negotiate for the use of land in its right of way for a telegraph or telephone line—and it must be alleged, as has been shown, that an unsuccessful attempt to acquire this land by agreement has been made—a necessity exists for the taking of this particular land.<sup>119</sup>

**§ 170. May condemn land in several counties in one proceeding.**—Where the railroad traverses several counties in a state, and a telegraph or telephone company is seeking to condemn its right of way for a line of wires, the same may be done in one proceeding. While the general rule is that lands belonging to different individu-

<sup>116</sup> *Lecoul v. Police Jury*, 20 La. Ann. 308; *New Orleans, etc., R. Co. v. Gray*, 32 La. Ann. 471.

<sup>117</sup> *Heyneman v. Blake*, 19 Cal. 579.

<sup>118</sup> *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705; *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 120 Ala. 21, 24 South. 408. See *St. Louis, etc., R. Co. v. Southwestern Tel. etc., Co.*, 121 Fed. 276, 58 C. C. A. 198; *Savannah, etc., R. Co. v. Postal Tel. Cable Co.*, 112 Ga. 941, 38 S. E. 358; *Ft. Worth, etc., R. Co. v. Southwestern, etc., Tel. Co.*, 96 Tex. 160, 71 S. W. 270, 60 L. R. A. 145.

<sup>119</sup> *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705.



als residing in the same county may be condemned in one proceeding,<sup>120</sup> yet the rule should receive a much greater indorsement where the land belongs to only one person, as in the case of a right of way of a railroad company; since it would be much easier to serve notice on the latter than it would be in case there were several owners. To our certain knowledge, we cannot say whether the question has been settled by the courts with respect to one proceeding settling the rights of several different original landowners living in different counties for their respective damages against the telegraph or telephone company for additional burdens to the land on which the railroad company's right of way is laid out; but we are of the opinion there would have to be different proceedings brought against the landowners in each county. However, all the landowners in one county could be made parties defendant in one proceeding. Where the proceeding is merely for the condemnation of the right of way of a railroad company traversing several counties within the same state, there is no question that the same can be done by one proceeding.<sup>121</sup> The damage which the railroad company is entitled to is for the whole property, and the cause of action arises in all the several counties as a unit. The county line crossing the railroad company's right of way does not destroy the singleness of its use.<sup>122</sup>

§ 171. **Same continued—constitutional.**—The statutes of some states provide that telegraph or telephone companies desiring to exercise the right of eminent domain over a railroad company's right of way may institute the proceedings "in any county through which the railroad may run"; or "all proceedings under this chapter must be brought in the district court for the county in which

<sup>120</sup> *Duke v. Central New Jersey Tel. Co.*, 53 N. J. Law, 341, 21 Atl. 460, 11 L. R. A. 664. See § 135. See *Martin v. Chicago, etc., Elec. Co.*, 220 Ill. 97, 77 N. E. 86.

<sup>121</sup> *St. Louis, etc., R. Co. v. Postal Tel. Co.*, 173 Ill. 508, 51 N. E. 382; *Houston, etc., R. Co. v. Postal Tel. Cable Co.*, 18 Tex. Civ. App. 502, 45 S. W. 179; *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705. And the courts of either of the counties may condemn the right for the entire length of the line, even though it is crossed by navigable streams. *Postal Tel. Cable Co. v. Texas, etc., R. Co.* (Tex. Civ. App.) 46 S. W. 912. And by the term "right of way," as applied to railroads in such connection, is meant the strip of land over which the track is laid through the country, and which is used in connection therewith. *Postal Tel. Cable Co. v. Southern R. Co.* (C. C.) 90 Fed. 30.

<sup>122</sup> *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705.

the property or some part thereof is situated.”<sup>123</sup> These provisions do not, however, conflict with that section of the constitution which provides in effect that all civil and criminal business arising in any county must be tried in such county.<sup>124</sup> The meaning of this constitutional clause, as was held, is that actions affecting realty shall be tried in the county where the business or the causes arise, or, if the cause of action arises in more counties than one, then in either of said counties.<sup>125</sup> The object in permitting one proceeding to settle damages arising from the condemnation of the right of way of a railroad company traversing several counties is to avoid trouble and expense in instituting proceedings in each of the several counties, when the property which belongs to one proprietor and is contiguous and used together for a common purpose can be considered in one proceeding.

§ 172. **By whom assessments are made—qualifications of.**—In the absence of a special constitutional or statutory provision, there is no right to trial by jury in condemnation proceedings instituted by a telegraph or telephone company.<sup>126</sup> However, it is frequently prescribed by provisions in either of these that damages in condemnation proceedings shall be assessed by a jury. In the absence of a constitutional provision forbidding it, the legislature may provide that the condemnation may be assessed by commissioners or arbitrators. The power of appointing commissioners is sometimes delegated to courts of record, but does not exist independent of statute.<sup>127</sup> The power is sometimes delegated to justices of the peace, to sheriffs, and municipal boards, and sometimes it is provided that they shall be selected by the parties to the proceeding. On account of the variance of the laws in the several states on this subject, no fixed and definite rule can be given, but the laws of the state in which the proceedings are instituted should be consulted in order to determine the question. The jurors or commissioners

<sup>123</sup> Laws of Utah.

<sup>124</sup> *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705.

<sup>125</sup> *Deseret Irr. Co. v. McIntyre*, 16 Utah, 398, 52 Pac. 628.

<sup>126</sup> *Postal Tel. Cable Co. v. Southern R. Co. (C. C.)* 122 Fed. 156.

<sup>127</sup> Consent of the owner to the appointment of commissioners does not give power to the court in a case which does not fall within the statute. *State v. New York, etc., Tel. Co.*, 51 N. J. Law, 83, 16 Atl. 188.

An order appointing commissioners to assess damages in a proceeding by a telegraph company to condemn a right of way on a railroad is not appealable, it not being a final judgment or order. *Southern R. Co. v. Postal Tel. Cable Co.*, 179 U. S. 641, 21 Sup. Ct. 249, 45 L. Ed. 355.

should be qualified <sup>128</sup> to act, and should therefore be disinterested <sup>129</sup> in the result of the proceedings.

§ 173. **Duty of commissioners.**—The duties of the commissioners who are appointed to inspect the premises for the purpose of determining the amount of damages which are to be awarded for the property condemned are generally regulated by the statutes on this subject. The following may be mentioned as some of their duties after the oath has been administered to them to well inquire and true assessment make of the due compensation for cash value and actual damage which the railroad company shall be entitled to receive for the appropriating of the property: They may hear testimony of witnesses offered by either party as to the cash value of the land sought to be appropriated, and the injury resulting to such railroad company, as the necessary and immediate consequence of the appropriation sought to be made; but in taking such testimony, none should be admitted with reference to uncertain or remote benefits or disadvantages that may or may not occur in the future; neither should any evidence be received in respect to the title or ownership of the property; nor upon any question other than that of the cash value of lands sought to be appropriated by the telegraph or telephone company. They cannot determine the question of public use, nor the question of necessity for the taking, except as to the amount of land or the width of the right of way.<sup>130</sup> All of this testimony should be taken down in writing. They may sit from day to day until their investigations and other duties are completed, and after making their award, which may be done by a majority of the commissioners, they shall make and sign a report of their proceedings in the premises and deliver the same to the sheriff, who shall make an immediate return thereof with the writ and his actions thereon to the clerk of the county court. There may be other duties which the commissioners are to perform, but it will hardly be necessary to enumerate them here. However, it may

<sup>128</sup> The commissioners should be good and lawful men; and where the record, which the clerk is required to keep shows that the men summoned by the clerk were good and lawful men, this is sufficient evidence of that fact, although the sheriff's return does not show that they possessed those qualifications, as required by the precept under which they were summoned. *Louisville, etc., R. Co. v. Postal Tel. Cable Co.*, 68 Miss. 806, 10 South. 74.

<sup>129</sup> Sometimes the charter provides that the commissioners should be disinterested parties, and where this is the case, and it does not appear anywhere in the proceedings that they were disinterested, the same will be void and of no effect. *Madden v. Louisville, etc., R. Co.*, 66 Miss. 258, 6 South. 181.

<sup>130</sup> *Union Pacific R. Co. v. Postal Tel. Cable Co.*, 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106.



be well to make mention of another duty which is of the highest importance and imposed upon all who are intrusted and empowered with the authority to assess damages for the appropriation of private or public property for public work; that is, they must *faithfully and honestly* perform all duties imposed upon them as commissioners.

§ 174. **Jurisdiction of federal court.**—The federal court has jurisdiction of a condemnation case where the petition alleges that over three thousand dollars are involved, and the necessary diverse citizenship is also alleged.<sup>131</sup> In such condemnation the United States court follows the state practice as near as possible.<sup>132</sup> A condemnation proceeding may be removed to the United States court if the necessary diverse citizenship exists and the amount involved is over three thousand dollars.<sup>133</sup>

§ 175. **The award of commissioners.**—The award of commissioners in condemnation proceedings operates as a judgment between the parties and is governed by the same rules that are ordinarily applied to judgments of courts. Such an award, or a verdict and judgment on appeal therefrom, has the same force as an ordinary judgment rendered by a court of competent jurisdiction.<sup>134</sup> It is conclusive upon the parties and privies, unless an appeal be taken.

<sup>131</sup> Postal, etc., Co. v. Cleveland, etc., R. Co. (C. C.) 94 Fed. 234.

<sup>132</sup> West. U. Tel. Co. v. Louisville, etc., R. Co. (D. C. 1912) 201 Fed. 932.

<sup>133</sup> Madisonville, etc., Co. v. St. Bernard, etc., Co., 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462; Georgia, etc., R. Co. v. Atlantic, etc., Co. (C. C.) 152 Fed. 991. The fact that a New York telegraph corporation, a parent company, owns practically all the stock of an Idaho corporation, does not prevent the latter exercising its power of eminent domain in Idaho. Oregon, etc., R. Co. v. Postal Tel. Cable Co., 111 Fed. 842, 49 C. C. A. 663; Alabama, etc., Ry. v. Cumberland, etc., Co., 88 Miss. 438, 41 South. 258; Postal Tel. Cable Co. v. Oregon, etc., R. R. (C. C.) 114 Fed. 787. The court may inquire whether the company was organized merely to give jurisdiction to the United States court in a suit; yet unless it is clearly proved that that was the sole cause of the incorporation the United States court will take jurisdiction. Percy Summer Club v. Astle, 163 Fed. 1, 90 C. C. A. 527.

<sup>134</sup> Charleston, etc., R. Co. v. Hughes, 105 Ga. 1, 30 S. E. 972, 70 Am. St. Rep. 17; Postal Tel. Cable Co. v. Louisville, etc., R. Co., 43 La. Ann. 522, 9 South. 119; Aldrich v. Cheshire R. Co., 21 N. H. 359, 53 Am. Dec. 212; Louisville, etc., R. Co. v. People's St. R., etc., Imp. Co., 101 Ala. 331, 13 South. 308; Memphis, etc., R. Co. v. Birmingham, etc., R. Co., 96 Ala. 571, 11 South. 642, 18 L. R. A. 166; Newton v. Ala., etc., R. Co., 99 Ala. 468, 13 South. 259; McCulley v. Cunningham, 96 Ala. 583, 11 South. 694; New Orleans, etc., R. Co. v. Rabasse, 44 La. Ann. 178, 10 South. 708; Atchison, etc., R. Co. v. Boerner, 34 Neb. 240, 51 N. W. 842, 33 Am. St. Rep. 637; Atchison, etc., R. Co. v. Forney, 35 Neb. 607, 37 Am. St. Rep. 450, 53 N. W. 585.



This is plainly the intent of the statute, for the institution of this tribunal would be useless unless their estimate should be regarded as final.<sup>135</sup> Any other view of the question would lead to great practical difficulties, for, if we could go behind their assessment, it would be impossible to draw any line beyond which we should not proceed. There would be scarcely any injury a landowner or a railroad company could sustain which might not be said, with more or less plausibility, to be one which the commissioners could not take into consideration.<sup>136</sup>

§ 176. **May have new award.**—These statutes provide that on good cause shown, either by the telegraph, telephone, or railroad company, by motion to the circuit court of the district in which the proceedings were had, a new inquiry and assessment may be had. It is necessary that these motions should state the grounds upon which said inquiry is asked, and supported by an affidavit of the party applying therefor, in which it should be stated that the award of the commissioners was contrary to the law and evidence. A new inquiry does not follow as a matter of course, either from the fact that illegal testimony was heard or that a party was wrongfully denied the right to open and conclude the argument.<sup>137</sup> A copy of all the proceedings had in the case, including a copy of all the evidence, should be filed with the motion. And after the opposite party has had proper notice of said motion, the court should consider the same. If the court should be of the opinion that the commissioners acted upon testimony which was irrelevant, immaterial or incompetent, that the award was contrary to the law and the evidence, and that injustice has been done, a new hearing and assessment should be ordered by said court. The court, being of the opinion that a new award should be had on said motion, should order a new writ to issue and another trial and assessment to be had. There are generally some limitations and conditions provided for in the statutes which must be complied with. For instance, it is provided that not more than one inquiry and assessment shall be allowed at the instance of the same party in reference to the same matter, and that, in case an appeal be taken from the decision of the court to the supreme court, the same must be done within a limited time—generally about thirty days—but an appeal shall not hinder or delay the telegraph company from constructing and operating the lines over the right of way of the railroad company, after it has

<sup>135</sup> *Postal Tel. Cable Co. v. Ala., etc., R. Co.*, 68 Miss. 314, 8 South. 375.

<sup>136</sup> *Aldrich v. Cheshire R. Co.*, 21 N. H. 359, 53 Am. Dec. 212.

<sup>137</sup> *Postal Cable Co. v. Ala., etc., R. Co.*, 68 Miss. 314, 8 South. 375.

paid or tendered the amount of award for which they are considered to be entitled.

§ 177. **The measure of damages—extent of injury.**—The next thing to be considered is the measure of damages to be awarded a railroad company by the telegraph or telephone company for the construction of a line of its wires over the former's right of way. The only interest which a railroad company acquires in and the only purpose to which it can use its right of way is such, only, as may be necessary to carry on the railroad business; but everything which may be necessary to do this may be done. It cannot sell, transfer, incumber or use the right of way, except as its necessities and conveniences may demand for the proper operation of its road. It cannot license the appropriation of any part of such right of way to private business purposes, nor to public purposes except so far as may be needful and helpful in the operation of the road itself.<sup>138</sup> A telegraph or telephone company does not under a condemnation proceeding acquire a fee to the land, but only an easement thereon to carry on the business of telegraphy.<sup>139</sup> It cannot use the land for any other purpose. The company cannot take possession of it or use it for any other purpose than to erect poles and suspend wires thereon. The company will have the right to enter upon that portion of right of way which is between the telegraph or telephone poles and under its wires, for the purpose of repairing its lines; but the telegraph or telephone company has no right to exclude the railroad company from the use of this land. The ownership of the railroad company to the roadbed remains as it was before, while the telegraph or telephone company merely acquires an easement upon what it condemns, for the purpose of entering thereon to erect and repair the lines.<sup>140</sup> Therefore, taking these facts into consideration, the extent of injury for which damages shall be awarded is very small, and even approaches that injury which courts refuse to notice, although it is held by some of the courts that the railroad companies are entitled to practically nominal damages, at least, for such use of their right of way.<sup>141</sup>

<sup>138</sup> Jones on Easements, § 383.

<sup>139</sup> Union Pac. R. Co. v. Colo., etc., R. Co., 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106.

<sup>140</sup> St. Louis, etc., R. Co. v. Postal Tel. Co., 173 Ill. 508, 51 N. E. 382; Chicago, etc., R. Co. v. City of Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979.

<sup>141</sup> Postal Tel. Cable Co. v. Oregon, etc., R. (C. C.) 104 Fed. 623, affirming 111 Fed. 842, 49 C. C. A. 663, \$500 for a distance of 200 miles; Chicago, etc.

§ 178. **Same continued—expense incurred—no reason.**—It has been said with much earnestness and with some degree of plausibility that it would be unjust to allow a telegraph or telephone company to plant its poles along the right of way when the railroad company had expended thousands of dollars to clear and keep it free from obstructions, and yet pay nothing for the privilege. But this view is more specious than sound, for the railroad must incur this expense for its own purposes, whether the telegraph or telephone line is there or not, and must keep the right of way clear of obstructions, whether it is occupied by a telegraph or telephone line or not; so there is no greater burden or expense because of the presence of the telegraph lines.<sup>142</sup> In one state, in particular, this reasoning is not held sound.<sup>143</sup> In this state the amount of damages allowed the railroad company has been fixed at the sum which it originally cost to clear eight feet—that being the width of the cross-arms on the telegraph line—of the right of way, plus the sum which would yield an annual interest sufficient to keep that portion of the right of way clear.

§ 179. **Same continued—measurement—true rule.**—We presume it is an undisputed fact that the railroad company loses no interest to its right of way but that it may be used for any purpose necessary and convenient for carrying on all business pertaining to railroading; on the other hand, the telegraph or telephone company becomes subordinate to and is dependent on the rights of the for-

R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; St. Louis, etc., R. Co. v. Postal Tel. Co., 173 Ill. 508, 51 N. E. 382; Mobile, etc., R. Co. v. Postal Tel. Cable Co., 101 Tenn. 62, 46 S. W. 571, 41 L. R. A. 403; Gulf, etc., R. Co. v. Southwestern Tel., etc., Co. (Tex. Civ. App.) 52 S. W. 87; Southwestern Tel., etc., Co. v. Gulf, etc., R. Co. (Tex. Civ. App.) 52 S. W. 107; Texas, etc., R. Co. v. Postal Tel. Cable Co. (Tex. Civ. App.) 52 S. W. 108; San Antonio, etc., R. Co. v. Southwestern R. Tel., etc., Co. (Tex. Civ. App.) 56 S. W. 201; Texas Midland R. Co. v. Southwestern Tel., etc., Co. (Tex. Civ. App.) 57 S. W. 313; Mobile, etc., R. Co. v. Postal Tel. Cable Co., 120 Ala. 21, 24 South. 408; Postal Tel. Cable Co. v. Oregon Short Line R. Co., 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705.

<sup>142</sup> Chicago, etc., R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; Atlantic Coast Line R. Co. v. Postal Tel. Cable Co., 120 Ga. 268, 48 S. E. 15, 1 Ann. Cas. 734; Mobile, etc., R. Co. v. Postal Tel. Cable Co., 101 Tenn. 62, 46 S. W. 571, 41 L. R. A. 403; Postal Tel. Cable Co. v. Oregon Short Line R. Co., 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705; Southwestern, etc., Tel. Co. v. Gulf, etc., R. Co. (Tex. Civ. App.) 52 S. W. 106.

<sup>143</sup> Postal Tel. Cable Co. v. Louisville Western R. Co., 49 La. Ann. 1270, 22 South. 219. See, also, Postal Tel. Cable Co. v. Morgan's Louisville, etc., R. Co., 49 La. Ann. 58, 21 South. 183; Southwestern Tel. Co. v. Kansas City, etc., R. Co., 109 La. 892, 33 South. 910.



mer company with respect to the uses of its right of way, by reason of which their lines may be removed from the right of way of the railroad company, if it is necessary for the latter to carry out its duties.<sup>144</sup> Therefore it seems that damages by reason of the probability of the railroad company using all of its right of way in the future for an enlargement of its railroad facilities would be too remote and should not be allowed.<sup>145</sup> It is true, also, that the telegraph or telephone company actually occupies a very small space of the railroad company's right of way, the poles occupying a space of ground, on the average, of eighteen inches and about one hundred and seventy-five feet from each other, and about thirty feet from the outside track. And while the wires are stretched over and cover a space all along the right of way of about eight feet, yet this can only be used by the telegraph or telephone company for the purpose of entering thereon to construct and maintain the line;<sup>146</sup> therefore in most instances the damages would practically be nominal;<sup>147</sup> however, this would not always be the case.<sup>148</sup> There is no question that the railroad company is entitled to damages; since, if its property should be taken for a public use without making due compensation for same, this would clearly be unconstitutional.<sup>149</sup> How much damages, and the manner in which the measurement is to be made, seems to be the question most often confronted and least seldom understood. The following rule—and one we think to be clearly correct—has been held to be the measure of damages to which a railroad company is entitled for the use of its right of way by a telegraph company: "The measure of damage \* \* \* suffered by a railroad company is not the value of the land embraced within the right of way between the poles and under the wires, but the measure of damages is the extent to which the value of the use of such spaces by the railroad company is diminished by the use of the same by the telegraph company for its purposes."<sup>150</sup>

<sup>144</sup> See § 156.

<sup>145</sup> Chicago, etc., R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979.

<sup>146</sup> See § 154.

<sup>147</sup> See cases cited in note 141, *infra*.

<sup>148</sup> Mobile, etc., R. Co. v. Postal Tel. Cable Co., 76 Miss. 731, 26 South. 370, 45 L. R. A. 223, overruling 68 Miss. 314, 8 South. 375; American Tel., etc., Co. v. St. Louis, etc., R. Co., 202 Mo. 656, 101 S. W. 576.

<sup>149</sup> Mobile, etc., R. Co. v. Postal Tel. Cable Co., 120 Ala. 21, 24 South. 408. See § 64 et seq. See, also, § 108.

<sup>150</sup> St. Louis, etc., R. Co. v. Postal Tel. Cable Co., 173 Ill. 508, 51 N. E. 382; Mobile, etc., R. Co. v. Postal Tel. Cable Co., 76 Miss. 731, 26 South. 370, 45 L. R. A. 223; Cleveland, etc., R. Co. v. Ohio Postal Tel. Cable Co., 68



The railroad company cannot sell, incumber, transfer or use its right of way except as may be necessary for the proper operation of the roads; therefore any supposed market value of this land cannot be considered in determining the measure of damages to be awarded the railroad company; but the value of this space must be determined by the use to which it is applied. And in determining this last question, the value of the use of this space must be such as that for which the railroad company may apply it, and not the value of the use for which the telegraph company may apply the same; for the value of the use in the latter may be greater than that in the former. And as the railroad company cannot speculate upon the value of its right of way, it could only recover such damages for the appropriation of such space as the value of the use of same for railroad purposes had been decreased or diminished.<sup>151</sup>

§ 180. **On public roads or highways.**—Not only may an individual's private property, or his property interest in the land over

Ohio St. 306, 67 N. E. 890, 62 L. R. A. 941; *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705; *Texas Midland R. Co. v. Southwestern Tel., etc., Co.* (Tex. Civ. App.) 57 S. W. 312; *San Antonio, etc., R. Co. v. Postal Tel. Cable Co.* (Tex. Civ. App.) 52 S. W. 108; *Gulf, etc., R. Co. v. Southwestern Tel., etc., Co.* (Tex. Civ. App.) 52 S. W. 86; *Montana Postal Tel. Cable Co. v. Oregon Short Line R. Co.* (C. C.) 114 Fed. 787; *Western, etc., R. Co. v. West. U. Tel. Co.*, 138 Ga. 420, 75 S. E. 471, 42 L. R. A. (N. S.) 225.

<sup>151</sup> *I. C. R. Co. v. Chicago*, 141 Ill. 509, 30 N. E. 1046; *Chicago, etc., R. Co. v. Chicago*, 149 Ill. 457, 37 N. E. 78; *Id.*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; *Western, etc., R. Co. v. West. U. Tel. Co.*, 138 Ga. 420, 75 S. E. 471, 42 L. R. A. (N. S.) 225; *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 101 Tenn. 62, 46 S. W. 571, 41 L. R. A. 403; *Louisville, etc., R. Co. v. Postal Tel. Cable Co.*, 68 Miss. 806, 10 South. 74, sustaining an award of \$2,500 for a right of way over one hundred and eight miles of railroad right of way; *Postal Tel. Cable Co. v. Alabama, etc., R. Co.*, 68 Miss. 314, 8 South. 375, sustaining an award of \$40 per mile; *Postal Tel. Cable Co. v. Louisville, etc., R. Co.*, 49 La. Ann. 1270, 22 South. 219, holding that \$8.50 a mile was too small, and that it should be increased to \$20 a mile; *Oregon, etc., R. R. v. Postal Tel. Cable Co.*, 111 Fed. 842, 49 C. C. A. 663, holding that \$500 damages for two hundred miles of right of way of railroad was adequate compensation; *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 76 Miss. 731, 26 South. 370, 45 L. R. A. 223, holding that an award of \$310 for three hundred and ten miles of railroad right of way adequate; *Gulf, etc., R. Co. v. Southwestern Tel., etc., Co.* (Tex. Civ. App.) 52 S. W. 86, upholding an award of \$4 per mile; *Texas, etc., R. Co. v. Postal Tel. Cable Co.* (Tex. Civ. App.) 52 S. W. 108, sustaining a judgment of \$83.90 for sixteen and three-fourths miles; *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 120 Ala. 21, 24 South. 408; *American Tel., etc., Co. v. St. Louis, etc., R. Co.*, 202 Mo. 656, 101 S. W. 576; *Atlantic Coast Line R. Co. v. Postal Tel. Cable Co.*, 120 Ga. 268, 48 S. E. 15, 1 Ann. Cas. 734.

which a street is laid out, or that over which a railroad has constructed a line of track, be subjected to the use of a telegraph, telephone, or electric company, but also his property rights in a public road or highway which has been laid out over his land.<sup>152</sup> This subject, as applied more specifically to city streets, has been discussed elsewhere,<sup>153</sup> but the condemnation of the right to erect a telephone line on a street is not a condemnation in the usual sense of the term, inasmuch as there is no taking of the property for the exclusive use of the party condemning.<sup>154</sup> Nearly all the states have enacted statutes for the condemnation by telegraph, telephone, and electric companies of a right of way on highways.<sup>155</sup> The landowner is protected in this, his property right, by the declaration of the constitution that private property shall not be taken or damaged without just compensation;<sup>156</sup> and, in the absence of a resort to a condemnation proceeding or his being otherwise compensated for such property, the consent of the proper officers of a county that a line be constructed thereon is not binding on him.<sup>157</sup> The courts are not in accord as to the amount of damages which should be awarded to the landowner by the telegraph or telephone company for its right of way over the easement in the public road or highway, but the better rule would seem to be that

<sup>152</sup> See *Postal Tel. Cable Co. v. Eaton*, 170 Ill. 513, 49 N. E. 365, 62 Am. St. Rep. 390, 39 L. R. A. 722; *West. U. Tel. Co. v. Polhemus*, 178 Fed. 904, 102 C. C. A. 105, 29 L. R. A. (N. S.) 465, use for 60 years right presumed; *State v. Weber*, 88 Kan. 175, 127 Pac. 536, 43 L. R. A. (N. S.) 1033; *Alt v. State*, 88 Neb. 259, 129 N. W. 432, 35 L. R. A. (N. S.) 1212; *Weaver v. Dawson County, etc., Tel. Co.*, 82 Neb. 696, 118 N. W. 650, 22 L. R. A. (N. S.) 1189; *Power Co. v. Wissler*, 160 N. C. 269, 76 S. E. 267, 43 L. R. A. (N. S.) 483, Ann. Cas. 1914C, 268.

<sup>153</sup> § 97 et seq.

<sup>154</sup> *Nicoll v. New York, etc., Tel. Co.*, 62 N. J. Law, 156, 40 Atl. 627.

<sup>155</sup> For references to the statutes of the various states on this subject, see § 155, note 45. See *West. U. Tel. Co. v. Polhemus*, 178 Fed. 904, 102 C. C. A. 105, 29 L. R. A. (N. S.) 465; *Weaver v. Dawson County, etc., Tel. Co.*, 82 Neb. 696, 118 N. W. 650, 22 L. R. A. (N. S.) 1189, applies to private roads. But see *Alt v. State*, 88 Neb. 259, 129 N. W. 432, 35 L. R. A. (N. S.) 1212.

<sup>156</sup> *Postal Tel. Cable Co. v. Eaton*, 170 Ill. 513, 49 N. E. 365, 62 Am. St. Rep. 390, 39 L. R. A. 722. See dissenting opinion in *Cater v. Northwestern Tel. Co.*, 60 Minn. 539, 63 N. W. 111, 28 L. R. A. 310, 51 Am. St. Rep. 543; *Cosgriff v. Tri-State Tel. Co.*, 15 N. D. 210, 107 N. W. 525, 5 L. R. A. (N. S.) 1142. But see *Hobbs v. Long-Distance Tel. Co.*, 147 Ala. 393, 41 South. 1003, 7 L. R. A. (N. S.) 87, 11 Ann. Cas. 461.

<sup>157</sup> *Postal Tel. Cable Co. v. Eaton*, 170 Ill. 513, 49 N. E. 365, 62 Am. St. Rep. 390, 39 L. R. A. 722. See *Hobbs v. Long-Distance Tel., etc., Co.*, 147 Ala. 393, 41 South. 1003, 7 L. R. A. (N. S.) 87, 11 Ann. Cas. 461, injunction denied for cutting trees.

he is entitled to only nominal damages, unless special and unusual damage be proved, thus reducing to a bare and useless technical right the property owner's claim.<sup>158</sup>

§ 181. **Crossing railroad tracks.**—Where a telegraph, telephone, or electric company has constructed a line on a public highway crossing a railroad track, it must be constructed across the latter so as not to interfere with the operation of its trains or the maintenance of its road.<sup>159</sup>

<sup>158</sup> *Eels v. American, etc., Tel. Co.*, 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640; *Postal Tel. Cable Co. v. Bruen* (Sup.) 39 N. Y. Supp. 220; *Blashfield v. Empire State Tel. Co.*, 147 N. Y. 520, 42 N. E. 2, damages being one dollar a pole; *Mutual Union Tel. Co. v. Katkamp*, 103 Ill. 420, a judgment of \$38.50 for eleven poles was reversed on the ground that it was excessive; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453; *Rugg v. Commercial Union Tel. Co.*, 66 Vt. 208, 28 Atl. 1036, setting aside an award of \$150.55 for twenty poles on the highway and for cross-arms and wires overhead as excessive; *Illinois, etc., Co. v. Meine*, 242 Ill. 568, 90 N. E. 230, 26 L. R. A. (N. S.) 189; *Tri-State, etc., Co. v. Cosgriff*, 19 N. D. 771, 124 N. W. 75, 26 L. R. A. (N. S.) 1171, allowing damages to trees already growing, but not future damages to such trees; *Long-Distance, etc., Co. v. Schmidt*, 157 Ala. 391, 47 South. 731, entitled to compensation for trees which will have to be cut. An award of \$1,400 for a right of way for a pipe line and telegraph and telephone line taking 4.38 acres, worth \$100 an acre, is excessive and will be set aside. *Cincinnati, etc., Co. v. Wilson*, 70 W. Va. 157, 73 S. E. 306. The damage cannot include the cost of rebuilding a fence every ten years for one hundred years, such damage being remote and speculative. *Board of Trade, etc., Co. v. Darst*, 192 Ill. 47, 61 N. E. 398, 85 Am. St. Rep. 288; *Postal Tel. Cable Co. v. Peyton*, 124 Ga. 746, 52 S. E. 803, 3 L. R. A. (N. S.) 333. In the case of *Wade v. Carolina Tel., etc., Co.*, 147 N. C. 219, 60 S. E. 987, a verdict of \$125 for a telephone line on the line between the highway and private property, there being a conflict of evidence as to whether it was actually on the private property, was sustained on the ground that it covered damage for the future as well as the past, the action being not for trespass, but for permanent damage or for appropriation of land. As to costs in condemnation proceedings, see *Matter of Brooklyn, etc., R. R.*, 176 N. Y. 213, 68 N. E. 249. As to amount of damages to be awarded to an abutting street owner, see § 119 et seq.

<sup>159</sup> The railroad company may compel the telegraph company to take up its wires from under the railroad track and to place them overhead, if the railroad finds that the underground method interferes with repairs and the reconstruction of its tracks. *South Eastern Ry. v. European, etc., Tel. Co.*, 9 Exch. 363. See *St. Louis, etc., Ry. v. Cape Girardeau, etc., Tel. Co.*, 134 Mo. App. 406, 114 S. W. 586, holding that, where one railroad company has condemned the right of way of another railroad track, the former may authorize a telegraph or telephone company to construct its poles and wires on such crossing, the former railroad being given the right to place its own wires on such poles; *Weaver v. Dawson County, etc., Tel. Co.*, 82 Neb. 696, 118 N. W. 650, 22 L. R. A. (N. S.) 1189; *Alt v. State*, 88 Neb. 259, 129 N. W. 432, 35 L. R. A. (N. S.) 1212, respective rights of public and roads. See §§ 74, 184a, 204. As to right to cut wires, see § 220.



§ 182. **Line on turnpike.**—Where the statutes of a state authorize a telegraph or telephone company to construct a line of wires on any of the public highways of the state, it may enjoin a turnpike company from interfering with such construction, where it is shown that the poles and wires as constructed will not interfere with the use of the turnpike as a highway.<sup>160</sup> In any event, under the principle of law that one quasi-public corporation may condemn land held by a similar corporation, so far as such land is not necessary for the duties of the latter, a telegraph or telephone company may condemn a right of way on the outer line of a turnpike.<sup>161</sup>

§ 183. **Same rule applied to telephone companies.**—In the discussion found in the foregoing sections "telegraph companies" were occasionally referred to without mentioning the "telephone," but a statute relative to "telegraph" is usually held to be applicable to "telephones."<sup>162</sup> Thus, a telephone company may be organized under the telegraph company statute, and may condemn a right of way thereunder,<sup>163</sup> since the word "telegraph" includes "telephones."<sup>164</sup> Where the statute authorizes a telegraph company to occupy the streets in the city such statute applies also to telephone companies.<sup>165</sup> So also a statute authorizing condemnation for right of way on highways or railroad rights of way by telegraph companies applies to telephone companies.<sup>166</sup> It has been

<sup>160</sup> *People's Tel., etc., Co. v. Berks, etc., Tr. Co.*, 199 Pa. 411, 49 Atl. 284. See *Hinnershitz v. United Traction Co.*, 199 Pa. 3, 48 Atl. 874; *Id.*, 206 Pa. 91, 55 Atl. 841; *Finchley, etc., Co. v. Finchley, etc., Council*, 1 Ch. 866.

<sup>161</sup> *State v. American, etc., Co.*, 43 N. J. Law, 381.

<sup>162</sup> *Eels v. American Tel., etc., Co.*, 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640.

<sup>163</sup> *State v. Central New Jersey Tel. Co.*, 53 N. J. Law, 341, 21 Atl. 460, 11 L. R. A. 664; *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828; *Cumberland Tel., etc., Co. v. Union Elect. Co. (C. C.)* 42 Fed. 273, 12 L. R. A. 544; *Attorney General v. Edison Tel. Co.*, L. R. 6 Q. B. D. 244; *Hudson River Tel. Co. v. Watervliet, etc., R. Co.*, 135 N. Y. 393, 32 N. E. 148, 17 L. R. A. 674, 31 Am. St. Rep. 838; *Doty v. American Tel., etc., Co.*, 123 Tenn. 329, 130 S. W. 1053, Ann. Cas. 1912C, 167; *Northwestern, etc., Co. v. Chicago, etc., Ry.*, 76 Minn. 334, 79 N. W. 315.

<sup>164</sup> *Sunset Tel., etc., Co. v. City of Eureka (C. C.)* 172 Fed. 755; *Sunset Tel., etc., Co. v. City of Pomona*, 172 Fed. 829, 97 C. C. A. 251, reversing (C. C.) 164 Fed. 561, but reversed itself in 224 U. S. 330, 32 Sup. Ct. 477, 56 L. Ed. 788.

<sup>165</sup> *City of Wichita v. Missouri, etc., Co.*, 70 Kan. 441, 78 Pac. 886.

<sup>166</sup> *San Antonio, etc., Ry. v. Southwestern, etc., Co.*, 93 Tex. 313, 55 S. W. 117, 77 Am. St. Rep. 884, 49 L. R. A. 459; *San Antonio, etc., Ry. v. Southwestern Tel., etc., Co. (Tex. Civ. App.)* 56 S. W. 201; *Ft. Worth, etc., R. Co. v. Southwestern Tel., etc., Co.*, 96 Tex. 160, 71 S. W. 270, 60 L. R. A. 145. But



held, however, that if a telephone company has no power to condemn a right of way, it may organize a telegraph company and cause the latter to condemn, as allowed by statute.<sup>167</sup>

§ 184. **Electric light companies may condemn—compensation.**—An electric light company may be authorized to condemn a right of way for its poles and lines.<sup>168</sup> And a foreign electric light and power company may be authorized to condemn.<sup>169</sup> When poles are erected and wires strung for the purpose of furnishing heat, light, or power to private persons, an additional servitude is imposed entitling abutting owners to compensation;<sup>170</sup> but when poles and wires are placed upon a street or highway to serve public interest, such as lighting the street or highway, no compensation need be made.<sup>171</sup>

see *Alabama, etc., R. Co. v. Cumberland Tel., etc., Co.*, 88 Miss. 438, 41 South. 258.

<sup>167</sup> *Alabama, etc., Ry. v. Cumberland, etc., Tel. Co.*, 88 Miss. 438, 41 South. 258. See *Ilome Tel. Co. v. Mayor*, 118 Tenn. 1, 101 S. W. 770, 11 Ann. Cas. 824, reversed by *Doty v. American Tel., etc., Co.*, 123 Tenn. 329, 130 S. W. 1053, Ann. Cas. 1912C, 167.

<sup>168</sup> *Shasta Power Co. v. Walker (C. C.)* 149 Fed. 568, affirmed in 160 Fed. 856, 87 C. C. A. 660, 19 L. R. A. (N. S.) 725; *Wissler v. Yadkin & Co.*, 158 N. C. 465, 74 S. E. 460; *Hydro-Elec. Co. v. Liston*, 70 W. Va. 83, 73 S. E. 86, 40 L. R. A. (N. S.) 602; *Minnesota, etc., P. Co. v. Koochiching*, 97 Minn. 429, 107 N. W. 405, 5 L. R. A. (N. S.) 638, 7 Ann. Cas. 1182. See *Jones v. Elec. Co.*, 125 Ga. 618, 54 S. E. 85, 6 L. R. A. (N. S.) 122, 5 Ann. Cas. 526, must be for public purpose; to same effect *State v. White R. P. Co.*, 39 Wash. 648, 82 Pac. 150, 2 L. R. A. (N. S.) 842, 4 Ann. Cas. 987; *Wisconsin River Imp. Co. v. Pier*, 137 Wis. 325, 118 N. W. 857, 21 L. R. A. (N. S.) 538; *State v. Superior Court*, 52 Wash. 196, 100 Pac. 317, 21 L. R. A. (N. S.) 448; *Minnesota, etc., P. Co. v. Pratt*, 101 Minn. 197, 112 N. W. 395, 11 L. R. A. (N. S.) 105. But see, *Minnesota, etc., P. Co. v. Koochiching Co.*, 97 Minn. 429, 107 N. W. 405, 5 L. R. A. (N. S.) 638, 7 Ann. Cas. 1182.

<sup>169</sup> *Pittsburg, etc., Co. v. Liston*, 70 W. Va. 83, 73 S. E. 86, 40 L. R. A. (N. S.) 602.

<sup>170</sup> *Goddard v. Chicago, etc., R. Co.*, 104 Ill. App. 533; *Goddard v. Chicago, etc., R. Co.*, 104 Ill. App. 526; *Tuttle v. Brush Electric Illuminating Co.*, 50 N. Y. Super. Ct. 464; *Schaaf v. Cleveland, etc., R. Co.*, 66 Ohio St. 215, 64 N. E. 145; *Callen v. Columbus Edison Electric Light Co.*, 66 Ohio St. 166, 64 N. E. 141, 58 L. R. A. 782; *McLean v. Brush Electric Co.*, 8 Ohio Dec. (Reprint) 619, 9 Cine. Law Bul. 65; *Haverford Electric Light Co. v. Hart*, 13 Pa. Co. Ct. R. 369. See *Andreas v. Bergen County Gas, etc., Co.*, 61 N. J. Eq. 69, 47 Atl. 555.

<sup>171</sup> *Gulf Coast Ice, etc., Co. v. Bowers*, 80 Miss. 570, 32 South. 113; *Loeber v. Butte Gen. Electric Co.*, 16 Mont. 1, 39 Pac. 912, 50 Am. St. Rep. 468; *Palmer v. Larchmont Electric Co.*, 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672, reversing 6 App. Div. 12, 39 N. Y. Supp. 522; *People v. Thompson*, 65 How. Prac. (N. Y.) 407; *Johnson v. Thomson-Houston Electric Co.*, 54 Hun, 469, 7

N. Y. Supp. 716; *Tuttle v. Brush Electric Illuminating Co.*, 50 N. Y. Supp. Ct. 464.

An electric light company may be enjoined from erecting its poles on a country highway until it has regularly acquired a right by condemnation proceedings (*Haverford Electric Light Co. v. Hart*, 1 Pa. Dist. R. 571); and an abutting property owner owning the fee of the highway may enjoin an electric light company from erecting its poles on the highway without their consent, the electric light line not being for the purpose of furnishing light on such highway (*Post v. Suffolk, etc., Co.*, 77 Misc. Rep. 369, 136 N. Y. Supp. 401).

## CHAPTER VIII

## ACROSS AND UNDER NAVIGABLE WATERS

§ 184a. Across bridges—condemnation.

185. Foreign oceanic cables—not included in act.

186. Cable business, commerce—under control of congress.

187. Not paramount right to use of navigable waters—*prima facie* negligence.

188. Local conditions where cable is laid.

189. Obstruction and interference, no distinction between.

190. Degree of care required.

191. Protection of cable under treaty.

192. Landing cable—state and federal authority.

192a. Canals, dams, etc., rights for.

§ 184a. Across bridges—condemnation.—Under the Post Roads Act, telegraph companies have the right or privilege to construct and maintain their lines over all railroad and other public bridges, whether they are erected under the state or federal authority, or whether they span interstate waters, navigable or unnavigable rivers, or other natural or artificial waterways.<sup>1</sup> This right has not been left to implication, for the act expressly grants such right, on the condition, however, that the lines shall be so constructed and maintained as not to obstruct the navigation on said waters or rivers.<sup>2</sup> The Post Roads Act does not apply to those companies which have not accepted the provisions thereof,<sup>3</sup> nor to those not organized under any state laws, but of a foreign country for trans-oceanic communication.<sup>4</sup> A bridge can only be condemned under the state power of eminent domain, since this act does not authorize condemnation.<sup>5</sup> But, where a bridge over an interstate navigable river has been constructed and completed in accordance with the terms and conditions of, and in the manner provided by

<sup>1</sup> Act Cong. July 24, 1866, c. 230, § 1, 14 Stat. 221; Rev. St. § 5263 (U. S. Comp. St. 1913, § 10072); *Kansas P. Tel. Co. v. Leavenworth, etc.*, Bridge Co., 89 Kan. 418, 131 Pac. 143. A bridge is a part of the public highway. *Beaver County v. Central Dist., etc.*, Tel. Co., 219 Pa. 340, 68 Atl. 846.

<sup>2</sup> Cannot construct a line along a public bridge so as to interfere with the opening of the draw span. *Pacific Mut. Tel. Co. v. Chicago, etc.*, Bridge Co., 36 Kan. 118, 12 Pac. 560.

<sup>3</sup> *Chicago, etc.*, Bridge Co. v. Pacific Mut. Tel. Co., 36 Kan. 113, 12 Pac. 535.

<sup>4</sup> *De Castro v. Compagnie Francaise du Tel. de Paris*, 85 Hun, 231, 32 N. Y. Supp. 960, affirmed in 155 N. Y. 688, 50 N. E. 1116.

<sup>5</sup> *Lock Haven Bridge Co. v. Clinton*, 157 Pa. 379, 27 Atl. 726. See §§ 69, 155. See, also, *New York, etc., R. Co. v. Electric Co.*, 219 Mass. 85, 106 N. E. 566, L. R. A. 1915B, 822.

the act of Congress,<sup>6</sup> such bridge cannot be condemned by a telegraph company, claiming the benefit of the Post Roads Act, unless it has complied with such express requirements of said statute as are essential and prerequisite to an exercise of the rights or privileges conferred thereby.<sup>7</sup>

§ 185. **Foreign oceanic cables—not included in act.**—It has been held that the Post Roads Act does not apply to exterior oceanic telegraphic lines constructed for the express purpose of carrying on a business with foreign countries, but that it only applies to interior lines or those constructed for telegraphic intercourse between points within the United States.<sup>8</sup> This act confers the privilege, in express terms, upon those companies organized or thereafter organized “under the laws of any state.”<sup>9</sup> But it has been held that an American cable company is not doing business in Newfoundland, although its cables land in Newfoundland, where the company uses the station merely to repeat messages.<sup>10</sup>

§ 186. **Cable business, commerce—under control of Congress.**—While the Post Roads Act authorizes the laying of telegraph lines across or under the navigable streams or waters of the United States, yet they must be constructed and maintained so as not to materially interfere with navigation thereon.<sup>11</sup> Navigation is included in the term “commerce,” and Congress is vested with the power to determine what is an obstruction to navigation.<sup>12</sup> The

<sup>6</sup> Act July 2, 1864, c. 216, § 9, 13 Stat. 360.

<sup>7</sup> Chicago, etc., Bridge Co. v. Pacific Mut. Tel. Co., 36 Kan. 113, 12 Pac. 535. A telegraph company has no right to lay its wires over a highway bridge which passes over a railway unless the latter consents thereto, the latter having paid for the bridge, and the English statute requiring consent where a telegraph line crosses a railway. South Eastern Ry. v. National Tel. Co., 2 Ch. 50. In the case East Tennessee Tel. Co. v. Board of Councilmen, etc., 143 Ky. 86, 136 S. W. 138, holding that a municipality might revoke a permit to a telephone company to erect its poles on the street and run its wires over a municipal bridge, even though they had been there thirty years. See chapter IV.

<sup>8</sup> American Atlantic Cable Tel. Co., Matter of, 14 Opinions of Attorney General, 62 (1872), but it is believed that this is not sound law.

<sup>9</sup> De Castro v. Compagnie Francaise du Tel. de Paris, 85 Hun, 231, 236, 32 N. Y. Supp. 960, affirmed (Mem.) 155 N. Y. 688, 50 N. E. 1116, citing opinion of Attorney General referred to in preceding note.

<sup>10</sup> Commercial Cable Co. v. Attorney General (1912) A. C. 820.

<sup>11</sup> Act Cong. July 24, 1866, c. 230, § 1, 14 Stat. 221; Rev. St. § 5263 (U. S. Comp. St. 1913, § 10072). Submarine cables, see Act Feb. 29, 1888, c. 17, 25 Stat. 41 (U. S. Comp. St. 1913, §§ 10087–10099). See Minnesota, etc., P. Co. v. Pratt, 101 Minn. 197, 112 N. W. 395, 11 L. R. A. (N. S.) 105, electric plant.

<sup>12</sup> Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23; U. S. v. Coal Dealers' Ass'n



constant rule of law is that navigation upon the streams and waters of the United States must not be so obstructed as to materially interfere with the paramount right to the free and uninterrupted use of such stream or waters. However, in some cases the general commerce of the country has been considered the controlling factor in determining whether a certain obstruction to navigation is unlawful.<sup>13</sup>

§ 187. **Not paramount right to use of navigable waters—prima facie negligence.**—While the bottom of navigable waters may be used for lawful purposes, including the laying of a cable, however, every one using such waters as a highway for the navigation of vessels, employed exclusively in carrying passengers, has the primary and paramount right to the use of such waters.<sup>14</sup> And so when vessels are interfered with, hindered or obstructed while navigating such waters, the cause therefor will prima facie be a nuisance. So, if telegraph lines or cables are laid under or over such waters in such a manner as to come in contact with a vessel lawfully navigating the same, there being no contributory negligence on the part of the vessel, which is well adapted and fitted for the navigation of the particular body of water in question, and as a result of which damages are incurred, the owner of such lines or cables will be liable therefor.<sup>15</sup> So also, where the bottom of a

(C. C.) 85 Fed. 252, 265; *South Carolina v. Georgia*, 93 U. S. 4, 23 L. Ed. 782; *U. S. v. Moline* (D. C.) 82 Fed. 592; *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 421, 15 L. Ed. 435; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. Ed. 96; *Re Provincial Fisheries*, 26 Can. S. C. 444.

<sup>13</sup> Compare *Blanchard v. West. U. Tel. Co.*, 60 N. Y. 510; *Tennessee, etc., R. Co. v. Danforth*, 112 Ala. 80, 20 South. 502; *Wheeling Bridge Case*, 13 How. 518, 14 L. Ed. 249; *Cardwell v. American Bridge Co.*, 113 U. S. 205, 5 Sup. Ct. 423, 28 L. Ed. 959; *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 9 L. Ed. 1012; *People v. Vanderbilt*, 38 Barb. (N. Y.) 282, 24 How. Prac. (N. Y.) 301, affirmed 26 N. Y. 287, 25 How. Prac. (N. Y.) 139; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. Ed. 96; *Mississippi, etc., R. Co. v. Ward*, 2 Black, 485, 17 L. Ed. 311; *Williamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8 Sup. Ct. 811, 31 L. Ed. 629; *Sweeney v. Chicago, etc., Ry.*, 60 Wis. 60, 18 N. W. 756; *Hamilton v. Vicksburg, etc., R. Co.*, 119 U. S. 280, 7 Sup. Ct. 206, 30 L. Ed. 393; *Escanable Co. v. Chicago*, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442. See Reg. v. Moss, 26 Can. S. C. 322.

<sup>14</sup> *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, cited in *City of New York v. Miln*, 11 Pet. 102, 9 L. Ed. 648; *Passengers Cases*, 7 How. 283, 12 L. Ed. 702; *Hall v. De Cuir*, 95 U. S. 485, 24 L. Ed. 547. See *Eastern, etc., Tel. Co. v. Capetown T. Co.*, 2 B. R. C. 114 (1902) A. C. 381, 71 L. J. P. C. (N. S.) 122, 50 Week. R. 657, 86 L. T. N. S. 457, electric railway interfering with cable not liable in the absence of negligence.

<sup>15</sup> *Blanchard v. West. U. Tel. Co.*, 60 N. Y. 510; *Doboy, etc., Tel. Co. v.*

river, as between New York City and Jersey City, is what is called "navigable mud," which steamers easily and necessarily plow through, cables in such mud are there at the risk of the owner, and if the screws of a steamer catch in such cables, the cable company can collect nothing, but, on the other hand, it is liable for injuries to the steamer.<sup>16</sup> The Post Roads Act does not confer the absolute right to lay cables upon the bottom, and the solid bottom at that, of rivers and streams of the United States, for they would be in the water and not under it.<sup>17</sup> They may, furthermore, be required to be laid, if practicable, below the surface of even a solid bottom of such water, regardless of the inconveniences which may arise necessarily from the laying of such cables.<sup>18</sup>

§ 188. **Local conditions where cable is laid.**—In the laying of telegraph lines or submarine cables, the conditions of the particular locality where they are laid should be considered in determining whether they are an obstruction to navigation. In other words, they may be laid in one locality or place without being an obstruction to navigation, when if laid in the same manner, but at another locality or place, they would be a serious obstruction to navigation. Thus, if they are laid in navigable mud where steamships do not frequent, they would not be an obstruction to navigation, but, on the other hand, if they are laid near a pier where ships of deep draught are accustomed to manœuvre in making anchor, the effect would be to the contrary. So the degree of obstruction must vary with the character and extent of the navigation at the place selected, and, as a consequence, the degree of precaution required in maintaining them at such place is dependable upon these varying circumstances.<sup>19</sup>

§ 189. **Obstruction and interference, no distinction between.**—It has been held that there is no distinction between obstruction and interference respecting the laying of cables in navigable waters. Any "permanent interference which prevents a vessel from

De Magathias (C. C.) 25 Fed. 697; *Heiberger v. Missouri, etc., Tel. Co.*, 133 Mo. App. 452, 113 S. W. 730, presumption may be overcome.

<sup>16</sup> *West. U. Tel. Co. v. Inman, etc., Co.* (D. C.) 43 Fed. 85, affirmed 59 Fed. 365, 8 C. C. A. 152.

<sup>17</sup> *West. U. Tel. Co. v. Inman, etc., Co.* (D. C.) 43 Fed. 85, affirmed 59 Fed. 365, 8 C. C. A. 152.

<sup>18</sup> *West. U. Tel. Co. v. Inman, etc., Co.* (D. C.) 43 Fed. 85, affirmed 59 Fed. 365, 8 C. C. A. 152. See *Stephens, etc., Trans. Co. v. West. U. Tel. Co.*, 22 Fed. Cas. 1301.

<sup>19</sup> *West. U. Tel. Co. v. Inman, etc., Co.* (D. C.) 43 Fed. 85, affirmed 59 Fed. 365, 8 C. C. A. 152.

going where she ordinarily has a right to go, and where, in her manœuvres, she may find it necessary to go, whether that necessity be constant or frequent, or only occasional, as emergencies may compel her, seems to me to constitute an 'obstruction.'"<sup>20</sup>

§ 190. **Degree of care required.**—Where a company is authorized to lay its cable on the bottom of navigable waters, the cable must be laid so as not to catch the bottoms of vessels navigating the waters in the ordinary way, and the vessels are bound to be so navigated as to avoid disturbing the cable.<sup>21</sup> The law requires that each party—the navigator and the cable company—should exercise his right so as if possible to avoid a conflict with the right of the other.<sup>22</sup> The navigator is not bound to know that a cable is laid at a certain place under navigable waters, but if he does know it—and that may be a question for the jury—he must use due care so as not to become entangled with it.<sup>23</sup> Where an anchor became entangled in a cable, and, in order to become disentangled therefrom, the cable was cut by the mate, acting under the master's orders, the court held that the ship was liable for the damage, in the absence of present and imminent danger, and when with reasonable patience and skill the anchor might have been extricated without cutting the cable.<sup>24</sup> But where the master and crew of a vessel, while endeavoring to disentangle the anchor from a submarine cable, cause it to break, the vessel is not liable for the damages, no negligence or intentional breaking being shown.<sup>25</sup> If the cable is not on the bottom of navigable waters, and catches the screw of a vessel navigating the same, the owner of the former is

<sup>20</sup> *West. U. Tel. Co. v. Inman, etc., Co.* (D. C.) 43 Fed. 85, affirmed 59 Fed. 365, 8 C. C. A. 152.

<sup>21</sup> *Stephens, etc., Co. v. West. U. Tel. Co.*, 8 Ben. 502, 22 Fed. Cas. 1301.

<sup>22</sup> *The Clara Killam*, L. R. 3 Adm. & Eccl. 161, Allen's Tel. Cas. 557, 3 Maritime L. Cas. 463.

<sup>23</sup> *Submarine Tel. Co. v. Dickson*, 15 C. B. N. S. 759, Allen's Tel. Cas. 229, question for jury; *West. U. Tel. Co. v. Inman*, 59 Fed. 365, 8 C. C. A. 152, affirmed (D. C.) 43 Fed. 85, holding that officers of vessel may assume that the cables are so laid as not to interfere with navigation; *Blanchard v. West. U. Tel. Co.*, 60 N. Y. 510; anchoring in a prohibited portion of a river. See *Bell Tel. Co. v. The Rapid*, 5 Can. Exch. 413, Code provisions of notice of cable-crossings when cable company may recover in case of injury. See Cal. Civ. Code, §§ 537, 539; Wash. Hill's Ann. Codes, §§ 1562, 1566; Ballinger's Ann. Codes & St., §§ 4370, 4374.

<sup>24</sup> *The Clara Killam*, L. R. 3 Adm. & Eccl. 161, Allen's Tel. Cas. 557, 3 Maritime L. Cas. 463; *The William H. Bailey* (D. C.) 100 Fed. 115; *Id.* (D. C.) 103 Fed. 799, 111 Fed. 1006, 50 C. C. A. 76.

<sup>25</sup> *The Anita Berwind* (D. C.) 107 Fed. 721.



liable for damages done.<sup>26</sup> The rule requiring ordinary or due care does not apply, where cables are laid without lawful authority, and, furthermore, regardless perhaps, whether the cables injured were or were not lawfully placed where they were.<sup>27</sup> The burden of proof is upon the company to show that its cables do not constitute an obstruction to navigation.<sup>28</sup>

§ 191. **Protection of cable under treaty.**—Under a treaty entered into between the United States and a number of foreign countries, and between each other, it has been made, expressly for the purpose of protecting submarine cables, a criminal offense to break or injure such cable.<sup>29</sup> As a means of carrying out the provisions of this treaty, the United States Congress has enacted a law imposing a punishment upon any one convicted for the violation of said treaty.<sup>30</sup> So, where a cable, which has been lawfully laid by virtue of the company's charter, the laws of the state, and said treaty, is cut by the officers of a vessel, instead of cutting away the anchor, to release the latter from its entanglement with the cable, a libel in rem lies against the vessel for damages for a maritime tort for the cutting of such cable.<sup>31</sup> And where a naval officer of

<sup>26</sup> *Stephens, etc., Co. v. West. U. Tel. Co.*, 8 Ben. 502, 22 Fed. Cas. 1301.

<sup>27</sup> *Doboy, etc., Tel. Co. v. De Magathias (C. C.)* 25 Fed. 697.

<sup>28</sup> *West. U. Tel. Co. v. Inman*, 59 Fed. 365, 8 C. C. A. 152, affirmed (D. C.) 43 Fed. 85.

<sup>29</sup> Convention for protection of submarine cables, concluded March 14, 1884; ratification advised by the Senate June 12, 1884; ratified by the President January 26, 1885; ratification exchanged April 16, 1885; proclaimed May 22, 1885. (Treaties and Conventions, 1889, p. 1176.) Compilations of treaties in force. Prepared under Senate resolution February 11, 1904, articles: I. Application of convention. II. Punishment for injuries to cables. III. Requirements for cable laying. IV. Payment for repairs. V. Rules for ships laying cables. VI. Vessels to avoid cables. VII. Losses from cables. VIII. Jurisdiction of courts. IX. Prosecutions for infractions. X. Evidence of violations. XI. Trials. XII. Laws to be enacted. XIII. Communication of legislation. XIV. Adhesion of other states. XV. Belligerent action not affected. XVI. Ratification. XVII. Operation; duration; additional articles; British colonies. See, also: 1887. Final protocol of agreement between the United States of America and other powers fixing May 1, 1888, as the date of effect of the convention concluded at Paris, March 14, 1884, for the protection of submarine cables; signed at Paris, July 7, 1887; ratification advised by the Senate February 20, 1888; ratified by the President March 1, 1888; proclaimed May 1, 1888. (Treaties and Conventions, 1889, p. 1184.) (Compilations of treaties in force; prepared under Senate resolution February 11, 1904.) See 24 U. S. Stat. 989.

<sup>30</sup> See chapter 17, Act Cong. Feb. 29, 1888, 25 Stat. 41.

<sup>31</sup> *The William H. Bailey* (D. C.) 100 Fed. 115, 103 Fed. 799, affirmed 111 Fed. 1006, 50 C. C. A. 76, in which it was said: "The evidence on this point



the United States negligently drops an anchor upon a cable and thereby disrupts it, damages may be recovered therefor by the owner of the cable from the United States; and where, by resolution of the Senate, the claim for same has been referred to the court of claims, it may then be brought there.<sup>32</sup>

§ 192. **Landing cable—state and federal authority.**—It has been held that it was not necessary for a domestic cable company to first obtain the express permission of Congress or the United States government to land a cable on the shores of the United States.<sup>33</sup> But where a foreign cable company has authority from one of the states of the Union to land its cable on the shores of that state, it does so subject to any future action of Congress while acting within

is that the night was calm and clear, that the vessel was only about a mile off shore, and that the tugboat had agreed to come back for it in the morning. If, as is contended by counsel for claimants, the vessel anchored within the anchorage grounds, they were not guilty of negligence in becoming entangled, but, becoming entangled, I think they should be held guilty either of willful injury or culpable negligence, for the following reasons: First, the statute provides that a cable shall be cut only when it becomes necessary in order to save life or limb of a vessel. Second, there would have been no difficulty in waiting, anchored as they were, until morning, and then cutting away the anchor when the tug came to take them on their course. Third, it appears from the testimony of the master that they had another anchor on board. Fourth, article 7 of the treaty of 1888 provides that owners of such cables shall remunerate vessel owners who can prove that they sacrificed an anchor in order to avoid injuring such cables. It was the custom of libellant to remunerate all vessel owners who lost anchor in such circumstances. In the *Clara Killam* Sir Robert Phillimore held in such a case that 'it was the duty of the ship to disentangle, if possible, her anchor from cable without injuring it,' and to take the necessary time therefor, 'unless she thereby exposed herself to present or imminent peril,' and that such a cable might have been cleared in the manner testified to by the expert for libellant therein; and he concluded that the cutting of the cable, in circumstances such as those here shown, was reckless and wrongful." The *Clara Killam*, L. R. 3 Adm. & Ecc. 161, Allen's Tel. Cas. 557. See *The Poughkeepsie* (D. C.) 162 Fed. 494, affirmed 212 U. S. 558, 29 Sup. Ct. 687, 53 L. Ed. 651; *Cleveland Terminal, etc., R. R. v. Cleveland Steamship Co.*, 208 U. S. 316, 28 Sup. Ct. 414, 52 L. Ed. 508, 13 Ann. Cas. 1215.

<sup>32</sup> *Commercial Pacific Cable Co. v. United States*, decided by court of claims June 2, 1913, where the court allowed \$35,894.47.

Where a cable company gives the notice that it will make compensation for the loss of anchor, etc., refers only to the value of the cable and chain, and not to damages resulting from the loss of them, however, it may possibly include consequential damages. *Agincourt, etc., Co. v. Eastern, etc., Tel. Co.*, 2 K. B. 305.

<sup>33</sup> *U. S. v. La Compagnie, etc., Tel. (C. C.)* 77 Fed. 495. See *American Atlantic Cable Tel. Co., Matter of*, 14 Opinions of Attorney General, 62.

its powers to regulate interstate and international commerce.<sup>34</sup> However, when such a cable is laid, a preliminary injunction will not be granted to prevent it from being laid and landed upon the territory of the United States without its consent, where it does not appear that any individual or the government will sustain irreparable loss or injury by the operation of said cable until final hearing.<sup>35</sup>

§ 192a. **Canals, dams, etc., rights for.**—The generation of electricity by water power is becoming popular and will become more so as the science of conveying electricity to distant points without loss of power becomes more developed. As a result of which many new questions may arise. The generation of electricity by water power, to be used for the purpose of lighting towns and cities, and supplying light, heat and power to the public, is a public use;<sup>36</sup> and where a public service corporation is organized to carry on a business of this nature, it may also be empowered to construct power plants,<sup>37</sup> canals, reservoirs, millraces and dams on private property, and in, upon and along navigable and nonnavigable streams, and condemn the same for such purposes.<sup>38</sup> So also the riparian rights in a stream are subject to condemnation by an electric power company,<sup>39</sup> but, in the exercise of this power, the riparian rights must be respected.<sup>40</sup> But where an electric company is

<sup>34</sup> *De Castro v. Compagnie, etc.*, 85 Hun, 231, 32 N. Y. Supp. 960, affirmed 155 N. Y. 688, 50 N. E. 1116.

<sup>35</sup> *U. S. v. La Compagnie, etc.*, Tel. (C. C.) 77 Fed. 495.

<sup>36</sup> *Nolan v. Central Georgia Power Co.*, 134 Ga. 201, 67 S. E. 656.

<sup>37</sup> The condemnation of land necessary for the purpose of an electric plant, generating and furnishing light and power, is proper for a public use. *Washington Water Power Co. v. Waters*, 19 Idaho, 595, 115 Pac. 682; *Webster v. Susquehanna Pole Line Co.*, 112 Md. 416, 76 Atl. 254, 21 Ann. Cas. 357; *Tuttle v. Jefferson Power, etc., Co.*, 31 Okl. 710, 122 Pac. 1102; *Great Falls Power Co. v. Webb*, 123 Tenn. 584, 133 S. W. 1105; *Deerfield River Co. v. Wilmington Power, etc., Co.*, 83 Vt. 548, 77 Atl. 862; *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199; *Electric Co. v. Liston*, 70 W. Va. 83, 73 S. E. 86, 40 L. R. A. (N. S.) 602.

*Poles.*—Lands may be condemned for electric poles across private property. *Wissler v. Yadkin River Power Co.*, 158 N. C. 465, 74 S. E. 460.

<sup>38</sup> *Minnesota Canal, etc., Power Co. v. Pratt*, 101 Minn. 197, 112 N. W. 395, 11 L. R. A. (N. S.) 105.

<sup>39</sup> *Northern Light, etc., Co. v. Stacher*, 13 Cal. App. 404, 109 Pac. 896.

<sup>40</sup> *Mentone Irrigation Co. v. Electric, etc., Power Co.*, 155 Cal. 323, 100 Pac. 1082, 22 L. R. A. (N. S.) 382, 17 Ann. Cas. 1222; *Central, etc., P. Co. v. Pope*, 141 Ga. 186, 80 S. E. 642, L. R. A. 1916D, 358, when dam may be a nuisance, creating sickness.

authorized to condemn private property for the construction of canals and reservoirs, and for the erection of structures and dams in navigable waters for the generation of electric power, it cannot exercise such power when the particular enterprise contemplates an interference with the navigable capacity or navigation of the navigable waters of the state, unless such interference is expressly authorized by statute.<sup>41</sup> The source or sources from which the power emanates for condemning water courses for purposes of aiding in the generation of electricity for distribution to the public depends upon the nature of the water course to be so used. If the water course is nonnavigable, or is navigable but is entirely within the limits of a state and is not united with others so as to form highways over which commerce is, or may be, carried on with other states or foreign countries, it is within the control and jurisdiction of the state;<sup>42</sup> otherwise it would be under the jurisdiction of the federal government.<sup>43</sup> However, if the water course sought to be condemned for electric generating purposes is navigable and is entirely within the limits of a state, but is united with others as stated above, and therefore becomes a navigable stream of the United States, the state does not therefore transfer exclusive control to the federal authorities, but the right of private persons or corporations to erect structures in such waters is dependent upon the concurrent or joint consent of both the state and federal government.<sup>44</sup>

<sup>41</sup> *Minnesota Canal, etc., Power Co. v. Pratt*, 101 Minn. 197, 112 N. W. 395, 11 L. R. A. (N. S.) 105.

<sup>42</sup> *Minnesota Canal, etc., Power Co. v. Pratt*, 101 Minn. 197, 112 N. W. 395, 11 L. R. A. (N. S.) 105, holding that in the absence of the exercise of power conferred by the federal government over navigable streams within the state, incident to its power to regulate commerce, the states have full power over such waters within their jurisdiction.

<sup>43</sup> See *The Daniel Ball*, 10 Wall. 557, 19 L. Ed. 999; *United States v. The Montello*, 11 Wall. 411, 20 L. Ed. 191; *Ex parte Boyer*, 109 U. S. 629, 3 Sup. Ct. 434, 27 L. Ed. 1056; *Hodges v. Williams*, 95 N. C. 331, 59 Am. Rep. 242. These cases modify as may be seen, to a certain extent, *Minnesota Canal, etc., Power Co. v. Pratt*, 101 Minn. 197, 112 N. W. 395, 11 L. R. A. (N. S.) 105.

<sup>44</sup> *Minnesota Canal, etc., Power Co. v. Pratt*, 101 Minn. 197, 112 N. W. 395, 11 L. R. A. (N. S.) 105, citing Act Cong. March 3, 1899, c. 425, §§ 9, 10, 30 Stat. 1151, U. S. Comp. St. 1913, §§ 9971, 9910, 6 Fed. St. Ann. p. 805, where the federal requirements may be found.

## CHAPTER IX

## LIABILITY FOR INJURIES CAUSED BY IMPROPER LOCATION, CONSTRUCTION AND MAINTENANCE

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§ 193. Injuries to persons on highways—in general.—We have, with a good deal of pleasure, discussed at some length the defini-



tion of telegraph, telephone, and electric companies, their legal status, with respect to the rights of exercising the powers of eminent domain; whether or not they were common carriers; the power of alienating their franchises; and the character of their property. We have also commented upon the rights of way acquired by such companies, giving thereunder the sources from which such rights were acquired, as from the federal and state government, and from municipalities, where the same could be exercised, under what manner and conditions the same could be had, the effect they would produce upon the property acquired, and then the interest acquired—whether or not it was or could be exclusive and vested. Presuming that all telegraph, telephone, and electric companies are comprehended under such definition, that they have thus far acquired all the rights and powers necessary to carry on their business as public institutions, and that they have complied with all the requirements necessary to be classed as corporations, we shall now comment upon their liability for injuries caused by improper location, construction and maintenance of their lines along the highways, to persons using them. After this we shall say something of injuries suffered by their employes.

§ 194. **Same continued—injury on highways.**—Telegraph, telephone, and electric companies must exercise reasonable care not only in the original location and construction of their lines,<sup>1</sup> but must maintain them in such a manner as to prevent injuries to persons using the streets and highways;<sup>2</sup> and on a failure so to do, whereby injury arises, they will be liable for all injuries resulting

<sup>1</sup> *Bevis v. Vanceburg Tel. Co.*, 121 Ky. 177, 89 S. W. 126, 28 Ky. Law Rep. 142; *Politowitz v. Citizens' Tel. Co.*, 123 Mo. App. 77, 99 S. W. 756; *Simmons v. Shreveport Gas, etc., Co.*, 116 La. 1033, 41 South. 248; *Ela v. Postal Tel. Cable Co.*, 71 N. H. 1, 51 Atl. 281; *Harton v. Forest City Tel. Co.*, 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. (N. S.) 956, 14 Ann. Cas. 390; *Ensign v. Central New York Tel. Co.*, 79 App. Div. 244, 79 N. Y. Supp. 799, affirmed in 179 N. Y. 539, 71 N. E. 1130; *Davidson v. Utah Independent Tel. Co.*, 34 Utah, 249, 97 Pac. 124; *Fisher v. New Bern*, 140 N. C. 506, 53 S. E. 342, 111 Am. St. Rep. 857, 5 L. R. A. (N. S.) 543, must keep them at proper elevation; *Fairbairn v. American R. Elec. Co.*, 170 Cal. 115, 148 Pac. 788, highest degree of care of electric line along highway.

<sup>2</sup> *Crawford v. Standard Tel. Co.*, 139 Iowa, 331, 115 N. W. 878; *Postal Tel. Cable Co. v. Jones*, 133 Ala. 217, 32 South. 500; *Harton v. Forest City Tel. Co.*, 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. (N. S.) 956, 14 Ann. Cas. 390; *Walther v. American Dist. Tel. Co.*, 11 Misc. Rep. 71, 32 N. Y. Supp. 751; *West Kentucky Tel. Co. v. Pharis*, 78 S. W. 917, 25 Ky. Law Rep. 1838; *Eastern Kentucky Tel., etc., Co. v. Hardwick*, 106 S. W. 307, 32 Ky. Law Rep. 582, holding that a telephone company must exercise ordinary care to maintain

from such breach of duty.<sup>3</sup> In the first place, these companies must exercise reasonable care in selecting a proper location on which

its line in good working order but is not liable for interruptions in the service not preventable by ordinary care.

*Unguarded excavations, manholes, trenches or post holes*, liable for injuries arising from. *Kent v. Southern Bell Tel., etc., Co.*, 120 Ga. 980, 48 S. E. 399; *Merritt v. Kinloch Tel. Co.*, 215 Mo. 299, 115 S. W. 19, hole not properly filled up after moving pole; *Van Vehten v. New York, etc., Tel., etc., Co.*, 71 N. J. Law. 45, 58 Atl. 1096, manhole; *White v. Keystone Tel. Co.*, 211 Pa. 455, 60 Atl. 998. See *Hill v. Chesapeake, etc., Tel. Co.*, 42 App. D. C. 170, 51 L. R. A. (N. S.) 1072, Ann. Cas. 1915D, 1085, passageway in store at slot apparatus or public pay station of telephone; *Ruehl v. Lidgerwood Rural Tel. Co.*, 23 N. D. 6, 135 N. W. 793, Ann. Cas. 1914C, 680, post holes in yard left opened, injuring child. See *Sullivan v. New York Tel. Co.*, 157 App. Div. 642, 142 N. Y. Supp. 735.

<sup>3</sup> *Alabama*.—*Postal Tel. Cable Co. v. Jones*, 133 Ala. 217, 32 South. 500.

*Arkansas*.—*City Elec. St. Ry. Co. v. Conery*, 61 Ark. 381, 33 S. W. 426, 54 Am. St. Rep. 262, 31 L. R. A. 570.

*California*.—*Diller v. Northern California P. Co.*, 162 Cal. 531, 123 Pac. 359, Ann. Cas. 1913D, 908, and note collating authorities.

*Colorado*.—*West. U. Tel. Co. v. Eyser*, 2 Colo. 141; *Denver Cons. Elec. Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566.

*District of Columbia*.—*District of Columbia v. Dempsey*, 13 App. D. C. 533.

*Georgia*.—*Southern Bell Tel., etc., Co. v. Howell*, 124 Ga. 1050, 53 S. E. 577, 4 Ann. Cas. 707.

*Illinois*.—*Cumberland Tel., etc., Co. v. Coats*, 100 Ill. App. 519, no negligence shown; *Palestine v. Siler*, 225 Ill. 630, 80 N. E. 345, 8 L. R. A. (N. S.) 205.

*Indiana*.—*West. U. Tel. Co. v. Levi*, 47 Ind. 552; *Brush Elec. Lighting Co. v. Kelley*, 126 Ind. 220, 25 N. E. 812, 10 L. R. A. 250; *Aiken v. Columbus*, 167 Ind. 139, 78 N. E. 657, 12 L. R. A. (N. S.) 416.

*Kansas*.—*Winegarner v. Edison Lt., etc., Co.*, 83 Kan. 67, 109 Pac. 778, 28 L. R. A. (N. S.) 677.

*Kentucky*.—*Bevis v. Vanceburg Tel. Co.*, 121 Ky. 177, 89 S. W. 126, 28 Ky. Law Rep. 142; *Louisville Home Tel. Co. v. Gasper*, 123 Ky. 128, 93 S. W. 1057, 9 L. R. A. (N. S.) 548.

*Louisiana*.—*Wilson v. Great Tel., etc., Co.*, 41 La. Ann. 1041, 6 South. 781.

*Maine*.—*Dickey v. Maine Tel. Co.*, 46 Me. 483. See *Shackford v. New England Tel., etc., Co.*, 112 Me. 204, 91 Atl. 931.

*Maryland*.—*Lee v. Maryland Tel., etc., Co.*, 97 Md. 692, 55 Atl. 680; *West. U. Tel. Co. v. State*, 82 Md. 293, 33 Atl. 763, 51 Am. St. Rep. 464, 31 L. R. A. 572; *Walter v. Baltimore Elec. Co.*, 109 Md. 513, 71 Atl. 953, 22 L. R. A. (N. S.) 1178.

*Massachusetts*.—*Thomas v. West. U. Tel. Co.*, 100 Mass. 156; *Sias v. Lowell, etc., St. R. Co.*, 179 Mass. 343, 60 N. E. 974.

*Michigan*.—*Hovey v. Michigan Tel. Co.*, 124 Mich. 607, 83 N. W. 600; *Kyes v. Valley Tel. Co.*, 132 Mich. 281, 93 N. W. 623; *Friesenhan v. Michigan Tel. Co.*, 134 Mich. 292, 96 N. W. 501; *Chaffee v. Tel., etc., Constr. Co.*, 77 Mich. 625, 43 N. W. 1064, 18 Am. St. Rep. 424, 6 L. R. A. 455.

*Missouri*.—*Larkin v. West. U. Tel. Co.*, 82 Mo. App. 155; *Politowitz v.*

to construct their lines,<sup>4</sup> and should they carelessly place them upon property for which they have no authority, or if they once had the authority to place them on said property but have since lost it, they become a nuisance with respect to such property, and

Citizens' Tel. Co., 123 Mo. App. 77, 99 S. W. 756; Gannon v. Laclede Gas Lt. Co., 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505.

*New Hampshire.*—Ela v. Postal Tel. Cable Co., 71 N. H. 1, 51 Atl. 281, failure to provide proper guards and brackets on curve.

*New Jersey.*—New York, etc., Tel. Co. v. Bennett, 62 N. J. Law, 742, 42 Atl. 759; Chalmers v. Paterson, etc., Tel. Co., 66 N. J. Law, 41, 48 Atl. 993; Suburban Elec. Co. v. Nugent, 58 N. J. Law, 658, 34 Atl. 1069, 32 L. R. A. 700; Guinn v. Delaware, etc., Tel. Co., 72 N. J. Law, 276, 62 Atl. 412, 111 Am. St. Rep. 668, 3 L. R. A. (N. S.) 988.

*New York.*—Ensign v. Central New York Tel., etc., Co., 79 App. Div. 244, 79 N. Y. Supp. 799, affirmed in 179 N. Y. 539, 71 N. E. 1130; Flood v. West. U. Tel. Co., 61 Hun. 619, 15 N. Y. Supp. 400; Gordon v. Ashley, 34 Misc. Rep. 743, 70 N. Y. Supp. 1038; Leeds v. New York Tel. Co., 64 App. Div. 484, 72 N. Y. Supp. 250; Sheldon v. West. U. Tel. Co., 51 Hun. 591, 4 N. Y. Supp. 526. See, also, Ward v. Atlantic, etc., Tel. Co., 71 N. Y. 81, 27 Am. Rep. 10; Leeds v. New York Tel. Co., 32 Misc. Rep. 671, 66 N. Y. Supp. 457; Id., 79 App. Div. 121, 80 N. Y. Supp. 114.

*North Carolina.*—Haynes v. Raleigh Gas Co., 114 N. C. 203, 19 S. E. 344, 41 Am. St. Rep. 786, 26 L. R. A. 810.

*Oregon.*—Ahern v. Oregon Tel., etc., Co., 24 Or. 276, 33 Pac. 403, 35 Pac. 549, 22 L. R. A. 635; Boyd v. Portland Gen. Elec. Co., 37 Or. 567, 62 Pac. 378, 52 L. R. A. 509; Chaperon v. Portland Elec. Co., 41 Or. 39, 67 Pac. 928.

*Pennsylvania.*—Little v. Central Dist., etc., Tel. Co., 213 Pa. 229, 62 Atl. 848; Pennsylvania Tel. Co. v. Varnau (Pa.) 15 Atl. 624; Central Pennsylvania, etc., Co. v. Wilkes-Barre, etc., R. Co., 11 Pa. Co. Ct. R. 417.

*Rhode Island.*—McDonald v. Postal Tel. Co., 22 R. I. 131, 46 Atl. 407.

*South Carolina.*—Miles v. Postal Tel. Cable Co., 55 S. C. 403, 33 S. E. 493; Irvine v. Greenwood, 89 S. C. 511, 72 S. E. 228, 36 L. R. A. (N. S.) 363.

*Tennessee.*—Postal Tel. Cable Co. v. Zoppi, 93 Tenn. 369, 24 S. W. 633; Cumberland Tel., etc., Co. v. Cook, 103 Tenn. 730, 55 S. W. 152; Cumberland

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<sup>4</sup> Ensign v. Central New York Tel., etc., Co., 79 App. Div. 244, 79 N. Y. Supp. 799, affirmed in 179 N. Y. 539, 71 N. E. 1130, wire strung so near decayed tree as to be broken down by a falling limb.

*Proximity to other objects.*—In the construction of its lines telephone company should be regardful of their being constructed in proximity to fire escapes, tree, or other objects through which the electrical current might likely be conducted, so as to injure persons or property. Asher v. City of Independence, 177 Mo. App. 1, 163 S. W. 574, fire escape; Estabrook v. Newburgh, etc., P. Co., 141 App. Div. 683, 125 N. Y. Supp. 944, near a tree; Johnson v. Bay City, 164 Mich. 251, 129 N. W. 29, Ann. Cas. 1912B, 866, near trees, question for jury; Dwyer v. Electric Co., 20 App. Div. 124, 46 N. Y. Supp. 874, iron brace supporting a cross-arm of the pole. See, also, Morgan v. Westmoreland Elec. Co., 213 Pa. 151, 62 Atl. 638; Roche v. New York Edison Co., 84 Misc. Rep. 427, 146 N. Y. Supp. 294.



if an injury is caused thereby, the company will undoubtedly be liable for such injury.<sup>5</sup> When the location has been properly made, then it devolves upon them to use due care in the construction of their lines, so as not to endanger the public with any faulty material or structure, or the manner in which they are constructed.<sup>6</sup> Not only is it the duty of these companies to properly locate and construct their lines, but they must also use the same degree of care to maintain them as long as they are used as was exercised in their construction. In other words, the location of these lines must be kept properly maintained. Should the location once have been properly selected and for any reason has since been neglected<sup>7</sup> or

Tel., etc., *Co. v. Hunt*, 108 Tenn. 697, 69 S. W. 729; *United Electric R. Co. v. Shelton*, 89 Tenn. 423, 14 S. W. 863, 24 Am. St. Rep. 614.

*Texas*.—Postal Tel. Cable Co. v. Coote (Civ. App.) 57 S. W. 912; *Wehner v. Lagerfelt*, 27 Tex. Civ. App. 520, 66 S. W. 221; *Southwestern Tel., etc., Co. v. Ingrando*, 27 Tex. Civ. App. 400, 65 S. W. 1085; *San Antonio, etc., Elec. Co. v. Ocon*, 105 Tex. 139, 146 S. W. 162, 39 L. R. A. (N. S.) 1046.

*Utah*.—*Davidson v. Utah Independent Tel. Co.*, 34 Utah, 249, 97 Pac. 124.

*Virginia*.—*Watts v. Southern Bell Tel., etc., Co.*, 100 Va. 45, 3 Va. Sup. Ct. R. 577, 40 S. E. 107.

*West Virginia*.—*Hannum v. Hill*, 52 W. Va. 166, 43 S. E. 223.

*Wisconsin*.—*Roberts v. Wisconsin Tel. Co.*, 77 Wis. 589, 46 N. W. 800, 20 Am. St. Rep. 143; *Block v. Milwaukee St. Ry. Co.*, 89 Wis. 371, 61 N. W. 1101, 46 Am. St. Rep. 849, 27 L. R. A. 365.

*United States*.—*Sheffield v. Central U. Tel. Co. (C. C.)* 36 Fed. 164; *Wolfe v. Erie Tel. Co. (C. C.)* 33 Fed. 320; *Henning v. West. U. Tel. Co. (C. C.)* 43 Fed. 131; *Southwestern Tel., etc., Co. v. Robinson*, 50 Fed. 810, 1 C. C. A. 684, 16 L. R. A. 545.

*England*.—*Holliday v. National Tel. Co.*, 2 Q. B. 302; *Gloster v. Toronto Elec. Lt. Co.*, 38 C. S. Ct. 27, 6 Ann. Cas. 529, 1 B. R. C. 786.

<sup>5</sup> *Broome v. New York, etc., Tel. Co.*, 42 N. J. Eq. 141, 7 Atl. 851, approved in *Chesapeake, etc., Tel. Co. v. Mackenzie*, 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 219, approved in *Maryland Tel., etc., Co. v. Ruth*, 106 Md. 644, 68 Atl. 358, 14 L. R. A. (N. S.) 427, 124 Am. St. Rep. 506, 14 Ann. Cas. 576, holding that the planting of a telephone pole in a private alley is an appropriation of private property, and is unlawful, unless the right to do has been acquired by contract or condemnation and the owner of the alley was legally authorized to abate it, provided he did so in such a manner as not to disturb the public peace or put in peril innocent third persons or their property.

<sup>6</sup> See § 196 et seq.; *Ela v. Postal Tel. Co.*, 71 N. H. 1, 51 Atl. 281; *Temple Elec. Light Co. v. Halliburton* (Tex. Civ. App.) 136 S. W. 584; question for the jury, *Jacks v. Reeves*, 78 Ark. 426, 95 S. W. 781; *Citizens' St. Ry. Co. v. Batley*, 159 Ind. 368, 65 N. E. 2; *Jones v. Union Ry. Co.*, 18 App. Div. 267, 46 N. Y. Supp. 321; *United Elec. Ry. Co. v. Shelton*, 89 Tenn. 423, 14 S. W. 863, 24 Am. St. Rep. 614; *West. U. Tel. Co. v. Thorn*, 64 Fed. 287, 12 C. C. A. 104. But see *Baltimore, etc., Ry. Co. v. Nugent*, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161.

<sup>7</sup> See § 195.



destroyed,<sup>8</sup> another must be made; and should the material out of which the lines are constructed become old, worn, decayed or cumbersome, it should be removed and the best and most up-to-date structures erected and used in lieu of these.<sup>9</sup> To be more explicit, the streets and highways should be substantially as safe after they are occupied by these companies as they were before these lines were constructed thereon.<sup>10</sup> They are not absolutely bound to make their lines safe to the public, to have their posts in the streets so strong and secure that they cannot be blown down or broken by any storm. They are bound to use proper care in the construction and maintenance of their lines, so that no traveler shall be injured by them, and the amount of care must be proportioned to the amount of danger and the liability to accident.<sup>11</sup> And where it is shown that the company transmits a high current of electricity by means of overhead wires along the street or highway, and that a traveler, without fault on his part, comes into contact with one of its wires hanging in, or lying on, the street or highway, and is injured by the electric current therefrom, a *prima facie* case of negligence is established.<sup>12</sup>

§ 195. **Same continued—abandonment, no defense.**—It is no defense for a company to say that the property which caused the injury has been abandoned or is not in use. For instance, where a person was injured by pieces of cut wire left in the street;<sup>13</sup> or

<sup>8</sup> See § 197.

<sup>9</sup> See §§ 196, 199.

<sup>10</sup> *West. U. Tel. Co. v. State*, 82 Md. 293, 33 Atl. 763, 51 Am. St. Rep. 464, 31 L. R. A. 512n.

*Moving buildings.*—Wires should be high enough and sufficiently insulated so as to permit the moving of houses or buildings along the street. *Winegarner v. Edison L., etc., Co.*, 83 Kan. 67, 109 Pac. 778, 28 L. R. A. (N. S.) 677; *Collar v. Tel. Co. (Minn.)* 155 N. W. 1075, L. R. A. 1916C, 1249.

<sup>11</sup> See § 198b.

<sup>12</sup> *Diller v. Northern Cal. Power Co.*, 162 Cal. 531, 123 Pac. 359, Ann. Cas. 1913D, 908; *Lewis v. Bowling Green Gas Lt. Co.*, 135 Ky. 611, 117 S. W. 278, 22 L. R. A. (N. S.) 1169; *Walter v. Baltimore Elec. Co.*, 109 Md. 513, 71 Atl. 953, 22 L. R. A. (N. S.) 1178; *Fickeisen v. Wheeling Elec. Co.*, 67 W. Va. 635, 67 S. E. 788, 27 L. R. A. (N. S.) 893; *Wilbert v. Sheboygan Lt., etc., Co.*, 129 Wis. 1, 106 N. W. 1058, 116 Am. St. Rep. 931. See, also, §§ 199, 207, 509, and numerous cases cited thereunder.

<sup>13</sup> The court in rendering an opinion on this subject has the following to say: "The same rule would apply when after erections are properly made the company negligently suffers them to fall down or to be out of repair or to remain so after reasonable notice. It was as much its duty safely to maintain as it was safely to erect. Whether the unsafe condition was or was not in its inception the result of a cause for which the company was responsi-

where the telephone instruments are removed from a building, but instead of removing its wires as suggested by the owner, they are merely cut loose from the instrument and their ends twisted together and left dangling in the building, so that atmospheric electricity, striking somewhere along their course on the outside, will be inducted into the building and there discharged to the peril of persons and property therein;<sup>14</sup> or where one of its wires becomes broken and is allowed to remain swinging across a feed wire of a street railway company for an unreasonable time, and a person comes in contact with it when charged from the said feed wire and is injured thereby;<sup>15</sup> or if its wires are allowed to remain

ble is only material in determining when the negligence began and in what it consisted. If it was the result of negligent construction this would constitute the negligence. On the other hand if, as in this case, the unsafe condition was the result of a cause for which the company was not at all responsible, the negligence consists, not in the fact that the wires fell into the street, but in the fact that they were allowed to remain there after reasonable notice to the company and the lapse of sufficient time within which to remove them. The duty of the company in such a case, it seems to us, is not at all dependent upon the nature of the cause which produced the unsafe condition. So far as the duty of removing the wires from the street was concerned it was immaterial whether their fall was the result of natural decay, of a malicious and unlawful act of some third person, of some extraordinary force of nature, or, as in this case, of the freezing of water thrown upon the cross-bars by the fire department. Nor could the company which had placed its property on a public street under a license from the city relieve itself of this duty by assuming to abandon it, when from natural wear or sudden casualty it had ceased to be valuable for the purpose for which it had been placed there." *Nichols v. City of Minneapolis*, 33 Minn. 430, 23 N. W. 868, 53 Am. Rep. 56; *Staring v. West. U. Tel. Co.*, 58 Hun, 606, 11 N. Y. Supp. 817. Pedestrian injured by tipping on an electric light wire which crossed and lay upon the sidewalk, *Brush El. L. Co. v. Kelley*, 126 Ind. 220, 25 N. E. 812, 10 L. R. A. 250.

<sup>14</sup> *Southern Bell Tel., etc., Co. v. McTyer*, 137 Ala. 601, 34 South. 1020, 97 Am. St. Rep. 62, negligence per se; *Jackson v. Wisconsin Tel. Co.*, 88 Wis. 243, 60 N. W. 430, 26 L. R. A. 101; *Owen v. Portage, etc., Co.*, 126 Wis. 412, 105 N. W. 924. See, also, *Fitzgerald v. Edison Electric, etc., Co.*, 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732; *Starr v. Southern Bell Tel., etc., Co.*, 156 N. C. 435, 72 S. E. 484. But see *Texas Tel., etc., Co. v. Scott* (Tex. Civ. App.) 127 S. W. 587, not per se negligent; *Norfolk, etc., Tr. Co. v. Daily*, 111 Va. 665, 69 S. E. 963; *Electric Lt. Co. v. Sullivan*, 22 App. D. C. 115; *Berstein v. Electric Co.*, 235 Pa. 53, 83 Atl. 612; *Evans v. Eastern Kentucky Tel. Co.*, 124 Ky. 620, 30 Ky. Law Rep. 833, 99 S. W. 936; *E. Tennessee Tel. Co. v. Simms*, 36 S. W. 171, 38 S. W. 131, 18 Ky. Law Rep. 761; *Same v. Sim*, 20 Ky. Law Rep. 1330, 38 S. W. 131.

<sup>15</sup> Where a telephone company allows a wire to become broken and remain in a dangerous condition for five months, and it comes in contact with an electric light wire, and causes death of a person, it is liable although a re-

coiled on the highway an unreasonable time after the company has notice of same, and it frightens teams and causes them to run away and injure any person or property,<sup>16</sup> or if they should become entangled therein to their injury; or if their abandoned property in any way causes an injury to persons or property, the fact of the abandonment of such property cannot be set up as a defense.<sup>17</sup>

§ 196. **Poles improperly constructed.**—Telegraph, telephone, or electrical companies will be liable for injuries to persons caused by the negligent or improper manner of constructing their poles, and supporters therefor. They must construct and maintain their poles so as not to endanger the public generally, or other public

cent storm was the cause of the contact. *Central U. Tel. Co. v. Sokola*, 34 Ind. App. 429, 73 N. E. 143. Where for three days a broken telephone wire hangs on property adjacent to a street and an electric street railway current is conducted by it and injures a person, the company is liable. *Lynchburg, etc., Co. v. Booker*, 103 Va. 594, 50 S. E. 148; *Brown v. Consolidated, etc., Co.*, 137 Mo. App. 718, 109 S. W. 1032, where electric light company and telephone wires were in first-class condition before a violent storm, and wires were not tested until next morning, may be liable. See, also, *West. U. Tel. Co. v. State*, 82 Md. 293, 33 Atl. 763, 31 L. R. A. 572, 51 Am. Rep. 464; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786.

<sup>16</sup> *Thomas v. West. U. Tel. Co.*, 100 Mass. 156. The company may be liable for a horse being frightened by construction material on the street. *Southwestern Tel., etc., Co. v. Doolittle* (Tex. Civ. App.) 138 S. W. 415; *Simonds v. Maine, etc., Co.*, 104 Me. 440, 72 Atl. 175, 28 L. R. A. (N. S.) 942. See, also, *Southwestern Tel., etc., Co. v. Robinson*, 50 Fed. 810, 1 C. C. A. 684, 16 L. R. A. 545; *West. U. Tel. Co. v. Engler*, 75 Fed. 102, 21 C. C. A. 246; *West. U. Tel. Co. v. Eyser*, 2 Colo. 141; *Brush Electric Lt. Co. v. Kelley*, 126 Ind. 220, 25 N. E. 812, 10 L. R. A. 250; *Cynthiana Tel. Co. v. Asbury*, 147 Ky. 307, 143 S. W. 1050; *West Ky. Tel. Co. v. Pharis*, 25 Ky. Law Rep. 1838, 78 S. W. 917; *Claussen v. Cumberland Tel., etc., Co.*, 126 La. 1087, 53 South. 357; *Hovey v. Michigan Tel. Co.*, 124 Mich. 607, 83 N. W. 600; *Nichols v. Minneapolis*, 33 Minn. 430, 23 N. W. 868, 53 Am. Rep. 56; *Heiberger v. Missouri, etc., Tel. Co.*, 133 Mo. App. 452, 113 S. W. 730; *Walther v. American District Tel. Co.*, 11 Misc. Rep. 71, 32 N. Y. Supp. 751; *Snee v. Clear Lake Tel. Co.*, 24 S. D. 361, 123 N. W. 729; *Bishop v. Rocky Mountain Bell Tel. Co.*, 33 Utah, 464, 94 Pac. 976; *Herlitzke v. La Cross, etc., Tel. Co.*, 145 Wis. 185, 130 N. W. 59; *East Tennessee Tel. Co. v. Parsons*, 154 Ky. 801, 159 S. W. 584, 47 L. R. A. (N. S.) 1021; falling of a wire, *Memphis Street Ry. Co. v. Kartwright*, 110 Tenn. 277, 75 S. W. 719, 100 Am. St. Rep. 807; *Jones v. Union Ry. Co.*, 18 App. Div. 267, 46 N. Y. Supp. 321; *Schenkel v. Pittsburg, etc., Tr. Co.*, 194 Pa. 182, 44 Atl. 1072, or frightens the horse so that injury ensues; *Postal Tel. Cable Co. v. Jones*, 133 Ala. 217, 32 South. 500.

<sup>17</sup> *Home Tel. Co. v. Fields*, 150 Ala. 306, 43 South. 711; *Nichols v. Minneapolis*, 33 Minn. 430, 23 N. W. 868, 53 Am. Rep. 56.



enterprises.<sup>18</sup> In the first place, they must be located so as not to incommode the public unnecessarily,<sup>19</sup> by placing them in the traveled part of a street or highway.<sup>20</sup> If the company has a license from a city to construct its poles on the streets, they will not be declared a nuisance,<sup>21</sup> but if they clearly appear to be improperly located thereon,<sup>22</sup> and injury results therefrom, the company will be liable notwithstanding that it has a license from the city to construct its poles at such places;<sup>23</sup> and in the latter case, as it has been held, it would be jointly liable with the city.<sup>24</sup> A pole may be lawfully constructed, yet it may be a question of fact whether the location of the pole was dangerous to the public.<sup>25</sup> The location may be properly made, but if its supporters or guy wires are in such a manner as to cause injury, the company will still be

<sup>18</sup> See § 86 et seq. See, also, § 194. See, also, *Murray v. Cowherd*, 148 Ky. 591, 147 S. W. 6, 40 L. R. A. (N. S.) 617, not excused on theory of nonfeasance.

<sup>19</sup> *Sheffield v. Central U. Tel. Co. (C. C.)* 36 Fed. 164.

<sup>20</sup> *Bevis v. Vanceburg Tel. Co.*, 121 Ky. 177, 89 S. W. 126, 28 Ky. Law Rep. 142; *Nebraska Tel. Co. v. Jones*, 60 Neb. 396, 83 N. W. 197, where stump of pole is in middle of road; *Illinois Terminal R. Co. v. Thompson*, 210 Ill. 226, 71 N. E. 328, where brakeman on car collides with pole located too near track; *Little v. Central, etc., Co.*, 213 Pa. 229, 62 Atl. 848, where poles are so near the traveled portion of the highway that a person seated on a wagon with his feet extending about one foot from side of wagon; *Alice, etc., Tel. Co. v. Billingsley*, 33 Tex. Civ. App. 452, 77 S. W. 255; *Watts v. Southern Bell Tel., etc., Co.*, 100 Va. 45, 40 S. E. 107. See *Earp v. Phelps*, 120 Md. 282, 87 Atl. 806; *Moore v. East Tennessee Tel. Co.*, 142 Fed. 965, 74 C. C. A. 227; *Wells v. West. U. Tel. Co.*, 40 Nova Scotia, 81; *Bonn v. Bell Tel. Co.*, 30 Ont. 696. *Riley v. New England Tel., etc., Co.*, 184 Mass. 150, 68 N. E. 17, irrespective of negligence under Massachusetts statute.

<sup>21</sup> See § 86 et seq.

<sup>22</sup> *Wolf v. Erie Tel., etc., Co. (C. C.)* 33 Fed. 320; *Bonn v. Bell Tel. Co.*, 30 Ont. 696; *Nebraska Tel. Co. v. Jones*, 60 Neb. 396, 83 N. W. 197; *Kowalski v. Newark Passenger R. Co.*, 15 N. J. Law J. 50; *West. U. Tel. Co. v. Eyser*, 2 Colo. 141.

<sup>23</sup> *Keasby on Electric Wires*, p. 154; *Kowalski v. Newark Passenger R. Co.*, 15 N. J. Law J. 50; *Wolfe v. Erie Tel., etc., Co. (C. C.)* 33 Fed. 320.

<sup>24</sup> *Atkinson v. Cheatham*, 26 Ont. App. 521; *Geneva v. Brush Electric Co.*, 50 Hun, 581, 3 N. Y. Supp. 595. See, also, *Nichols v. Minneapolis*, 33 Minn. 430, 23 N. W. 868, 53 Am. Rep. 56; *Denver v. Sherrett*, 88 Fed. 226, 31 C. C. A. 499; *West Kentucky Tel. Co. v. Pharis*, 78 S. W. 917, 25 Ky. Law Rep. 1838; *Mooney v. Luzerne*, 186 Pa. 161, 40 Atl. 311, 40 L. R. A. 811; *Kost v. Ashland*, 236 Pa. 164, 84 Atl. 691; *Colbourn v. Wilmington*, 4 Pennewill (Del.) 443, 56 Atl. 605; *American Dist. Tel. Co. v. Oldham*, 148 Ky. 320, 146 S. W. 764, Ann. Cas. 1913E, 376.

<sup>25</sup> *Wolfe v. Erie Tel., etc., Co. (C. C.)* 33 Fed. 320; *Sheffield v. Central U. Tel. Co. (C. C.)* 36 Fed. 164.



liable.<sup>26</sup> Thus, where the guy wire which supports the pole is swinging so low as not to permit a fire engine with its crew, which

<sup>26</sup> *Louisville Home Tel. Co. v. Gasper*, 123 Ky. 128, 93 S. W. 1059, 9 L. R. A. (N. S.) 548, 29 Ky. Law Rep. 578, person injured by guy wire in a public alley so placed as to be indiscernible and dangerous to vehicles; *Grant v. Sunset, etc., Co.*, 7 Cal. App. 267, 94 Pac. 368, guy wire 25 feet from pole and at a point where a person in the dark going to the depot runs into it; *Sheldon v. West. U. Tel. Co.*, 51 Hun, 591, 4 N. Y. Supp. 526, affirmed in 121 N. Y. 697, 24 N. E. 1099, guy running from top of pole near fence to peg near edge of road, and being concealed by two trees; *Wilson v. Great Southern Tel., etc., Co.*, 41 La. Ann. 1041, 6 South. 781, fire engine running against guy which is about 6 feet from ground, although pole and wire were on ground where vehicles were forbidden to go on, fire engine being an exception; *Davidson v. Utah Independent Tel. Co.*, 34 Utah, 249, 97 Pac. 124, guy wire running from pole to edge of highway and causes injury to a person driving on that side of highway on a dark night, there being no sidewalk and vehicles travel entire width of street; *Ft. Worth v. Williams*, 55 Tex. Civ. App. 289, 119 S. W. 137, an unincased wire running to edge of sidewalk where people are liable to stumble over same; *Williams v. City of Parsons*, 87 Kan. 649, 125 Pac. 60, city may be liable where woman stumbles over wire running across path; *Poumeroule v. Postal Cable Tel. Co.*, 167 Mo. App. 533, 152 S. W. 114; *Raines v. East Tennessee Tel. Co.*, 152 Ky. 205, 153 S. W. 224, telephone company must exercise reasonable care to place guy wire so as not to be susceptible to danger; *Mogk v. New York, etc., Co.*, 78 App. Div. 560, 79 N. Y. Supp. 685, party driving into wire not necessarily guilty of negligence; *Raines v. East Tennessee Tel. Co.*, 150 Ky. 670, 150 S. W. 830, street not yet accepted by city; *Bentley v. Missouri, etc., Co.*, 142 Mo. App. 215, 125 S. W. 533, where night so dark a telephone pole cannot be seen two feet away, and a guy wire between sidewalk and curb, company not liable. But see *Mayfield Water, etc., Co. v. Webb*, 111 S. W. 712, 33 Ky. Law Rep. 909, 18 L. R. A. (N. S.) 179, not liable for injury to child climbing wire.

*Electrical guy wires.*—*New Omaha, etc., Light Co. v. Johnson*, 67 Neb. 393, 93 N. W. 778, holding that an electric company is under the duty to exercise all reasonable precaution against passing a dangerous current through a guy wire attached to a pole on a vacant, uninclosed lot in a densely populated portion of the city; *Neal v. Wilmington, etc., Ry. Co.*, 3 Pennewill (Del.) 467, 53 Atl. 338, guy wire supporting trolley wire falls and becomes charged with electricity, is liable, after notice, for not protecting the public against it; *Chattanooga Elect. Ry. Co. v. Mingle*, 103 Tenn. 667, 56 S. W. 23, 76 Am. St. Rep. 703, although the fall is caused by the stroke of the trolley, a presumption of negligence arises against the company; *South Omaha Waterworks Co. v. Vocasek*, 62 Neb. 710, 87 N. W. 536, evidence that a boy 17 years old knew that the guy wire of an electric light post carried a current of electricity, and that he placed his hand on it after being warned by a younger companion, does not conclusively establish contributory negligence, where it appears that the wire had been charged with electricity for several days, with notice to the owner, and that it had been handled frequently by various persons during that time, and a few minutes before by the boy, without harm; *Campbell v. United Ry. Co.*, 243 Mo. 141, 147 S. W. 788, where current of electricity runs through one of trolley company's guy wires on to

is rushing to the scene of a fire, to pass thereunder, the company will be liable, even though this wire is attached to a pole erected on neutral ground.<sup>27</sup> So also the poles should be sufficiently strong

a private wire; *Friesenhan v. Michigan Tel. Co.*, 134 Mich. 292, 96 N. W. 501; *South Texas Tel. Co. v. Tabb*, 52 Tex. Civ. App. 213, 114 S. W. 448; *Johnson v. Northwestern Tel. Co.*, 48 Minn. 433, 57 N. W. 225; *Id.*, 54 Minn. 37, 55 N. W. 829. See *Guinn v. Delaware, etc., Tel. Co.*, 72 N. J. Law, 276, 62 Atl. 412, 3 L. R. A. (N. S.) 988, 111 Am. St. Rep. 668. See, also, duty to take notice of danger of wire passing through limbs of tree that children will likely climb tree, *Temple v. McComb, etc., Light Co.*, 89 Miss. 1, 42 South. 874, 11 L. R. A. (N. S.) 449, 119 Am. St. Rep. 698, 10 Ann. Cas. 924. See, also, *Cumberland Tel., etc., Co. v. Coats*, 100 Ill. App. 519; *Delaware, etc., Tel. Co. v. Fleming*, 53 Ind. App. 555, 102 N. E. 163; *Lundeen v. Livingston Elec. Lt. Co.*, 17 Mont. 32, 41 Pac. 995; *Davidson v. Telephone Co.*, 34 Utah, 249, 97 Pac. 124.

*Guy wires in proximity to charged wires.*—If it is shown that a guy wire was maintained in such proximity to a dangerous electric wire, with which it came in contact, and as a result of which a person was injured by touching the guy, negligence may be properly inferred. *Graves v. City, etc., Tel. Ass'n (C. C.)* 132 Fed. 387; *Valparaiso Ltg. Co. v. Tyler*, 177 Ind. 278, 96 N. E. 768; *Michigan City, etc., Elec. Co. v. Dibka*, 54 Ind. App. 248, 100 N. E. 877; *Snyder v. Mutual Tel. Co.*, 135 Iowa, 215, 112 N. W. 776, 14 L. R. A. (N. S.) 321; *Macon v. Paducah St. Ry. Co.*, 110 Ky. 680, 62 S. W. 496, 23 Ky. Law Rep. 46; *Citizens' Tel. Co. v. Wakefield (Ky.)* 126 S. W. 127; *Electric Lt. Co. v. Johnson*, 67 Neb. 393, 93 N. W. 778; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786; *Shawnee, etc., P. Co. v. Sears*, 21 Okl. 13, 95 Pac. 449; *Turton v. Powelton Elec. Co.*, 185 Pa. 406, 39 Atl. 1053; *Garretson v. Tacoma, etc., P. Co.*, 50 Wash. 24, 91 Pac. 511; *Lomoe v. Superior, etc., P. Co.*, 147 Wis. 5, 132 N. W. 623; *Ryan v. Oshkosh Gas Lt. Co.*, 138 Wis. 466, 120 N. W. 264; where service wire falls and sags upon guy wire, *Village v. Siler*, 225 Ill. 630, 80 N. E. 345, 8 L. R. A. (N. S.) 205; *Freeman v. Missouri, etc., Tel. Co.*, 160 Mo. App. 271, 142 S. W. 733; *Ryan v. Oshkosh Gas Lt. Co.*, *supra*; due care requires installation of circuit breaker, *Hoover v. Kansas City Elevated R. Co.*, 159 Mo. App. 416, 140 S. W. 321.

*Guy wires, incasement.*—Guy wires extending to the ground where people are liable to trip over them should be incased so as to be visible. *Grant v. Sunset Tel., etc., Co.*, *supra*; *Poumeroule v. Postal Tel. Cable Co.*, *supra*; *Ft. Worth v. Williams*, *supra*; *Bentley v. Missouri, etc., Tel. Co.*, *supra*.

*Span wires.*—If railway company negligently permits a span wire to become a carrier of deadly current of electricity, it will generally be liable in damages for injuries to persons who, not knowing of its dangerous condition, touch it or touch some wire or appliance connected with it, which becomes dangerous when the span wire is charged. *Potts v. Shreveport, etc., R. Co.*, 110 La. 1, 34 South. 103, 98 Am. St. Rep. 452; *Campbell v. Rys. Co.*, 243 Mo. 141, 147 S. W. 788; *Jones v. Ry. Co.*, 18 App. Div. 267, 46 N. Y. Supp. 321.

<sup>27</sup> *Wilson v. Great Southern Tel., etc., Co.*, 41 La. Ann. 1041, 6 South. 781. See *Pennebaker v. San Joaquin, etc., Power Co.*, 158 Cal. 579, 112 Pac. 459, 31 L. R. A. (N. S.) 1099, 139 Am. St. Rep. 202, not charged with a duty to

within themselves to sustain the weight of the wires.<sup>28</sup> For instance, a telephone company is not relieved from liability for injury to a person owing to the falling of one of its poles of insufficient strength by the fact that the cutting of guy wires attached to a building by the owner thereof, after he had revoked his license, contributed to the falling of the pole.<sup>29</sup> And they will continue to be responsible for injuries arising from an improper maintenance of the line, although the system is to be maintained by another.<sup>30</sup>

**§ 196a. Destruction of property by lightning.**—Electrical companies will not only be liable for personal injuries, but where their

cut off at its own instance the current from some certain district merely upon knowledge being brought to it that a building within that district is on fire.

<sup>28</sup> American Dist. Tel. Co. v. Oldham, 148 Ky. 320, 146 S. W. 764, Ann. Cas. 1913E, 376. See § 197.

<sup>29</sup> Johnson v. Northwestern Tel. Exch. Co., 48 Minn. 433, 51 N. W. 225; Id., 54 Minn. 37, 55 N. W. 829. In this case it was said that undoubtedly the defendant was bound to foresee that Shadwell, the private owner, might remove those guys, but it could not anticipate that he would do it negligently so as to allow the pole to fall into the street without warning to passers-by. Negligence, not wanton, cannot ordinarily be said to be the proximate cause of an injury when the negligence, which could not have been reasonably anticipated, of another independent human agency, has intervened and directly caused the injury. Hence it was not clear but that on the state of facts the negligence of Shadwell was the sole proximate cause of injury. But, however that may be, the question was settled on the former appeal. See, also, American Dist. Tel. Co. v. Oldham, 148 Ky. 320, 146 S. W. 764, Ann. Cas. 1913E, 376.

<sup>30</sup> Aaron v. Missouri, etc., Tel. Co., 89 Kan. 186, 131 Pac. 582. 45 L. R. A. (N. S.) 309, where a telephone company leased to another telephone company the right to string wires on the former's poles, held liable to the estate of an employé of the latter who is killed by a pole falling while he was removing his company's wire in connection with the rebuilding of the pole line, a defect in the pole not being apparent, and the lineman not being bound to ascertain the condition of the pole. A general warning to a lineman was no defense in the case.

But a telephone company which owns a telephone pole is not responsible for an injury from an insulator falling from a cross-arm on such pole, the cross-arm and insulator being the property of a telegraph company and being in the exclusive possession of the latter company. Quill v. Empire State, etc., Co., 159 N. Y. 1, 53 N. E. 679. And a lineman of an electric light company who climbs a pole owned by a telephone company on which there are electric light cross-arms and wires cannot hold either company liable for the breaking of a cross-arm belonging to the telephone company when he had no reason to suppose that the cross-arm had been inspected and he did not inspect the cross-arm himself and there was no proof that the cross-arm when originally erected was defective or that the electric light company knew of the defect. Consolidated, etc., Co. v. Chambers, 112 Md. 324, 75 Atl. 241, 26 L. R. A. (N. S.) 509.



lines have been improperly and negligently constructed and maintained, and as a result of which there is a loss or injury to property, they will be liable therefor.<sup>31</sup> Such companies are bound to anticipate that lightning may pass along their wires, and are also bound to exercise due care for the protection of the public and their customers from such current. So it has been held that they are liable for negligence in failing to provide the usual safeguards to prevent electricity from lightning from being transmitted over their wires and causing a destruction of property or a damage by fire.<sup>32</sup> However, there is authority to the contrary.<sup>33</sup> Every per-

<sup>31</sup> *Merchants' Mut. Tel. Co. v. Hirschman*, 43 Ind. App. 283, 87 N. E. 238, obstructing access to property by improper location of telephone; *McKay v. Southern Bell Tel., etc., Co.*, 111 Ala. 337, 19 South. 695, 56 Am. St. Rep. 59, 31 L. R. A. 589, injury to horse; *Hovey v. Michigan Tel. Co.*, 124 Mich. 607, 83 N. W. 600, injury to horse; *Richmond, etc., R. Co. v. Rubin*, 102 Va. 809, 47 S. E. 834, burning of store; *Jackson v. Wisconsin Tel. Co.*, 88 Wis. 243, 60 N. W. 430, 26 L. R. A. 101, destruction of barn; *Blanchard v. West. U. Tel. Co.*, 60 N. Y. 510, injury to vessel; *Stephens, etc., Transp. Co. v. West. U. Tel. Co.*, 22 Fed. Cas. 1301, No. 13,371, 8 Ben. 502, injury to vessel. See chapter 8, improper construction of cables. See, also, *Wells v. Northeastern Tel. Co.*, 101 Me. 371, 64 Atl. 648; *Wood v. Cumberland Tel., etc., Co.*, 151 Ky. 77, 151 S. W. 29; *Miles v. Postal, etc., Co.*, 55 S. C. 403, 33 S. E. 493, as to property destroyed by fire caused by current. But see *National, etc., Co. v. Denver*, 16 Colo. App. 86, 63 Pac. 949; *Chaffee v. Telephone, etc., Co.*, 77 Mich. 625, 43 N. W. 1064, 6 L. R. A. 455, 18 Am. St. Rep. 424.

<sup>32</sup> *Peninsula Tel. Co. v. McCaskill*, 64 Fla. 420, 60 South. 338, Ann. Cas. 1914B, 1029; *Jackson v. Wisconsin Tel. Co.*, 88 Wis. 243, 60 N. W. 430, 26 L. R. A. 101. In the first case lightning struck a pine tree, then glanced off or threw its static force upon a telephone wire about 6 feet away, and was thence transmitted to a store building about one-fourth mile distance where the wires were installed without insulators or a ground wire, a precaution universally used by the telephone companies operating overhead wires. It further appeared that no damage was done to other houses entered by the same wire which were there insulated and grounded. The courts said: "It is a matter of common knowledge that lightning frequently plays along or near telephone lines and that our houses are secure though telephones are placed in them; rather than a menace a well installed telephone has come to be regarded a protection against the lightning's stroke. It may be true that there is no protection against the destructive effect of a direct bolt of lightning of high voltage, but we must be wiser than we are, even after reading carefully the testimony of the experts of the plaintiff in error, to hold that the indirect effect of the indirect forces of a stroke of lightning may not be minimized and rendered harmless by those safeguards in such common use, and in so far as the evidence before us discloses such safeguards as have never failed to accomplish the uses for which they were designed. In holding that it is actionable negligence to fail to provide any safeguards, we are in

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<sup>33</sup> *Phoenix Lt., etc., Co. v. Bennett*, 8 Ariz. 314, 74 Pac. 48, 63 L. R. A. 219.



son must answer for the consequences of his own negligence; and while, generally speaking, there can be no liability for an act of God, yet if this, in connection with the negligence of the person, results directly in producing a loss or injury, a recovery therefor may be had. Consequently, if lightning is conducted to, or into a building, through the negligence of the company in the construction and maintenance of its wires, it will be liable, although the lightning may be considered an act of God.<sup>34</sup> The owner of the property will not be denied damages for the loss or injury to his property because of the fact that the wires were erected before the building or property destroyed, where the same is entirely upon his own premises.<sup>35</sup>

§ 197. **Same continued—strength and stability of poles.**—The strength and stability which poles for telegraph, telephone, or electric companies should have depends somewhat upon the locality in which they are erected, and the number of wires they are supposed to hold. For instance, if there are a great number of wires to be supported, as is generally the case in towns and cities, the poles should be much stronger and more firmly planted in the ground than they otherwise would have to be.<sup>36</sup> The conditions of the country through which they are constructed, with respect to winds and storms, should be considered since a pole which might be very substantial in a country where there are few, if any, storms, would not be suitable in a country subject to such climatic changes.<sup>37</sup> While these companies are duty bound to the public to have poles with sufficient strength to withstand the changes of the climate which are reasonably expected to be suffered in that particular region, yet they are not bound to construct or maintain the lines

line with what we consider the great weight of authority. *Southern Bell Tel. & Tel. Co. v. McTyer*, 137 Ala. 601, 34 South. 1020, 97 Am. St. Rep. 62; *Southwestern Tel. & Tel. Co. v. Abeles*, 94 Ark. 254, 126 S. W. 724, 21 Ann. Cas. 1006, 140 Am. St. Rep. 115; *Southwestern Tel. & Tel. Co. v. Bruce*, 89 Ark. 581, 117 S. W. 564; *Griffith v. New England Tel. & Tel. Co.*, 72 Vt. 441, 48 Atl. 643, 52 L. R. A. 919; *Southern Tel. & Tel. Co. v. Evans*, 54 Tex. Civ. App. 63, 116 S. W. 418."

<sup>34</sup> *Evans v. Eastern Ky. Tel., etc., Co.*, 124 Ky. 620, 30 Ky. L. Rep. 833, 99 S. W. 936; *Jackson v. Wisconsin Tel. Co.*, 88 Wis. 243, 60 N. W. 430, 26 L. R. A. 101. See, also, *Brown v. West Riverside Coal Co.*, 143 Iowa, 662, 120 N. W. 732, 28 L. R. A. (N. S.) 1260; *Hebert v. Lake Charles Ice, etc., Co.*, 111 La. 522, 35 South. 731, 100 Am. St. Rep. 505, 64 L. R. A. 101.

<sup>35</sup> *Miles v. Postal Tel. Cable Co.*, 55 S. C. 403, 33 S. E. 493.

<sup>36</sup> See § 88. See *American Dist. Tel. Co. v. Oldham*, 148 Ky. 320, 146 S. W. 764, Ann. Cas. 1913E, 376.

<sup>37</sup> See § 198 et seq.

so as to guard against storms of unusual severity, the occurrence of which could not be reasonably expected.<sup>38</sup> They must, however, be strong enough to withstand such violent storms as may be reasonably expected or such as reasonable foresight and prudence could anticipate.<sup>39</sup> Not only should the poles be sufficiently strong—and speaking on this subject, the same rule is applied to the cross-arms<sup>40</sup>—at the time they are erected to hold up the wires and endure and withstand anticipated and reasonable climatic changes, but they must also be durable, or made to be such; since, as is well known, the life of these poles is short, if these companies were permitted to allow their poles to become weakened by decay, or, in other words, if they were not duty bound to maintain their lines, they would avoid many responsibilities.<sup>41</sup>

§ 198. Duty to provide safeguards on premises for patrons—*res ipsa loquitur* applicable.—Telephone companies should equip

<sup>38</sup> See § 198 et seq. See *American Dist. Tel. Co. v. Oldham*, 148 Ky. 320, 146 S. W. 764, Ann. Cas. 1913E, 376.

<sup>39</sup> *Ward v. Atlantic, etc., Tel. Co.*, 71 N. Y. 81, 27 Am. Rep. 10; *Bellinger v. New York, etc., R. Co.*, 23 N. Y. 42; *Mayor v. Bailey*, 2 Denio (N. Y.) 433; *Riker v. New York, etc., R. Co.*, 64 App. Div. 357, 72 N. Y. Supp. 168; *Southwestern Tel., etc., Co. v. Ingrando*, 27 Tex. Civ. App. 400, 65 S. W. 1085; *Southwestern Tel., etc., Co. v. Robinson*, 50 Fed. 810, 1 C. C. A. 684, 16 L. R. A. 545; *West. U. Tel. Co. v. Harris*, 6 Ga. App. 260, 64 S. E. 1123; *Anthony v. Cass Co. Home Tel. Co.*, 165 Mich. 388, 130 N. W. 659; *Harrington v. Com'rs*, 153 N. C. 437, 69 S. E. 399. But see *Southwestern Tel., etc., Co. v. Keys*, 50 Tex. Civ. App. 648, 110 S. W. 767, where a horse was struck by lightning passing from wire before company had opportunity to repair after notice.

<sup>40</sup> *Postal Tel. Cable Co. v. Jones*, 133 Ala. 217, 32 South. 500; *Dwyer v. Electric Co.*, 20 App. Div. 124, 46 N. Y. Supp. 874, injury from a metallic brace supporting a cross-arm.

<sup>41</sup> See § 198 et seq. See *American Dist. Tel. Co. v. Oldham*, 148 Ky. 320, 146 S. W. 764, Ann. Cas. 1913E, 376; *Burton v. Cumberland Tel., etc., Co. (Ky.)* 118 S. W. 287; *Evansville, etc., Tr. Co. v. Montgomery*, 50 Ind. App. 528, 98 N. E. 731; *Harton v. Forest City Tel. Co.*, 146 N. C. 429, 59 S. E. 1022, 14 Ann. Cas. 390, 14 L. R. A. (N. S.) 956; *Joseph v. Edison Elec. Co.*, 104 La. 634, 29 South. 223. Must inspect as often as is reasonably necessary to ascertain any defect. *Pacific Tel., etc., Co. v. Parmenter*, 170 Fed. 140, 95 C. C. A. 382; *Evansville, etc., Tr. Co. v. Montgomery*, supra; *Postal Tel. Cable Co. v. Kelly*, 134 Ga. 218, 67 S. E. 803; *Murray v. Cowherd*, 148 Ky. 591, 147 S. W. 6, 40 L. R. A. (N. S.) 617; *Cumberland Tel., etc., Co. v. Warner*, 25 Ky. Law Rep. 1843, 79 S. W. 199; *Ward v. Atlantic, etc., Tel. Co.*, 71 N. Y. 81, 27 Am. Rep. 10; *Terrell v. Washington*, 158 N. C. 281, 73 S. E. 888; *Harton v. Forest City Tel. Co.*, supra.

*Abandoned Poles.*—Where poles have been abandoned the company should exercise proper diligence in seeing that they do not endanger the public until

their telephones which they have installed in buildings with known and approved devices so as to prevent their wires from conducting lightning or excessive currents of electricity to or into said buildings;<sup>42</sup> and, in the discharge of such duty, they must exercise the care of a prudent person under like circumstances, otherwise they will be liable to any one injured thereby.<sup>43</sup> Consequently they

removed. *Dobbins v. West. U. Tel. Co.*, 163 Ala. 222, 50 South. 919, 136 Am. St. Rep. 69; *Powers v. Independent Long Dist. Tel. Co.*, 19 Idaho, 577, 114 Pac. 666.

<sup>42</sup> *Southwestern Tel., etc., Co. v. Abeles*, 94 Ark. 254, 126 S. W. 724, 140 Am. St. Rep. 115, 21 Ann. Cas. 1006; *Griffith v. New England Tel., etc., Co.*, 72 Vt. 441, 48 Atl. 643, 52 L. R. A. 919; *Southern Bell Tel., etc., Co. v. McTyer*, 137 Ala. 601, 34 South. 1020, 97 Am. St. Rep. 62, abandoned telephone wires; *Brucker v. Gainesboro Tel. Co.*, 125 Ky. 92, 100 S. W. 240, 30 Ky. Law Rep. 1162; *Evans v. Eastern Kentucky Tel., etc., Co.*, 124 Ky. 620, 99 S. W. 936, 30 Ky. Law Rep. 833; *Southern Bell Tel., etc., Co. v. Parker*, 119 Ga. 721, 47 S. E. 194, shock at the telephone; *Wells v. Northeastern Tel. Co.*, 101 Me. 371, 64 Atl. 648; *Delahunt v. United Tel., etc., Co.*, 215 Pa. 241, 64 Atl. 515, 114 Am. St. Rep. 958; *Bardon v. Northwestern Tel. Exch. Co.*, 93 Minn. 421, 101 N. W. 1132; *Southern Tel., etc., Co. v. Evans*, 54 Tex. Civ. App. 63, 116 S. W. 418; *Owen v. Portage Tel. Co.*, 126 Wis. 412, 105 N. W. 924. See *Rural Home Tel. Co. v. Arnold* (Ky.) 119 S. W. 811; *Southwestern Tel., etc., Co. v. Bruce*, 89 Ark. 581, 117 S. W. 564. See *Richmond, etc., R. Co. v. Rubin*, 102 Va. 809, 47 S. E. 834; *Jackson v. Wisconsin Tel. Co.*, 88 Wis. 243, 60 N. W. 430, 26 L. R. A. 101. See, also, *Minneapolis General Elec. Co. v. Cronon*, 166 Fed. 657, 92 C. C. A. 345, 20 L. R. A. (N. S.) 816; *Fish v. Waverly Elec. Lt. Co.*, 189 N. Y. 336, 82 N. E. 150, 13 L. R. A. (N. S.) 226, liable to family and servants; *Peninsular Tel. Co. v. McCaskill*, 64 Fla. 420, 60 South. 338, Ann. Cas. 1914B, 1029. See § 196. But see *Phoenix Lt., etc., Co. v. Bennett*, 8 Ariz. 314, 74 Pac. 48, 63 L. R. A. 219.

<sup>43</sup> *Southwestern Tel., etc., Co. v. Abeles*, 94 Ark. 254, 126 S. W. 724, 140 Am. St. Rep. 115, 21 Ann. Cas. 1006; *Delahunt v. United Tel., etc., Co.*, 215 Pa. 241, 64 Atl. 515, 114 Am. St. Rep. 958; *Southern Tel., etc., Co. v. Evans*, 54 Tex. Civ. App. 63, 116 S. W. 418; *Griffith v. New England Tel., etc., Co.*, 72 Vt. 441, 48 Atl. 643, 52 L. R. A. 919; *Southern Bell Tel., etc., Co. v. McTyer*, 137 Ala. 601, 34 South. 1020, 97 Am. St. Rep. 62. See, also, cases cited in note 42.

*Lightning conducted into building.*—Telephone companies should use lightning arresters, or other devices, for preventing lightning from being conducted into the building of one of its patrons, and will be liable for damages for the failure so to do, or the negligent construction of such which it may place therein. *Southern Bell Tel., etc., Co. v. McTyer*, supra; *Southwestern Tel. Co. v. Abeles*, supra; *Peninsular Tel. Co. v. McCaskill*, 64 Fla. 420, 60 South. 338, Ann. Cas. 1914B, 1029; *Southern Bell Tel., etc., Co. v. Parker*, 119 Ga. 721, 47 S. E. 194; *Southern Tel., etc., Co. v. Evans*, supra; *Southwestern Tel., etc., Co. v. Davis* (Tex. Civ. App.) 156 S. W. 1146; subject for the jury, *Evans v. Eastern Kentucky Tel., etc., Co.*, 124 Ky. 620, 30 Ky. Law Rep. 833, 99 S. W. 936; *Southwestern Tel., etc., Co. v. Abeles*, supra; *Griffith v. New England Tel., etc., Co.*, supra; negligence may be inferred, *Southern Bell Tel., etc., Co.*



will be liable for personal injuries to one using their instruments in the ordinary manner during an ordinary electrical disturbance,<sup>44</sup> or from a discharge of electricity from wires to persons not actually coming in contact therewith.<sup>45</sup> Furthermore, where so dangerous an agency as electricity is undertaken to be delivered into houses by electrical companies for daily use, very great care and caution should be observed, and such a degree thereof as is commensurate with the danger involved, and which is enhanced by the lack of the consumer's knowledge of the safety of the means and appliances employed to effect the deliv-

v. McTyer, *supra*; Evans v. Eastern Kentucky Tel., etc., Co., *supra*; Byron Tel. Co. v. Sheets, 122 Ill. App. 6.

*Warning not to use telephone during storm.*—Action cannot be based on failure of company to place a warning on telephone against its use during the continuance of an electrical storm, Rocap v. Bell Tel. Co., 230 Pa. 597, 79 Atl. 769, 36 L. R. A. (N. S.) 279.

<sup>44</sup> Southwestern Tel., etc., Co. v. Abeles, 94 Ark. 254, 126 S. W. 724, 140 Am. St. Rep. 115, 21 Ann. Cas. 1006; Southern Bell, etc., Co. v. Parker, 119 Ga. 721, 47 S. E. 194; Delahunt v. United Tel., etc., Co., 215 Pa. 241, 64 Atl. 515, 114 Am. St. Rep. 958. But see Rocap v. Bell Tel. Co., 230 Pa. 597, 79 Atl. 769, 36 L. R. A. (N. S.) 279, extraordinary storm. See, also, Southwestern Tel., etc., Co. v. Robinson, 50 Fed. 810, 1 C. C. A. 684, 16 L. R. A. 545; Southern Bell Tel., etc., Co. v. McTyer, 137 Ala. 601, 34 South. 1020, 97 Am. St. Rep. 62; Columbus R. Co. v. Kitchens, 142 Ga. 677, 83 S. E. 529, L. R. A. 1915C, 570; Griffith v. New England Tel., etc., Co., 72 Vt. 441, 48 Atl. 643, 52 L. R. A. 919; Jackson v. Wisconsin Tel. Co., 88 Wis. 243, 60 N. W. 430, 26 L. R. A. 101.

*Turning on electric light.*—Denver Consol. Elec. Co. v. Lawrence, 31 Colo. 301, 73 Pac. 39; Alabama, etc., R. Co. v. Appleton, 171 Ala. 324, 54 South. 638, Ann. Cas. 1913A, 1181, holding doctrines *res ipsa loquitur* applies. Turner v. Southern Power Co., 154 N. C. 131, 69 S. E. 767, 32 L. R. A. (N. S.) 848.

<sup>45</sup> Where the services on the premises have been discontinued and the instruments removed, if the wires are left in the building with exposed ends, no consideration of public policy justifies the dangers thus created, and leaving the wires so exposed is negligence per se justifying a recovery for injuries to any person rightfully on the premises caused by lightning conveyed on the premises by the wires. Southern Bell Tel., etc., Co. v. McTyer, 137 Ala. 691, 34 South. 1020, 97 Am. St. Rep. 62; Starr v. Southern Bell Tel., etc., Co., 156 N. C. 435, 72 S. E. 484. In Texas Tel., etc., Co. v. Scott (Tex. Civ. App.) 127 S. W. 587, held not to be negligence per se. In Griffith v. New England Tel., etc., Co., 72 Vt. 441, 48 Atl. 643, 52 L. R. A. 919, where intestate was killed by lightning while sitting in his house under a telephone instrument installed by the defendant, the court said that, when the jury had found what the force was and its extent, it was for them to say whether there were known and approved appliances for arresting, diverting, and controlling such force so as to prevent injury, and whether the defendant was negligent in not providing such appliances, and whether the deceased came to his death by reason of such neglect.



ery.<sup>46</sup> It is generally held that in case of injuries sustained from electric appliances on private property the doctrine of *res ipsa loquitur* applies where it is shown that all the appliances for generating and delivering the electric current are under the control of the person or company furnishing the same.<sup>47</sup> So also the company will

<sup>46</sup> *Alton Illuminating Co. v. Foulds*, 190 Ill. 367, 60 N. E. 537. *Denver Consol. Elec. Co. v. Lawrence*, 31 Colo. 301, 73 Pac. 39, quoting Thompson, in his work on the law of Negligence, says, "It may be doubted whether persons or corporations employing, for their own private advantage, so dangerous an agency as electricity, ought not to be regarded as quasi-insurers, as toward third persons, against any injurious consequences which may flow from it." In this case the party was injured from a shock by turning on a light. An attempt was made to be relieved from liability by a contract stipulating against liability, but the court held that such a contract was against public policy. See *Minneapolis General Elec. Co. v. Cronon*, 166 Fed. 657, 92 C. C. A. 345, 20 L. R. A. (N. S.) 816; *Fish v. Waverly Elec. Lt. Co.*, 189 N. Y. 336, 82 N. E. 150, 13 L. R. A. (N. S.) 226, liable to family and servants; *Peninsular Tel. Co. v. McCaskill*, 64 Fla. 420, 60 South. 338, Ann. Cas. 1914B, 1029. But see *Phoenix Lt., etc., Co. v. Bennett*, 8 Ariz. 314, 74 Pac. 48, 63 L. R. A. 219. See, also, *Alabama City, etc., R. Co. v. Appleton*, 171 Ala. 324, 54 South. 638, Ann. Cas. 1913A, 1181; *Abrams v. Seattle*, 60 Wash. 356, 111 Pac. 168, 140 Am. St. Rep. 916; *Griffith v. New England Tel. Co.*, 72 Vt. 441, 48 Atl. 643, 52 C. C. A. 919; *Turner v. Southern P. Co.*, 154 N. C. 131, 69 S. E. 767, 32 L. R. A. (N. S.) 848; *Columbus R. Co. v. Kitchens*, 142 Ga. 677, 83 S. E. 529, L. R. A. 1915C, 570; *Denson v. Electric Co.*, 135 Ga. 132, 68 S. E. 1113; *Younie v. Blackfoot L., etc., Co.*, 15 Idaho, 56, 96 Pac. 193; *Webster v. Light, etc., R. Co.*, 158 App. Div. 210, 143 N. Y. Supp. 57; *Electric L., etc., Co. v. Sutherland*, 61 Fla. 167, 55 South. 83; *Norfolk, etc., Tr. Co. v. Daily*, 111 Va. 665, 69 S. E. 963; *White v. Elec. Co.*, 75 Wash. 139, 134 Pac. 807; *Houston v. Traction Co.*, 155 N. C. 4, 71 S. E. 21; *Light, etc., P. Co. v. Lakeman*, 156 Ky. 33, 160 S. W. 723; *Hill v. Elec. Co.*, 22 Cal. App. 788, 136 Pac. 492; *Hanton v. Light, etc., P. Co.*, 124 La. 562, 50 South. 544; *Ohrstrom v. Tacoma*, 57 Wash. 121, 106 Pac. 629; *Berstein v. Elec. Co.*, 235 Pa. 53, 83 Atl. 612.

<sup>47</sup> *Hebert v. Hudson River Elec. Co.*, 136 App. Div. 107, 120 N. Y. Supp. 672; *Alexander v. Nanticoke Light Co.*, 209 Pa. 571, 58 Atl. 1068, 67 L. R. A. 475; *Turner v. Southern P. Co.*, 154 N. C. 131, 69 S. E. 767, 32 L. R. A. (N. S.) 848; *Crowe v. Nanticoke Lt. Co.*, 209 Pa. 580, 58 Atl. 1071; *Bice v. Wheeling Elec. Co.*, 62 W. Va. 685, 59 S. E. 626; *Giraudi v. San Jose Elec. Imp. Co.*, 107 Cal. 120, 40 Pac. 108, 48 Am. St. Rep. 114, 28 L. R. A. 596; *Wheeler v. Northern Ohio Tr. Co.*, 27 Ohio Cir. Ct. R. 517, *prima facie* negligence; *Houston v. Durham Tr. Co.*, 155 N. C. 4, 71 S. E. 21, *prima facie* negligence; *Walters v. Denver Consol. Elec. Lt. Co.*, 17 Colo. App. 192, 68 Pac. 117; *Memphis Consol. Gas, etc., Co. v. Letson*, 135 Fed. 969, 68 C. C. A. 453, inference of negligence; *Thomas v. Wheeling Elec. Co.*, 54 W. Va. 395, 46 S. E. 217; *Runyan v. Kanawha Water, etc., Co.*, 68 W. Va. 609, 71 S. E. 259, 35 L. R. A. (N. S.) 430; *Diller v. Northern California P. Co.*, 162 Cal. 531, 123 Pac. 359, Ann. Cas. 1913D, 908; *Geismann v. Missouri-Edison Elec. Co.*, 173 Mo. 654, 73 S. W. 654; *Winkelman v. Kansas City Elec. Lt. Co.*, 110 Mo. App. 184, 85 S. W. 99; *Von Trebra v. Laclede Gaslight Co.*, 209 Mo. 648, 108 S. W. 559; *Alabama, etc., R. Co.*

be liable if the injury results, not from a shock received from an excessive current of electricity, but because of the negligence of the electric company in not properly attaching its fixtures.<sup>48</sup> But, on the other hand, when an injury to property, or to a person, results because of some defect in the wiring of a building, or the installing of fixtures, and such wiring is not done nor fixtures installed by the company, its only duty being to furnish electricity for lighting, the company will not be liable in damages for such injury.<sup>49</sup> However, it has been held that an electric company, before sending its currents for lighting purposes through apparatus installed in a building by other parties, is bound, on its own re-

v. Appleton, 171 Ala. 324, 54 South. 638, Ann. Cas. 1913A, 1181, and note; Guinn v. Delaware, etc., Tel. Co., 72 N. J. Law, 276, 62 Atl. 412, 111 Am. St. Rep. 668, 3 L. R. A. (N. S.) 988. But for holding that doctrine does not apply, see, Western Coal, etc., Co. v. Garner, 87 Ark. 190, 112 S. W. 392, 22 L. R. A. (N. S.) 1183; Toledo R., etc., Co. v. Rippon, 28 Ohio Cir. Ct. R. 561, affirmed in 75 Ohio St. 609, 80 N. E. 1133; Denver Consol. Elec. Co. v. Walters, 39 Colo. 301, 89 Pac. 815.

*Applicable to telephone.*—It has been held that this doctrine is applicable in the case of an injury to one while using a telephone, although the current doing the injury is produced by a company other than the telephone company, if the latter is shown to have had knowledge of trouble on its line from the electric current. Delahunt v. United Tel., etc., Co., 215 Pa. 241, 64 Atl. 515, 114 Am. St. Rep. 958; Alabama City, etc., R. Co. v. Appleton, *supra*. However, it does not apply in the case of an injury sustained while using a telephone during a violent electrical storm, where the plaintiff goes further than the proof of the accident and the consequent injuries and shows the cause of it to have been atmospheric electricity and not an electric current within the control of man. Rocap v. Bell Tel. Co., 230 Pa. 597, 79 Atl. 769, 36 L. R. A. (N. S.) 279. See Southwestern Tel., etc., Co. v. Bruce, 89 Ark. 581, 117 S. W. 564. Application of *res ipsa loquitur* to accidents on streets and highways, see cases in note 12.

<sup>48</sup> Fish v. Waverly Elec., etc., Co., 189 N. Y. 336, 82 N. E. 150, 13 L. R. A. (N. S.) 226, are light insecurely attached to ceiling; to same effect, Fish v. Kirlin-Gray Elec. Co., 18 S. D. 122, 99 N. W. 1092, 112 Am. St. Rep. 782; Turner v. Southern Power Co., 154 N. C. 131, 69 S. E. 767, 32 L. R. A. (N. S.) 848.

<sup>49</sup> National, etc., Ins. Co. v. Denver Consol. Elec. Co., 16 Colo. App. 86, 63 Pac. 949; Harter v. Colfax Elec., etc., Co., 124 Iowa, 500, 100 N. W. 508; Memphis Consol., etc., Elec. Co. v. Speers, 113 Tenn. 83, 81 S. W. 595, illumination of sign owned by another; Brunelle v. Lowell Elec. L. Corp., 188 Mass. 493, 74 N. E. 676; Minneapolis Gen. Elec. Co. v. Cronon, 166 Fed. 651, 92 C. C. 345, 20 L. R. A. (N. S.) 816, doctrine of *res ipsa loquitur* does not apply; Peters v. Lynchburg Light, etc., Co., 108 Va. 333, 61 S. E. 745, 22 L. R. A. (N. S.) 1188. However, see Reynolds v. Narragansett Elec., etc., Co., 26 R. I. 457, 59 Atl. 393, and Royal Elec. Co. v. Heve, 11 Quebec K. B. 436, where this distinction was not made.

sponsibility, to make reasonable inspection of the apparatus to see whether it is fit for use.<sup>50</sup>

**§ 198a. Brush discharge.**—It is the duty of electrical companies to exercise proper care in insulating and otherwise protecting their wires so that danger will be avoided by coming in contact with them. So, if there is an injury caused by a “brush” or “disruptive” discharge of electricity as a result of the negligence of the owner of such line, it will be liable therefor. This question may arise either where the injury is to a servant of the owner of the line, or where it is to a person lawfully traveling upon the highway or a person upon the owner’s premises by invitation. While the relationship existing between an electrical company and its servants and such persons will effect the nature of the liability as to each as a result of its negligence in the manner and way discussed, yet it owes a duty to each of these to safeguard its wires so as not to negligently permit an escape of electricity therefrom.<sup>51</sup>

**§ 198b. Not insurers—degree of care.**—An electrical company furnishing electricity for lighting, heating, motive power, or for other purposes, is not an insurer against injury to property or persons whose duties require them to be near the wires; yet it must exercise a very high degree of care to prevent such injury.<sup>52</sup>

<sup>50</sup> *Hoboken Land, etc., Co. v. United Elec. Co.*, 71 N. J. Law, 430, 58 Atl. 1082; *Tismer v. New York Edison Co.*, 170 App. Div. 647, 156 N. Y. Supp. 28, P. U. R. 1916A, 949.

<sup>51</sup> *Jewell v. Excelsior Powder Mfg. Co.*, 143 Mo. App. 200, 127 S. W. 598; *Dunn v. Cavanaugh*, 185 Fed. 451, 107 C. C. A. 521; *Hoppe v. Winona*, 113 Minn. 252, 129 N. W. 577, 33 L. R. A. (N. S.) 449, Ann. Cas. 1912A, 247. See, also, § 212 et seq., as to third persons or customers of the line. See *Lutolf v. United Elec., etc., Co.*, 184 Mass. 53, 67 N. E. 1025; *O’Flaherty v. Nassau Elec. R. Co.*, 34 App. Div. 74, 54 N. Y. Supp. 96, affirmed 165 N. Y. 624, 59 N. E. 1128; *Shade v. Bay Counties Power Co.*, 152 Cal. 10, 92 Pac. 62, parties walking the street and being injured by electrical discharge from wires; *Chittick v. Philadelphia, etc., Transit Co.*, 224 Pa. 13, 73 Atl. 4, 22 L. R. A. (N. S.) 1073, plaintiff sitting in a window two or three hundred feet from an explosion, due to a trolley pole of a street car coming in contact with a steel brace being hoisted into position in constructing an elevated railway, and while receiving no electrical shock the explosion caused an impairment of plaintiff’s eyesight due to the blinding flash, recovery was not allowed, but fright brought about by wilful tort, recovery may be had. See note to 3 L. R. A. (N. S.) 49.

<sup>52</sup> *Alabama City, etc., R. Co. v. Appleton*, 171 Ala. 324, 54 South. 638, Ann. Cas. 1913A, 1181; *Denver Consol. Elec. Co. v. Lawrence*, 31 Colo. 301, 73 Pac. 39, injured while turning on an electric light; *Bice v. Wheeling Elec. Co.*, 62 W. Va. 685, 59 S. E. 626, defective transformer; same effect, *Mangan v. Louisville, etc., Light Co.*, 122 Ky. 476, 29 Ky. Law Rep. 38, 91 S. W. 703, 6 L. R. A. (N. S.) 459; *Morhard v. Richmond Elec., etc., R. Co.*, 111 App. Div. 353, 98 N. Y. Supp. 124; *Reynolds v. Narragansett Elec., etc., Co.*, 26 R. I. 457, 59 Atl.



While the various courts have different expressions as to the measure of damages in such cases, their forms of expressing same ranging from "reasonable"<sup>53</sup> or "ordinary care and diligence"<sup>54</sup> to a degree of care closely approximating that of an insurer, the general rule is, however, that they must use reasonable care in the construction and maintenance of their lines and apparatus, and such as a reasonable and prudent person would use under similar circumstances. The degree of care required of these companies varies with the danger which will be incurred by their negligence,<sup>55</sup> and must

393; *McCabe v. Narragansett Elec., etc., Co.*, 26 R. I. 427, 59 Atl. 112; *Alton, etc., Ill. Co. v. Foulds*, 81 Ill. App. 322, affirmed in 190 Ill. 367, 60 N. E. 537; *Yates v. Southwestern Brush Elec., etc., Co.*, 40 La. Ann. 467, 4 South. 250, improper fuse catches causing escape of current over brass pipe; *Gilbert v. Duluth Gen. Elec. Co.*, 93 Minn. 99, 100 N. W. 653, 106 Am. St. Rep. 430, installation of defective electric socket by injured party at his residence, when wires are crossed sending excessive current, not negligence to preclude recovery; to same effect *Memphis Consol., etc., Elec. Co. v. Letson*, 135 Fed. 969, 68 C. C. A. 453; *Royal Elec. Co. v. Heve*, Rap. Jud. Quebec, 11 B. R. 436, for purpose of turning on light, takes hold of an ordinary incandescent light in house and is shocked, presumption that excessive current came over same system and from same source as that from which the ordinary supply was delivered; *Miller v. Ouray Elec., etc., Co.*, 18 Colo. App. 131, 70 Pac. 447, complaint stating a cause of action; *Witmer v. Buffalo, etc., Elec., etc., Co.*, 112 App. Div. 698, 98 N. Y. Supp. 781, question for jury as to which of two lines current came over; *Caglione v. Mt. Morris Elec., etc., Co.*, 56 App. Div. 191, 67 N. Y. Supp. 660, injury from current over abandoned fixture. See *Herzog v. Municipal Elec., etc., Co.*, 89 App. Div. 569, 85 N. Y. Supp. 712, affirmed in 180 N. Y. 518, 72 N. E. 1142, not liable for loss of building where it used single, instead of double, cap molding to sustain the wires on the ceiling of the upper story, where the wires were liable to be affected by moisture; *Katafiasz v. Toledo Consol. Elec. Co.*, 24 Ohio Cir. Ct. R. 127, not liable where plaintiff had knowledge of defect; to same effect, *McMullan v. Edison Elec. Ill. Co.*, 13 Misc. Rep. 392, 34 N. Y. Supp. 248. See *Harrison v. Kansas City Elec. L. Co.*, 195 Mo. 606, 93 S. W. 951, 7 L. R. A. (N. S.) 293; *Turner v. Southern Power Co.*, 154 N. C. 131, 69 S. E. 767, 32 L. R. A. (N. S.) 848; *Rocap v. Bell Tel. Co.*, 230 Pa. 597, 79 Atl. 769, 36 L. R. A. (N. S.) 279; *Columbus R. Co. v. Kitchens*, 142 Ga. 677, 83 S. E. 529, L. R. A. 1915C, 570.

<sup>53</sup> *Griffin v. United Elec. Lt. Co.*, 164 Mass. 492, 41 N. E. 675, 49 Am. St. Rep. 477, 32 L. R. A. 400; *Block v. Milwaukee St. Ry. Co.*, 89 Wis. 371, 61 N. W. 1101, 46 Am. St. Rep. 849, 27 L. R. A. 365; *Illingsworth v. Boston Elec. Lt. Co.*, 161 Mass. 583, 37 N. E. 778, 25 L. R. A. 552; *Huber v. La Crosse City R. Co.*, 92 Wis. 636, 66 N. W. 708, 53 Am. St. Rep. 940, 31 L. R. A. 583; *Wilbert v. Sheboygan Lt., etc., Co.*, 129 Wis. 1, 106 N. W. 1058, 116 Am. St. Rep. 931.

<sup>54</sup> *Atlanta Consol. St. Ry. Co. v. Owings*, 97 Ga. 663, 25 S. E. 377, 33 L. R. A. 798.

<sup>55</sup> *City Elec. St. Ry. Co. v. Conery*, 61 Ark. 381, 33 S. W. 426, 54 Am. St. Rep. 262, 31 L. R. A. 570.



be commensurate with the danger involved;<sup>56</sup> and, according to many decisions, where so dangerous an agency as electricity is undertaken to be delivered into houses for daily use, and where persons coming in contact therewith are certain to be seriously injured, if not killed, the law imposes upon the person or company making such delivery the duty of exercising the utmost care and prudence consistent with the practical operation of its plant and system to prevent such injury.<sup>57</sup> In determining the question of the degree of care to be exercised by electrical companies in the construction and maintenance of their lines, the location of which, the

<sup>56</sup> *Barto v. Iowa Tel. Co.*, 126 Iowa, 241, 101 N. W. 876, 106 Am. St. Rep. 347; *Walter v. Baltimore Elec. Co.*, 109 Md. 513, 71 Atl. 953, 22 L. R. A. (N. S.) 1178; *Eaton v. Weiser*, 12 Idaho, 544, 86 Pac. 541, 118 Am. St. Rep. 225; *Palestine v. Siler*, 225 Ill. 630, 80 N. E. 345, 8 L. R. A. (N. S.) 205; *Gilbert v. Duluth Gen. Elec. Co.*, 93 Minn. 99, 100 N. W. 653, 106 Am. St. Rep. 430; *Musolf v. Duluth Edison Elec. Co.*, 108 Minn. 369, 122 N. W. 499, 22 L. R. A. (N. S.) 451; *Perham v. Portland Gen. Elec. Co.*, 33 Or. 451, 53 Pac. 14, 72 Am. St. Rep. 730, 40 L. R. A. 799; *Hoppe v. Winona*, 113 Minn. 252, 129 N. W. 577, Ann. Cas. 1912A, 247, 33 L. R. A. (N. S.) 449; *Herron v. Pittsburg*, 204 Pa. 509, 54 Atl. 311, 93 Am. St. Rep. 798; *Moran v. Corliss Steam Engine Co.*, 21 R. I. 386, 43 Atl. 874, 45 L. R. A. 267; *Parsons v. Charleston Cons. R., etc., Co.*, 69 S. C. 305, 48 S. E. 284, 104 Am. St. Rep. 800; *Anderson v. Seattle, etc., R. Co.*, 36 Wash. 387, 78 Pac. 1013, 104 Am. St. Rep. 962; *Kempf v. Spokane, etc., R. Co.*, 82 Wash. 263, 144 Pac. 77, L. R. A. 1915C, 405.

<sup>57</sup> *City Elec. St. Ry. Co. v. Conery*, 61 Ark. 381, 33 S. W. 426, 54 Am. St. Rep. 262, 31 L. R. A. 570; *Phenix Lt., etc., Co. v. Bennett*, 8 Ariz. 314, 74 Pac. 48, 63 L. R. A. 219; *Giraudi v. Elec. Imp. Co.*, 107 Cal. 120, 40 Pac. 108, 48 Am. St. Rep. 114, 28 L. R. A. 596; *Winegarner v. Edison Lt., etc., Co.*, 83 Kan. 67, 109 Pac. 778, 28 L. R. A. (N. S.) 677; *Denver Consol. Elec. Co. v. Simpson*, 21 Colo. 371, 41 Pac. 409, 31 L. R. A. 566; *McLaughlin v. Louisville Elec. Lt. Co.*, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812; *Lewis v. Bowling Green Gas Lt. Co.*, 135 Ky. 611, 117 S. W. 278, 22 L. R. A. (N. S.) 1169; *Mangan v. Louisville Elec. Lt. Co.*, 122 Ky. 476, 91 S. W. 703, 6 L. R. A. (N. S.) 459; *Paducah Lt., etc., Co. v. Parkman*, 156 Ky. 197, 160 S. W. 931, 52 L. R. A. (N. S.) 586; *Potts v. Shreveport Belt R. Co.*, 110 La. 1, 34 South. 103, 98 Am. St. Rep. 452; *Hebert v. Lake Charles Ice, etc., Co.*, 111 La. 522, 35 South. 731, 100 Am. St. Rep. 505, 64 L. R. A. 101; *Gilbert v. Duluth Gen. Elec. Co.*, 93 Minn. 99, 100 N. W. 653, 106 Am. St. Rep. 430; *Musolf v. Duluth Edison Elec. Co.*, 108 Minn. 369, 122 N. W. 499, 24 L. R. A. (N. S.) 451; *Temple v. McComb City Elec. Lt., etc., Co.*, 89 Miss. 1, 42 South. 874, 119 Am. St. Rep. 698, 10 Ann. Cas. 924, 11 L. R. A. (N. S.) 449; *Gannon v. Laclede Gas Lt. Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505; *Braun v. Buffalo Gen. Elec. Co.*, 200 N. Y. 484, 94 N. E. 206, 140 Am. St. Rep. 645, 21 Ann. Cas. 370, 34 L. R. A. (N. S.) 1089; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 19 S. E. 344, 41 Am. St. Rep. 786, 26 L. R. A. 819; *Turner v. So. Power Co.*, 154 N. C. 131, 69 S. E. 767, 32 L. R. A. (N. S.) 849; *Ferrell v. Dixie Cotton Mills*, 157 N. C. 528, 73 S. E. 142, 37 L. R. A. (N. S.) 64; *Ahern v. Oregon Tel., etc., Co.*, 24 Or. 276, 33 Pac. 403, 35 Pac. 549, 22 L. R. A. 635; *Perham v. Portland Gen. Elec. Co.*, 33 Or. 451, 53

use to which they are put, their remoteness or proximity to travelers on the highway, and any other circumstances affecting the case, should be considered.<sup>58</sup>

§ 199. **Fallen lines—duty to restore.**—It is incumbent upon telegraph, telephone and other electric companies to restore and repair their lines within a reasonable time after a violent storm, and on failure to do so, whereby injury results, the company will become liable.<sup>59</sup> Broken and hanging wires are dangerous at any time, and more especially during thunderstorms.<sup>60</sup> Science and common experience show that wires suspended in the atmosphere attract electricity during storms, and when so suspended and not insulated are dangerous to persons who may at such times be

Pac. 14, 24, 72 Am. St. Rep. 730, 40 L. R. A. 799; *Boyd v. Portland Gen. Elec. Co.*, 37 Or. 567, 62 Pac. 378, 52 L. R. A. 509; *Gentzkow v. Portland R. Co.*, 54 Or. 114, 102 Pac. 614, 135 Am. St. Rep. 821; *Mooney v. Luzerne Borough*, 186 Pa. 161, 40 Atl. 311, 40 L. R. A. 811; *Fitzgerald v. Edison Elec. Ill. Co.*, 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732; *Herron v. Pittsburg*, 204 Pa. 509, 54 Atl. 311, 93 Am. St. Rep. 798; *Alexander v. Nanticoke Lt. Co.*, 209 Pa. 571, 58 Atl. 1068, 67 L. R. A. 475; *Delahunt v. United Tel., etc., Co.*, 215 Pa. 241, 64 Atl. 515, 114 Am. St. Rep. 958; *Snyder v. Wheeling Elec. Co.*, 43 W. Va. 661, 28 S. E. 733, 64 Am. St. Rep. 922, 39 L. R. A. 499; *Runyan v. Kanawha Water, etc., Co.*, 68 W. Va. 609, 71 S. E. 259, 35 L. R. A. (N. S.) 430; *Gloster v. Toronto Elec. Lt. Co.*, 38 C. S. Ct. 27, 6 Ann. Cas. 529, 1 B. R. C. 786; *British Columbia Elec. Ry. Co. v. Crumpton*, 43 C. S. Ct. 1, 17 Ann. Cas. 1038; *Green v. West. Penn. R. Co.*, 246 Pa. 340, 92 Atl. 341, L. R. A. 1915C, 151.

<sup>58</sup> *Boyd v. Portland Gen. Elec. Co.*, 37 Or. 567, 62 Pac. 378, 52 L. R. A. 509.

<sup>59</sup> *Southwestern Tel., etc., Co. v. Robinson*, 50 Fed. 810, 1 C. C. A. 684, 16 L. R. A. 545; *Cumberland Tel., etc., Co. v. Hunt*, 108 Tenn. 697, 69 S. W. 729; *West Kentucky Tel. Co. v. Pharis*, 78 S. W. 917, 25 Ky. Law Rep. 1838; *Simmons v. Shreveport Gas, etc., Co.*, 116 La. 1033, 41 South. 248; *Harton v. Forest City Tel. Co.*, 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. (N. S.) 956, 14 Ann. Cas. 390. See *Fitch v. Central New York Tel., etc., Co.*, 42 App. Div. 321, 59 N. Y. Supp. 140; *Brown v. Consol. Lt., etc., Co.*, 137 Mo. App. 718, 109 S. W. 1032; *Hebert v. Lake Charles, etc., Co.*, 111 La. 522, 35 South. 731, 100 Am. St. Rep. 505, 64 L. R. A. 101; *Gilbert v. Duluth, etc., Elec. Co.*, 93 Minn. 99, 100 N. W. 653, 106 Am. St. Rep. 430; *Goodwin v. Columbia Tel. Co.*, 157 Mo. App. 596, 138 S. W. 940; *Anthony v. Cass County, etc., Tel. Co.*, 165 Mich. 388, 130 N. W. 659; *Foley v. Northern Cal. P. Co.*, 14 Cal. App. 401, 112 Pac. 467; *Wagner v. People's Ry. Co.*, 7 Pennewill (Del.) 393, 75 Atl. 610; *District of Columbia v. Dempsey*, 13 App. D. C. 533; *Economy, etc., P. Co. v. Hiller*, 203 Ill. 518, 68 N. E. 72; *Godfrey v. R. Co.*, 56 Ill. App. 378; *Leavenworth Coal Co. v. Ratchford*, 5 Kan. App. 150, 48 Pac. 927; *Claussen v. Cumberland Tel., etc., Co.*, 126 La. 1087, 53 South. 357; *Strack v. Missouri, etc., Tel. Co.*, 216 Mo. 601, 116 S. W. 526; *Wilhite v. Huntsville*, 167 Mo. App. 155, 151 S. W. 232; *Chaparon v. Portland, etc., Elec. Co.*, 41 Or. 39, 67 Pac. 928; *Boyd v. Portland Elec. Co.*, 37 Or. 567, 62 Pac. 378, 52 L. R. A. 509; *Borell v. Cumberland Tel., etc., Co.*, 133 La. 630, 63 South. 247, L. R. A. 1916D, 1064.

<sup>60</sup> *Henning v. West. U. Tel. Co. (C. C.)* 43 Fed. 131.

brought in contact with them.<sup>61</sup> True, this may be considered to be a new force of power which interfered, with the production of which the company had nothing to do, but the new force of power here would have been harmless but for the displaced wires; and the fact that the wire took on a new force, with the creation of which the company was not responsible, contributed no less directly to the injury on that account.<sup>62</sup> This proposition should be modified, however, by the statement that, where the poles and wires of the company are properly erected and maintained, the company will not be liable for damages due to a wire breaking during an extraordinary storm and injuring a person, unless the company fails to discover and remedy it within a reasonable time; but where the storm is an ordinary storm the company will be liable anyway.<sup>63</sup> In addition to the danger arising particularly from storms, there may arise other dangerous conditions to the line due to other causes,<sup>64</sup> such as sagging wires,<sup>65</sup> fallen poles,<sup>66</sup> or wires<sup>67</sup> which

<sup>61</sup> *Southwestern Tel., etc., Co. v. Robinson*, 50 Fed. 810, 1 C. C. A. 684, 16 L. R. A. 545. See *Peninsular Tel. Co. v. McCaskill*, 64 Fla. 420, 60 South. 338, Ann. Cas. 1914B, 1029, and note.

<sup>62</sup> *Southwestern Tel., etc., Co. v. Robinson*, 50 Fed. 810, 1 C. C. A. 684, 16 L. R. A. 545. See *Gleeson v. Virginia, etc. R. Co.*, 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 459.

<sup>63</sup> *Boyd v. Portland, etc., Co.*, 40 Or. 126, 66 Pac. 576, 57 L. R. A. 619; *Boyd v. Portland, etc., Co.*, 37 Or. 567, 62 Pac. 378, 52 L. R. A. 509; *Warren v. City Elec., etc., Co.*, 141 Mich. 298, 104 N. W. 613; *Heidt v. Southern, etc., Tel. Co.*, 122 Ga. 474, 50 S. E. 361; *Strack v. Missouri, etc., Tel. Co.*, 216 Mo. 601, 116 S. W. 526.

<sup>64</sup> *Simmons v. Shreveport Gas, etc., Co.*, 116 La. 1033, 41 South. 248; *West Kentucky Tel. Co. v. Pharis*, 78 S. W. 917, 25 Ky. Law Rep. 1838; *Harton v. Forest City Tel. Co.*, 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. (N. S.) 956, 14 Ann. Cas. 390; *Hovey v. Michigan Tel. Co.*, 124 Mich. 607, 83 N. W. 600; *Miller v. Lewistown Elec., etc., Co.*, 212 Pa. 593, 62 Atl. 32; *Warren v. City Elec. R. Co.*, 141 Mich. 298, 104 N. W. 613; *Anthony v. Cass County, etc., Tel. Co.*, 165 Mich. 388, 130 N. W. 659; *Wilhite v. Huntsville*, 167 Mo. App. 155, 151 S. W. 232.

<sup>65</sup> *Southern Bell Tel., etc., Co. v. Howell*, 124 Ga. 1050, 53 S. E. 577, 4 Ann. Cas. 707; *Jacks v. Reeves*, 78 Ark. 426, 95 S. W. 781; *Crawford v. Standard Tel. Co.*, 139 Iowa, 331, 115 N. W. 878; *Weaver v. Dawson County Mut. Tel. Co.*, 82 Neb. 696, 118 N. W. 650, 22 L. R. A. (N. S.) 1189; *Chant v. Clinton Tel. Co.*, 130 Wis. 533, 110 N. W. 423. See, also, *Neuert v. Boston*, 120 Mass. 338; *Todd v. City of Crete*, 79 Neb. 671, 113 N. W. 172; *Quincy, etc., Elec. Co. v. Bauman*, 104 Ill. App. 600, affirmed in 203 Ill. 295, 67 N. E. 807; *Parsons v. Charleston Consol., etc., Elec. Co.*, 69 S. C. 305, 48 S. E. 284, 104 Am. St. Rep. 800; *Home Tel. Co. v. Fields*, 150 Ala. 306, 43 South. 711.

<sup>66</sup> See §§ 196, 197. See, also, *Burton v. Cumberland Tel., etc., Co. (Ky.)* 118 S. W. 287; *Cumberland Tel., etc., Co. v. Warner*, 79 S. W. 199, 25 Ky. Law

<sup>67</sup> See note 67 on following page.



are left unrepaired an unreasonable length of time, thereby subjecting the company for any injuries arising therefrom.<sup>68</sup> Thus, where

Rep. 1843; *Kyes v. Valley Tel. Co.*, 132 Mich. 281, 93 N. W. 623; *Johnson v. Northwestern Tel. Exch. Co.*, 54 Minn. 37, 55 N. W. 829; *Harton v. Forest City Tel. Co.*, 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. (N. S.) 956, 14 Ann. Cas. 390; *Aaron v. Tel. Co.*, 89 Kan. 186, 131 Pac. 582, 45 L. R. A. (N. S.) 309; *American District Tel. Co. v. Oldham*, 148 Ky. 320, 146 S. W. 764, Ann. Cas. 1913E, 376 and note, see liability of city for fallen lines.

<sup>67</sup> *Brush Elec. Lt. Co. v. Kelley*, 126 Ind. 220, 25 N. E. 812, 10 L. R. A. 250; *Staring v. West. U. Tel. Co.*, 58 Hun. 606, 11 N. Y. Supp. 817; *Nichols v. Minneapolis*, 33 Minn. 430, 23 N. W. 868, 53 Am. St. Rep. 56; *Memphis St. R. Co. v. Kartright*, 110 Tenn. 277, 75 S. W. 719, 100 Am. St. Rep. 807; *Devine v. Brooklyn, etc., Co.*, 1 App. Div. 237, 37 N. Y. Supp. 170; *Politowitz v. Citizens', etc., Co.*, 115 Mo. App. 57, 90 S. W. 1031; *Clancy v. N. Y., etc., R. R.*, 82 App. Div. 563, 81 N. Y. Supp. 875. See, also, the cases cited in note 73. See, also, *Newark Elec., etc., Co. v. McGilvery*, 62 N. J. Law, 451, 41 Atl. 955; *Metropolitan, etc., R. Co. v. Gilbert*, 70 Kan. 261, 78 Pac. 807, 3 Ann. Cas. 256; *Macon v. Paducah St. Ry. Co.*, 110 Ky. 680, 62 S. W. 496; *Wehner v. Lagerfelt*, 27 Tex. Civ. App. 520, 66 S. W. 221.

*Pulley wire from arc lamp, liable for injuries arising from.*—*Lexington Ry. Co. v. Fain*, 24 Ky. Law Rep. 1443, 71 S. W. 628.

<sup>68</sup> *Postal Tel. Cable Co. v. Jones*, 133 Ala. 217, 32 South. 500; *West. U. Tel. Co. v. Engler*, 75 Fed. 102, 21 C. C. A. 246; *Dow v. Sunset Tel., etc., Co.*, 157 Cal. 182, 106 Pac. 587; *City, etc., R. v. Conery*, 61 Ark. 381, 33 S. W. 426, 54 Am. St. Rep. 262, 31 L. R. A. 570; *Cook v. Wilmington, etc., Elec. Co.*, 9 Houst. (Del.) 306, 32 Atl. 643; *Atlanta, etc., R. Co. v. Owings*, 97 Ga. 663, 25 S. E. 377, 33 L. R. A. 798; *West. U. Tel. Co. v. Harris*, 6 Ga. App. 260, 64 S. E. 1123; *Central U. Tel. Co. v. Sokola*, 34 Ind. App. 429, 73 N. E. 143; *Economy, etc., P. Co. v. Hiller*, 203 Ill. 518, 68 N. E. 72; *Godfrey v. R. Co.*, 56 Ill. App. 378; *Emporia v. White*, 74 Kan. 864, 86 Pac. 295; *Kansas City v. File*, 60 Kan. 157, 55 Pac. 877; *Leavenworth Coal Co. v. Ratchford*, 5 Kan. App. 150, 48 Pac. 927; *West. Ky. Tel. Co. v. Pharis*, 25 Ky. Law Rep. 1838, 78 S. W. 917; *Macon v. Paducah St. Ry. Co.*, 110 Ky. 688, 23 Ky. Law Rep. 46, 62 S. W. 496; *Citizens' Tel. Co. v. Wakefield (Ky.)* 126 S. W. 127; *State v. Crisfield, etc., Mfg. Co.*, 118 Md. 521, 85 Atl. 615; *Elec., etc., P. Co. v. State*, 109 Md. 186, 72 Atl. 651; *Claussen v. Cumberland Tel., etc., Co.*, 126 La. 1087, 53 South. 357; *Hebert v. Lake Charles, etc., W. Co.*, 111 La. 522, 35 South. 731, 64 L. R. A. 101, 100 Am. St. Rep. 505; *Lutolf v. Elec. L. Co.*, 184 Mass. 53, 67 N. E. 1025; *Nichols v. Minneapolis*, 33 Minn. 430, 23 N. W. 868, 53 Am. Rep. 56; *Freeman v. Missouri, etc., Tel. Co.*, 160 Mo. App. 271, 142 S. W. 733; *Strack v. Missouri, etc., Tel. Co.*, 216 Mo. 601, 116 S. W. 526; *Hoover v. Kansas City, etc., R. Co.*, 159 Mo. App. 416, 140 S. W. 321; *Trout v. Laclede Gas Lt. Co.*, 151 Mo. App. 207, 132 S. W. 58; *Wilkins v. Water & Lt. Co.*, 92 Neb. 513, 138 N. W. 754; *New York, etc., Tel. Co. v. Bennett*, 62 N. J. Law, 742, 42 Atl. 759; *Goodwin v. Columbia Tel. Co.*, 157 Mo. App. 596, 138 S. W. 940; *Brubaker v. Kansas City, etc., Lt. Co.*, 130 Mo. App. 439, 110 S. W. 12; *Dutcher v. Rockland Elec. Co.*, 123 App. Div. 765, 108 N. Y. Supp. 567; *Id.*, 195 N. Y. 540, 88 N. E. 1118; *Cagliione v. Mt. Morris Elec., etc., Co.*, 56 App. Div. 191, 67 N. Y. Supp. 660; *Dannenbower v. West. U. Tel. Co.*, 218 Pa. 216, 67 Atl. 207; *Gentzkow v. Portland Ry. Co.*, 54 Or. 114, 102 Pac. 614, 135 Am. St. Rep. 821; *Turton v. Powelton Elec. Co.*, 185 Pa. 406, 39 Atl. 1053; *Carroll v. Electric Co.*, 47 Or. 429, 84 Pac.



a wire is left suspended near the public highway where a person would likely come in contact with it on a dark night,<sup>69</sup> or even where it is left so as to interfere with travel at any time,<sup>70</sup> it would then become a nuisance for which the company would be liable for any injuries thereby resulting. Of course, the company must have a reasonable time, after a displacement of its wires caused by storms or other causes other than the acts of the company, to discover, reach, and repair the dangerous parts;<sup>71</sup> and it will not be liable for resulting injuries where the defect or condition has not existed for a sufficient length of time to charge the company with negligence.<sup>72</sup> What is a reasonable time depends somewhat upon sur-

389. 6 L. R. A. (N. S.) 290; *Fish v. Electric Co.*, 18 S. D. 122, 99 N. W. 1092, 112 Am. St. Rep. 782; *Laughlin v. So. Pub. Service Corp.*, 83 S. C. 62, 64 S. E. 1010; *Parsons v. Charleston, etc., Ry. Co.*, 69 S. C. 305, 48 S. E. 284, 104 Am. St. Rep. 800; *Mitchell v. Charleston, etc., Power Co.*, 45 S. C. 146, 22 S. E. 767, 31 L. R. A. 577; *Metz v. Postal Tel. Cable Co.*, 72 Wash. 188, 130 Pac. 343; *Garretson v. Tacoma R. Co.*, 50 Wash. 24, 96 Pac. 511; *San Antonio, etc., Elec. Co. v. Badders*, 46 Tex. Civ. App. 559, 103 S. W. 229; *Houston Lt., etc., Co. v. Hooper*, 46 Tex. Civ. App. 257, 102 S. W. 133; *Citizens' Tel. Co. v. Thomas*, 45 Tex. Civ. App. 20, 99 S. W. 879; *Lomoe v. Superior, etc., Power Co.*, 147 Wis. 5, 132 N. W. 623; *Gloster v. Toronto Elec. Lt. Co.*, 38 C. S. Ct. 27, 6 Ann. Cas. 529, 26 C. L. T. 847; *Diller v. Northern Cal. P. Co.*, 162 Cal. 531, 123 Pac. 359, Ann. Cas. 1913D, 908; *Foley v. Northern Cal. P. Co.*, 14 Cal. App. 401, 112 Pac. 467; *So. Bell Tel., etc., Co. v. Davis*, 12 Ga. App. 28, 76 S. E. 786; *Lewis v. Bowling Green Gas Lt. Co.*, 135 Ky. 611, 117 S. W. 278, 22 L. R. A. (N. S.) 1169; *Walter v. Baltimore Elec. Co.*, 109 Md. 513, 71 Atl. 953, 22 L. R. A. (N. S.) 1178; *Booker v. Southwest. Ry. Co.*, 144 Mo. App. 273, 128 S. W. 1012; *Lydston v. Rockingham County, etc., P. Co.*, 75 N. H. 23, 70 Atl. 385, 21 Ann. Cas. 1236; *Crosby v. Portland Ry. Co.*, 53 Or. 496, 512, 100 Pac. 390, 101 Pac. 204; *Miller v. Lewiston Elec., etc., Co.*, 212 Pa. 593, 62 Atl. 32; *Citizens' Tel. Co. v. Thomas*, 45 Tex. Civ. App. 20, 99 S. W. 879; *San Marcos Elec., etc., Co. v. Compton*, 48 Tex. Civ. App. 586, 107 S. W. 1151; *San Antonio, etc., Elec. Co. v. Ocon* (Tex. Civ. App.) 130 S. W. 846; *Wilbert v. Sheboygan, etc., R. Co.*, 129 Wis. 1, 106 N. W. 1058, 116 Am. St. Rep. 931; *Ryan v. Oshkosh Gas Lt. Co.*, 138 Wis. 466, 120 N. W. 264. See *Fickeisen v. Wheeling Elec. Co.*, 67 W. Va. 335, 67 S. E. 788, 27 L. R. A. (N. S.) 893. See § 194.

<sup>69</sup> *Ahern v. Oregon Tel., etc., Co.*, 24 Or. 276, 32 Pac. 403, 35 Pac. 549, 22 L. R. A. 635. See cases in note 67, *supra*.

<sup>70</sup> See § 196 et seq.

<sup>71</sup> *Cumberland Tel., etc., Co. v. Pierson*, 170 Ind. 543, 84 N. E. 1088; *Heidt v. Southern Tel., etc., Co.*, 122 Ga. 474, 50 S. E. 361; *Harton v. Forest City Tel. Co.*, 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. (N. S.) 956, 14 Ann. Cas. 390; *San Antonio Gas, etc., Co. v. Ocon*, 105 Tex. 139, 146 S. W. 162, 39 L. R. A. (N. S.) 1046; *Read v. City, etc., R. Co.*, 115 Ga. 366, 41 S. E. 629; *Borell v. Cumberland Tel., etc., Co.*, 133 La. 630, 63 South. 247, L. R. A. 1916D, 1064, must show that the poles were rotten, or the installation otherwise defective, or that the company was guilty of laches.

<sup>72</sup> *Cumberland Tel., etc., Co. v. Pierson*, 170 Ind. 543, 84 N. E. 1088; *Heidt v. Southern Tel., etc., Co.*, 122 Ga. 474, 50 S. E. 361; *Harton v. Forest City*

rounding circumstances.<sup>73</sup> We understand that these companies have instruments in their offices by which they may be enabled to make an approximate calculation of the place at which the line is down or broken; at any rate, if this cannot be determined, the operators surely can easily determine that the wire is either broken or out of line, by reason of the fact that messages cannot be sent over it, and as soon as the fact is ascertained it is the duty of the company to restore the line immediately. If the line should not be broken or crossed, but only hanging loose from the insulators, messages could still be sent over the line without any hindrance and without the operators knowing anything about their being down. Under such circumstances the company may not know of the danger in such wires, but as soon as it obtains the information of the defect in the line it is the duty of the company to restore it within a reasonable time.<sup>74</sup> Usually in any of these cases the lia-

Tel. Co., 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. (N. S.) 956, 14 Ann. Cas. 390; Ward v. Atlantic, etc., Tel. Co., 71 N. Y. St. 27 Am. Rep. 10; Fitch v. Central New York Tel., etc., Co., 42 App. Div. 321, 59 N. Y. Supp. 140; Wilbert v. Sheboygan, etc., Ry. Co., 129 Wis. 1, 106 N. W. 1058, 116 Am. St. Rep. 931.

<sup>73</sup> For unreasonable length of time, see Jacks v. Reeves, 78 Ark. 426, 95 S. W. 781, two days; Central Union Tel. Co. v. Sokola, 34 Ind. App. 429, 73 N. E. 143, five months; Postal Tel. Cable Co. v. Jones, 133 Ala. 217, 32 South. 500, two days; Home Tel. Co. v. Fields, 150 Ala. 306, 43 South. 711; West Kentucky Tel. Co. v. Pharis, 78 S. W. 917, 25 Ky. Law Rep. 1838, fourteen days; Lynchburg Tel. Co. v. Booker, 103 Va. 594, 50 S. E. 148, three days; Friesenhan v. Michigan Tel. Co., 134 Mich. 292, 96 N. W. 501, four days; Texas, etc., Tel. Co. v. Prince, 36 Tex. Civ. App. 462, 82 S. W. 327; Adams v. Weakley, 35 Tex. Civ. App. 371, 80 S. W. 411; Brown v. Consol., etc., Co., 137 Mo. App. 718, 109 S. W. 1032, overnight; Potera v. Brookhaven, 95 Miss. 774, 49 South. 617, six hours; Southern Bell Tel. Co. v. Lynch, 95 Ga. 529, 20 S. E. 500, two weeks. See Parmelee v. Tri-State, etc., Tel. Co., 103 Minn. 530, 115 N. W. 1135.

Electrical company must act promptly. Cook v. Wilmington, etc., Elec. Co., 9 Houst. (Del.) 306, 32 Atl. 643; Boyd v. Portland Elect. Co., 40 Or. 126, 66 Pac. 576, 57 L. R. A. 619; Read v. City, etc., Ry. Co., 115 Ga. 366, 41 S. E. 629, acting promptly may exonerate itself. See Fisher v. New Bern, 140 N. C. 506, 53 S. E. 342, 5 L. R. A. (N. S.) 542, 111 Am. St. Rep. 857, two days without attention.

<sup>74</sup> *Notice of defects.*—Notice of a defect, in order to charge a company with liability therefor, need not be direct and express; it is enough that the defect has existed for such a length of time that it should have been known. Fitzgerald v. Edison Elec., etc., Co., 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732. See, also, Parsons v. Charleston Consol. R., etc., Elec. Co., 69 S. C. 305, 48 S. E. 284, 104 Am. St. Rep. 800; Southern Bell, etc., Tel. Co. v. Davis, 12 Ga. App. 28, 76 S. E. 786; Twist v. Rochester, 37 App. Div. 307, 55 N. Y. Supp. 850, affirmed in 165 N. Y. 619, 59 N. E. 1131; New England Tel., etc., Co. v. Moore, 179 Fed. 364, 102 C. C. A. 642, 31 L. R. A. (N. S.) 617; Hoxsey v. St. Louis, etc., R. Co., 171 Ill. App. 109. Where there has been an abrasion

bility of the company is a question of fact to be determined by a jury.<sup>75</sup>

§ 200. **Insulation of wires—inspection of line.**—Electrical companies over whose lines dangerous currents of electricity are passing must exercise the greatest degree of care and prudence in the protection of their wires to prevent injury at such places where peo-

in an insulated wire for a considerable period of time, the company will be presumed to know its condition. *Griffin v. United Elec., etc., Co.*, 164 Mass. 492, 41 N. E. 675, 32 L. R. A. 400, 49 Am. St. Rep. 477; *Mitchell v. Raleigh Elec. Co.*, 129 N. C. 166, 39 S. E. 801, 55 L. R. A. 398, 85 Am. St. Rep. 735. As to constructive notice, see *Central U. Tel. Co. v. Sokola*, 34 Ind. App. 429, 73 N. E. 143; *Lomoe v. Superior Water, etc., Co.*, 147 Wis. 5, 132 N. W. 623; *Logansport v. Smith*, 47 Ind. App. 64, 93 N. E. 883; *Caron v. La Cite de St. Henri*, Rap. Jud. Quebec, 9 C. S. 490; *Strack v. Missouri, etc., Tel. Co.*, 216 Mo. 601, 116 S. W. 526. Must exercise due diligence to receive information of the condition of its wires, *Mitchell v. Charleston Light, etc., Co.*, 45 S. C. 146, 22 S. E. 767, 31 L. R. A. 577; and not liable if it does, *Smith v. East End Elec. Light Co.*, 198 Pa. 19, 47 Atl. 1123. See, also, *Politowitz v. Citizens' Tel. Co.*, 115 Mo. App. 57, 90 S. W. 1031; *United Elec., etc., Co. v. State*, 100 Md. 634, 60 Atl. 248; *Madison v. Thomas*, 130 Ga. 153, 60 S. E. 461; *Eaton v. Weiser*, 12 Idaho, 544, 86 Pac. 541, 118 Am. St. Rep. 225; *Brubaker v. Kansas City Elec., etc., Co.*, 130 Mo. App. 439, 110 S. W. 12. To whom notice should be given, see *Decatur v. Hamilton*, 89 Ill. App. 561; *Aument v. Pennsylvania Tel. Co.*, 28 Pa. Super. Ct. 610; *Goodwin v. Columbia Tel. Co.*, 157 Mo. App. 596, 138 S. W. 940; *Strack v. Missouri, etc., Tel. Co.*, supra.

<sup>75</sup> *Friesenhan v. Michigan, etc., Co.*, 134 Mich. 292, 96 N. W. 501; *Warren v. City, etc., R.*, 141 Mich. 298, 104 N. W. 613; *Wolpers v. New York, etc., Co.*, 91 App. Div. 424, 86 N. Y. Supp. 845; *Boyd v. Portland, etc., Co.*, 37 Or. 567, 62 Pac. 378, 52 L. R. A. 509; *Ensign v. Central, etc., Co.*, 79 App. Div. 244, 79 N. Y. Supp. 799, affirmed 179 N. Y. 539, 71 N. E. 1130; *Burns v. City of Emporia*, 63 Kan. 285, 65 Pac. 260; *Ela v. Postal, etc., Co.*, 71 N. H. 1, 51 Atl. 281; *Hovey v. Michigan, etc., Co.*, 124 Mich. 607, 83 N. W. 600; *Fox v. Manchester*, 183 N. Y. 141, 75 N. E. 1116, 2 L. R. A. (N. S.) 474; *Lewis v. Bowling Green Gaslight Co.*, 135 Ky. 611, 117 S. W. 278, 22 L. R. A. (N. S.) 1169, tampering with wires. See *Augusta, etc., Elec. Co. v. Weekly*, 124 Ga. 384, 52 S. E. 444; *Annapolis, etc., L. Co. v. Fredericks*, 109 Md. 595, 72 Atl. 534; *New York, etc., Tel. Co. v. Bennett*, 62 N. J. Law, 742, 42 Atl. 759; *Burton Tel. Co. v. Gordon*, 25 Ohio Cir. Ct. R. 642; *Richmond, etc., Elec. R. Co. v. Rubin*, 102 Va. 809, 47 S. E. 834; *Block v. Milwaukee St. R. Co.*, 89 Wis. 371, 61 N. W. 1101, 27 L. R. A. 365, 46 Am. St. Rep. 849; *Harrison v. Electric L. Co.*, 195 Mo. 606, 93 S. W. 951, 7 L. R. A. (N. S.) 293; *Heidt v. Southern Tel., etc., Co.*, 122 Ga. 474, 50 S. E. 361; *Southwestern Tel., etc., Co. v. Myane*, 86 Ark. 548, 111 S. W. 987; *Mooney v. Luzerne*, 186 Pa. 161, 40 Atl. 311, 40 L. R. A. 811; *Horning v. Hudson R. Tel. Co.*, 111 App. Div. 122, 97 N. Y. Supp. 625, affirmed in 186 N. Y. 552, 79 N. E. 1107; *Decatur v. Hamilton*, 89 Ill. App. 561; *Pierce v. United, etc., Elec. Co.*, 161 Cal. 176, 118 Pac. 700; *Lundy v. Southern Bell Tel., etc., Co.*, 90 S. C. 25, 72 S. E. 558; *Dugan v. Erie County Elec. Co.*, 241 Pa. 259, 88 Atl. 437; *Mahan v. Newton*,



ple have the right to go, either for work, business, or pleasure.<sup>76</sup> It is the duty of these companies to properly and safely insulate or guard their wires at such places, and to use the highest and utmost care and prudence, which may be consistent with the practical operation of their system, and by constant oversight, inspection, and repair to keep them in such condition at such places; and failing to furnish perfect protection at such points where people will likely come in contact with their wires subjects them to any liability arising therefrom.<sup>77</sup> So, under ordinary circumstances, a per-

etc., R. Co., 189 Mass. 1, 75 N. E. 59; West. U. Tel. Co. v. Thorn, 64 Fed. 287, 12 C. C. A. 104; Boyd v. Portland Gen. Elec. Co., 41 Or. 336, 68 Pac. 810; Alabama City, etc., R. Co. v. Appleton, 171 Ala. 324, 54 South. 638, Ann. Cas. 1913A, 1181.

<sup>76</sup> See § 194, travelers on streets and highways. As to individuals engaged in lawful occupation in a place where he is entitled to be, see Clements v. Louisiana Elec. Lt. Co., 44 La. Ann. 692, 11 South. 51, 32 Am. St. Rep. 348, 16 L. R. A. 43; Potts v. Shreveport Belt R. Co., 110 La. 1, 34 South. 103, 98 Am. St. Rep. 452; Hebert v. Lake Charles Ice, etc., Co., 111 La. 522, 35 South. 731, 100 Am. St. Rep. 505, 64 L. R. A. 101; Brown v. Edison Elec. Ill. Co., 90 Md. 400, 45 Atl. 182, 78 Am. St. Rep. 442, 46 L. R. A. 745; Illingsworth v. Boston Elec. Lt. Co., 161 Mass. 583, 37 N. E. 778, 25 L. R. A. 552; Hoppe v. Winona, 113 Minn. 252, 129 N. W. 577, Ann. Cas. 1912A, 247, 33 L. R. A. (N. S.) 449; Braun v. General Elec. Co., 200 N. Y. 484, 94 N. E. 206, 140 Am. St. Rep. 645, 21 Ann. Cas. 370, 34 L. R. A. (N. S.) 1089; Perham v. Portland Gen. Elec. Co., 33 Or. 451, 53 Pac. 14, 24, 72 Am. St. Rep. 730, 40 L. R. A. 799; Fitzgerald v. Edison Elec. Ill. Co., 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732; Greenville v. Pitts, 102 Tex. 1, 107 S. W. 50, 132 Am. St. Rep. 843, 14 L. R. A. (N. S.) 979; Runyan v. Kanawha, etc., Co., 68 W. Va. 609, 71 S. E. 259, 35 L. R. A. (N. S.) 430.

<sup>77</sup> Newark, Elec., etc., Co. v. Garden, 78 Fed. 74, 23 C. C. A. 649, 37 L. R. A. 725; Minneapolis, etc., Elec. Co. v. Cronon, 166 Fed. 651, 92 C. C. A. 345, 20 L. R. A. (N. S.) 816; New England Tel., etc., Co. v. Moore, 179 Fed. 364, 102 C. C. A. 642, 31 L. R. A. (N. S.) 617; Phoenix Lt., etc., Co. v. Bennett, 8 Ariz. 314, 74 Pac. 48, 63 L. R. A. 219; Palestine v. Siler, 225 Ill. 630, 80 N. E. 345, 8 L. R. A. (N. S.) 205; Winegarner v. Edison Lt., etc., Co., 83 Kan. 67, 109 Pac. 778, 28 L. R. A. (N. S.) 677; McLaughlin v. Louisville Elec. Lt. Co., 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812; Thomas v. Maysville Gas Co., 108 Ky. 224, 56 S. W. 153, 53 L. R. A. 147; Lewis v. Bowling Green Gas Lt. Co., 135 Ky. 611, 117 S. W. 278, 22 L. R. A. (N. S.) 1169; Thomas v. Somerset, 30 Ky. Law Rep. 131, 97 S. W. 420, 7 L. R. A. (N. S.) 963; Potts v. Shreveport Belt R. Co., 110 La. 1, 34 South. 103, 98 Am. St. Rep. 452; Hebert v. Lake Charles Ice, etc., Co., 111 La. 522, 35 South. 731, 100 Am. St. Rep. 505, 64 L. R. A. 101; Brown v. Edison Elec. Ill. Co., 90 Md. 400, 45 Atl. 182, 78 Am. St. Rep. 442, 46 L. R. A. 745; Griffin v. United Elec. Lt. Co., 164 Mass. 492, 41 N. E. 675, 49 Am. St. Rep. 477, 32 L. R. A. 400; Hodgins v. Bay City, 156 Mich. 687, 121 N. W. 274, 132 Am. St. Rep. 546; Musolf v. Duluth, etc., Elec. Co., 108 Minn. 369, 122 N. W. 499, 24 L. R. A. (N. S.) 451; Temple v. McComb City Elec., etc., Co., 89 Miss. 1, 42 South. 874, 119 Am.



son has a right, without being open to the charge of contributory negligence, to assume that this duty of the company has been discharged;<sup>78</sup> however, the right to this assumption does not relieve

St. Rep. 698, 10 Ann. Cas. 924, 11 L. R. A. (N. S.) 449; *Ryan v. St. Louis Tr. Co.*, 190 Mo. 621, 89 S. W. 865, 2 L. R. A. (N. S.) 777; *Fox v. Manchester*, 183 N. Y. 141, 75 N. E. 1116, 2 L. R. A. (N. S.) 474; *Braun v. Buffalo*, etc., Elec. Co., 200 N. Y. 484, 94 N. E. 206, 140 Am. St. Rep. 645, 21 Ann. Cas. 370, 35 L. R. A. (N. S.) 1089; *Fitzgerald v. Edison Elec. Ill. Co.*, 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732; *Alexander v. Nanticoke Lt. Co.*, 209 Pa. 571, 58 Atl. 1068, 67 L. R. A. 475; *Parsons v. Charleston*, etc., R. Co., 69 S. C. 305, 48 S. E. 284, 104 Am. St. Rep. 800; *Fish v. Electric Co.*, 18 S. D. 122, 99 N. W. 1092, 112 Am. St. Rep. 782; *Wetherby v. Twin State Gas Co.*, 83 Vt. 189, 75 Atl. 8, 21 Ann. Cas. 1092, 25 L. R. A. (N. S.) 1220; *Miner v. Franklin Co. Tel. Co.*, 83 Vt. 311, 75 Atl. 653, 26 L. R. A. (N. S.) 1195; *Runyan v. Kanawha*, etc., Co., 68 W. Va. 609, 71 S. E. 259, 35 L. R. A. (N. S.) 430; *Gloster v. Toronto Elec. Lt. Co.*, 38 C. S. Ct. 27, 6 Ann. Cas. 529, 1 B. R. C. 786; *Alabama*, etc., R. Co. v. *Appleton*, 171 Ala. 324, 54 South. 638, Ann. Cas. 1913A, 1181; *Knowlton v. Des Moines Edison Lt. Co.*, 117 Iowa, 451, 90 N. W. 818; *Connell v. Keokuk Elec. Ry.*, etc., Co., 131 Iowa, 622, 109 N. W. 177; *Hoppe v. Winona*, 113 Minn. 252, 129 N. W. 577, Ann. Cas. 1912A, 247, 33 L. R. A. (N. S.) 449; *Fisher v. New Bern*, 140 N. C. 506, 53 S. E. 342, 111 Am. St. Rep. 857, 5 L. R. A. (N. S.) 542; *Mitchell v. Raleigh Elec. Co.*, 129 N. C. 166, 39 S. E. 801, 85 Am. St. Rep. 735, 55 L. R. A. 398; *Ladow v. Oklahoma*, etc., Elec. Co., 28 Okl. 15, 119 Pac. 250; *Perham v. Portland Gen. Elec. Co.*, 33 Or. 451, 53 Pac. 14, 24, 72 Am. St. Rep. 730, 40 L. R. A. 799; *Graves v. Washington P. Co.*, 44 Wash. 675, 87 Pac. 956, 11 L. R. A. (N. S.) 452.

*Through Trees*.—Wires through or near trees, bound to anticipate persons may lawfully climb. See *McCrea v. Beverly*, etc., Elec. Co., 216 Mass. 495, 104 N. E. 365; *Philbin v. Marlborough Elec. Co.*, 218 Mass. 394, 105 N. E. 893; *Brubaker v. Kansas City Elec. Lt. Co.*, 130 Mo. App. 439, 110 S. W. 12,

<sup>78</sup> *Perham v. Portland Elec. Co.*, 33 Or. 451, 53 Pac. 14, 24, 72 Am. St. Rep. 730, 40 L. R. A. 799; *Mitchell v. Raleigh Elec. Co.*, 129 N. C. 166, 39 S. E. 801, 85 Am. St. Rep. 735, 55 L. R. A. 398; *Fitzgerald v. Edison Elec.*, etc., Co., 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732; *Thomas v. Wheeling Elec. Co.*, 54 W. Va. 395, 46 S. E. 217; *Clements v. Louisiana Elec. Lt. Co.*, 44 La. Ann. 692, 11 South. 51, 32 Am. St. Rep. 348, 16 L. R. A. 43; *Hodgins v. Bay City*, 156 Mich. 687, 121 N. W. 274, 132 Am. St. Rep. 546; *Suburban Elec. Co. v. Nugent*, 58 N. J. Law, 658, 34 Atl. 1069, 32 L. R. A. 700; *Gentzkow v. Portland Ry. Co.*, 54 Or. 114, 102 Pac. 614, 135 Am. St. Rep. 821; *Runyan v. Kanawha Water*, etc., Co., 68 W. Va. 609, 71 S. E. 259, 35 L. R. A. (N. S.) 430.

*Invitation to risk consequences*.—It has been held that where the insulation of wires is imperfect it acts as an invitation to persons working in proximity to them to risk the consequences of contact with them. *Newark Elec. Lt.*, etc., Co. v. *Garden*, 78 Fed. 74, 23 C. C. A. 649, 37 L. R. A. 725; *McLaughlin v. Louisville Elec. Lt. Co.*, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812; *Mitchell v. Raleigh Elec. Co.*, supra; *Perham v. Portland*, etc., Elec. Co., supra. But where the person knows the wire to be otherwise the rule would be different, *Graves v. Washington*, etc., P. Co., 44 Wash. 675, 87 Pac. 956, 11 L. R. A. (N. S.) 452.

a lineman from the obligation of exercising active diligence for his own safety.<sup>79</sup> Furthermore, this duty does not extend to places

swaying of limbs is liable to abrade the insulation; children climbing trees, *Clements v. Potomac Elec. P. Co.*, 26 App. D. C. 482; *Temple v. McComb City Elec., etc., P. Co.*, 89 Miss. 1, 42 South. 874, 11 L. R. A. (N. S.) 449, 119 Am. St. Rep. 698, 10 Ann. Cas. 924; *Benton v. North Carolina Public Ser. Corp.*, 165 N. C. 354, 81 S. E. 448; *Mullen v. Wilkes-Barre, etc., Elec. Co.*, 229 Pa. 54, 77 Atl. 1108, child not trespasser while upon other's premises.

*Side of buildings.*—Parties working or being near the wall of a building. See *Wales v. Pacific Elec. Motor Co.*, 130 Cal. 521, 62 Pac. 932, 1120; *McLaughlin v. Louisville Elec. Lt. Co.*, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812, 18 Ky. Law Rep. 693; *Brown v. Edison, etc., Co.*, 90 Md. 400, 45 Atl. 182, 78 Am. St. Rep. 442, 46 L. R. A. 745; *Griffin v. United Elec. Lt. Co.*, 164 Mass. 492, 41 N. E. 675, 49 Am. St. Rep. 477, 32 L. R. A. 400; *Geismann v. Missouri, etc., Elec. Co.*, 173 Mo. 654, 73 S. W. 654; *Winkelman v. Kansas City Elec. Lt. Co.*, 110 Mo. App. 184, 85 S. W. 99; *Williams v. Fulton*, 177 Mo. App. 177, 164 S. W. 247; *Birsch v. Citizens' Elec. Co.*, 36 Mont. 574, 93 Pac. 940; *Consol. Gas Co. v. Brooks* (N. J. Sup.) 53 Atl. 296; *Yeager v. Edison Elec. Co.*, 242 Pa. 101, 88 Atl. 872; *Fitzgerald v. Edison, etc., Co.*, 207 Pa. 118, 56 Atl. 350; window roof, *Brown v. Edison, etc., Co.*, supra; balcony, wires in proximity to balcony should be carefully guarded, *Brooks v. Consol. Gas Co.*, 70 N. J. Law, 211, 57 Atl. 396; *Consol. Gas Co. v. Brooks*, supra; *Thomas v. Wheeling Elec. Co.*, 54 W. Va. 395, 46 S. E. 217.

*Roofs of buildings.*—Wires over or near the roofs of buildings. See *Giraudi v. Electric Imp. Co.*, 107 Cal. 120, 40 Pac. 108, 48 Am. St. Rep. 114, 28 L. R. A. 596; *Grennis v. Louisville Elec. Co.*, 20 Ky. Law Rep. 1293, 49 S. W. 184; *Clements v. Louisiana Elec. L. Co.*, 44 La. Ann. 692, 11 South. 51, 32 Am. St. Rep. 348, 16 L. R. A. 43; *Colusa Parrot, etc., Co.*, 162 Fed. 276, 89 C. C. A. 256; *Reagan v. Boston Elec. Lt. Co.*, 167 Mass. 406, 45 N. E. 743; *Steindorff v. St. Paul Gas Lt. Co.*, 92 Minn. 496, 100 N. W. 221; *Williams v. Fulton*, 177 Mo. App. 177, 164 S. W. 247; *Sommer v. Public Service Corp.*, 79 N. J. Law, 349, 75 Atl. 892; *Ennis v. Gray*, 87 Hun, 355, 34 N. Y. Supp. 379, 68 N. Y. St. Rep. 312; *Fitzgerald v. Edison Elec., etc., Co.*, 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732; where roof not normally used, rule otherwise, *Sullivan v. Boston, etc., R. Co.*, 156 Mass. 378, 31 N. E. 128; *Cumberland v. Lottig*, 95 Md. 42, 51 Atl. 841; *Keefe v. Narragansett Elec. Lt. Co.*, 21 R. I. 575, 43 Atl. 542; *Burnett v. Ft. Worth, etc., P. Co.*, 102 Tex. 31, 112 S. W. 1040, 19 L. R. A. (N. S.) 504, trespasser or licensee; *Greenville v. Pitts*, 102 Tex. 1, 107 S. W. 50, 14 L. R. A. (N. S.) 979, 132 Am. St. Rep. 843, policeman on building, trespasser.

*Bridges.*—High tension wires on bridges. See *Hoppe v. Winona*, supra; *Bourke v. Butte Elec., etc., Co.*, 33 Mont. 267, 83 Pac. 470; *Perham v. Portland, etc., Elec. Co.*, supra; *Runyan v. Kanawha, etc., Lt. Co.*, supra; not usually liable to children climbing out on bridge; *Consolidated Elec., etc., Co. v. Healy*, 65 Kan. 798, 70 Pac. 884; *Thornburg v. City, etc., R. Co.*, 65 W. Va. 379, 64 S. E. 358; *Gloster v. Toronto Elec. Lt. Co.*, supra; *Nelson v. Branford, etc., Co.*, 75 Conn. 548, 54 Atl. 303; but see, to the contrary, *Weth-*

<sup>79</sup> *Jackson, etc., St. R. R. v. Simmons*, 107 Tenn. 392, 64 S. W. 705.

where no one can reasonably be expected to go.<sup>80</sup> These companies are bound to exercise due care in the inspection of their

erby's *Adm'r v. Twin State, etc., Co.*, 83 Vt. 189, 75 Atl. 8, 21 Ann. Cas. 1092, 25 L. R. A. (N. S.) 1220; *Graves v. Washington, etc., P. Co.*, *supra*.

*Elevated railroads.*—Electric wires along an elevated railway structure near where passengers travel and are likely to come in contact with. See *Wittleder v. Citizens' Elec. Ill. Co.*, 47 App. Div. 410, 62 N. Y. Supp. 297; *Wagner v. Brooklyn Hgts. R. Co.*, 69 App. Div. 349, 74 N. Y. Supp. 809, affirmed in 174 N. Y. 520, 66 N. E. 1117.

*At poles.*—Electric wires at poles where the company's employes, or those of other companies, or other persons, coming near thereto would likely come in contact with high tension currents. See *New Omaha, etc., Lt. Co. v. Dent*, 68 Neb. 668, 94 N. W. 819, 103 N. W. 1091; *Smith v. Twin City, etc., Tr. Co.*, 102 Minn. 4, 112 N. W. 1001; *Memphis Consol., etc., Elec. Co. v. Bell*, 152 Fed. 677, 82 C. C. A. 25; *Knowlton v. Des Moines, etc., Lt. Co.*, *supra*; *Rambo v. Empire, etc., Elec. Co.*, 90 Kan. 390, 133 Pac. 553; *Bowling Green Gas Lt. Co. v. Dean*, 142 Ky. 678, 134 S. W. 1115; *Anglea v. E. Tenn. Tel. Co.*, 142 Ky. 539, 134 S. W. 1119; *Consolidated Gas Elec., etc., Co. v. State*, 109 Md. 186, 72 Atl. 851; *Illingsworth v. Boston Elec., etc., Co.*, 161 Mass. 583, 37 N. E. 778, 25 L. R. A. 552; *Hodgins v. Bay City*, 156 Mich. 687, 121 N. W. 274, 132 Am. St. Rep. 546; *Von Trebra v. Laclede Gas Lt. Co.*, 209 Mo. 648, 108 S. W. 559; *Trout v. Laclede Gas Lt. Co.*, 151 Mo. App. 207, 132 S. W. 58; *Cincinnati, etc., Elec. Co. v. Archdeacon*, 80 Ohio St. 27, 88 N. E. 125; *Hipple v. Edison Elec., etc., Co.*, 240 Pa. 91, 87 Atl. 297; *Morgan v. Westmoreland*, 213 Pa. 151, 62 Atl. 638; *San Antonio, etc., Elec. Co. v. Badders*, 46 Tex. Civ. App. 559, 103 S. W. 229; *Danville v. Thornton*, 110 Va. 541, 66 S. E. 839.

*Between poles.*—Wires at points between poles where parties will likely come in contact with them, *Staab v. Rocky Mountain, etc., Tel. Co.*, 23 Idaho, 314, 129 Pac. 1078; *Wilkins v. Water, etc., Co.*, 92 Neb. 513, 138 N. W. 754; *Hipple v. Edison, etc., Ill. Co.*, *supra*; *Denison, etc., Power Co. v. Patton* (Tex. Civ. App.) 135 S. W. 1040; *Winegarner v. Edison, etc., P. Co.*, 83 Kan. 67, 109 Pac. 778, 28 L. R. A. (N. S.) 677; specially where there is a municipal ordinance requiring the insulation of wires at such place, *Hausler v. Com. Elec. Co.*, 240 Ill. 201, 88 N. E. 561, affirmed in 144 Ill. App. 643; *Knowlton v. Des Moines Edison Lt. Co.*, *supra*; *Musolf v. Duluth Edison Elec. Co.*, *supra*; *Mitchell v. Raleigh Elec. Co.*, 129 N. C. 166, 39 S. E. 801, 85 Am. St. Rep. 735, 55 L. R. A. 398; not so if person was trespasser, *Stark v. Muskegon, etc., Lt. Co.*, 141 Mich. 575, 104 N. W. 1100, 1 L. R. A. (N. S.) 822; *New Omaha, etc., Lt. Co. v. Anderson*, 73 Neb. 84, 102 N. W. 89.

*Over vacant lots.*—If circumstances and conditions require the insulation

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<sup>80</sup> *Hector v. Boston Elec., etc., Co.*, 174 Mass. 212, 54 N. E. 539, 75 Am. St. Rep. 300; *Calumet Elec. St. Ry. Co. v. Goose*, 70 Ill. App. 381; *Sheffield Co. v. Morton*, 161 Ala. 153, 49 South. 772; *Knowlton v. Des Moines, etc., Lt. Co.*, 117 Iowa, 451, 90 N. W. 818; *Myer v. Union, etc., P. Co.*, 151 Ky. 332, 151 S. W. 941, 43 L. R. A. (N. S.) 136; *Cumberland v. Lottig*, 95 Md. 42, 51 Atl. 841; *Keefe v. Narragansett Elec. Lt. Co.*, 21 R. I. 575, 43 Atl. 542; *Brush Elec. Lt., etc., Co. v. Lefevre*, 93 Tex. 604, 57 S. W. 640, 77 Am. St. Rep. 898, 49 L. R. A. 771; *Wetherby v. Twin State, etc., Co.*, 83 Vt. 189, 75 Atl. 8, 21 Ann. Cas. 1092, 25 L. R. A. (N. S.) 1220.



line,<sup>81</sup> and to keep their wires properly insulated and guarded at such places as may be necessary,<sup>82</sup> and to anticipate or foresee all

of wires stretched across vacant lots, and a person is injured as result of the wires not being insulated, the company will be liable. *Braun v. Buffalo, etc., Elec. Co.*, supra; *Byerly v. Consol., etc., Ice Co.*, 130 Mo. App. 593, 109 S. W. 1065; *Meyer v. Menominee, etc., Tr. Co.*, 151 Wis. 279, 138 N. W. 1008; *Rowley v. Newburgh, etc., P. Co.*, 151 App. Div. 65, 135 N. Y. Supp. 944; *Sheffield Co. v. Morton*, 161 Ala. 153, 49 South. 772; *Myer v. Union, etc., P. Co.*, 151 Ky. 332, 151 S. W. 941, 43 L. R. A. (N. S.) 136; *Davoust v. Alameda*, 149 Cal. 69, 84 Pac. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847; *Pennebaker v. San Joaquin, etc., P. Co.*, 158 Cal. 579, 112 Pac. 459, 31 L. R. A. (N. S.) 1099, 139 Am. St. Rep. 202.

*Near the wires.*—Where electric wires are strung near other wires and to which electricity may be conducted. See *Hebert v. Lake Charles, etc., W. Co.*, supra; *Mize v. Rocky Mountain Tel. Co.*, 38 Mont. 521, 100 Pac. 971, 129 Am. St. Rep. 659, 16 Ann. Cas. 1189; *Parsons v. Charleston, etc., Elec. Co.*, supra. See § 201.

*Other places.*—At such other places as are not heretofore mentioned where persons are likely to come in contact with electric wires. See *Anderson v. Jersey City, etc., L. Co.*, 63 N. J. Law, 387, 43 Atl. 654, air shaft of a club house; *Thomas v. Somerset*, 30 Ky. Law Rep. 131, 97 S. W. 420, 7 L. R. A. (N. S.) 963, booth for sale of confections; *Hayes v. Southern P. Co.*, 95 S. C. 230, 78 S. E. 956, inside building near window; *Com. Elec. Co. v. Melville*, 210 Ill. 70, 70 N. E. 1052, place under sidewalk; *Ryan v. St. Louis Tr. Co.*, 190 Mo. 621, 89 S. W. 865, 2 L. R. A. (N. S.) 777, basement room of street railway company's power house; *Humphreys v. Raleigh, etc., Coke Co.*, 73 W. Va. 495, 80 S. E. 803, L. R. A. 1916C, 1270, wire in a mine entry.

*Awnings.*—Whether wires at or near awnings should be insulated depends a great deal upon the surroundings. If it was such place people might likely expect to be, the company would be liable. *O'Gara v. Philadelphia Elec. Co.*, 244 Pa. 156, 90 Atl. 529; *Rucker v. Sherman Oil, etc., Co.*, 29 Tex. Civ. App. 418, 68 S. W. 818. But see *Brush Elec., etc., Co. v. Lefevre*, 93 Tex. 604, 57 S. W. 640, 77 Am. St. Rep. 898, 49 L. R. A. 771, where person not reasonably expected to go.

<sup>81</sup> *Crawford v. Standard Tel. Co.*, 139 Iowa, 331, 115 N. W. 878; *Postal Tel.*

<sup>82</sup> *Simmons v. Shreveport Gas, etc., Co.*, 116 La. 1033, 41 South. 248; *Heidt v. Southern Tel., etc., Co.*, 122 Ga. 474, 50 S. E. 361; *Politowitz v. Citizens' Tel. Co.*, 123 Mo. App. 77, 99 S. W. 756; *Guinn v. Delaware, etc., Tel. Co.*, 72 N. J. Law, 276, 62 Atl. 412, 111 Am. St. Rep. 668, 3 L. R. A. (N. S.) 988; *New York, etc., Tel. Co. v. Bennett*, 62 N. J. Law, 742, 42 Atl. 759; *Sheffield Co. v. Morton*, 161 Ala. 153, 49 South. 772; *Hebert v. Lake Charles, etc., Co.*, 111 La. 522, 35 South. 731, 100 Am. St. Rep. 505, 64 L. R. A. 101; *Thomas v. Mayesville Gas Co.*, 108 Ky. 224, 56 S. W. 153, 53 L. R. A. 147; *Maysville Gas Co. v. Thomas*, 25 Ky. Law Rep. 403, 75 S. W. 1129; *Memphis Consol., etc., Elec. Co.*, 113 Tenn. 83, 81 S. W. 595; *Rowe v. New York, etc., Tel. Co.*, 66 N. J. Law, 19, 48 Atl. 523; *Nelson v. Branford L., etc., Co.*, 75 Conn. 548, 54 Atl. 303; *Brush Elec., etc., Co. v. Lefevre*, 93 Tex. 604, 57 S. W. 640, 77 Am. St. Rep. 898, 47 L. R. A. 771; *Lewis v. Bowling Green Gas L. Co.*, 135 Ky. 611, 117 S. W. 278, 22 L. R. A. (N. S.) 1169; *Knowlton v. Des Moines, etc., Co.*, 117 Iowa, 457, 90 N. W. 818.



probable results which are likely to happen by reason of their connection or location with other wires.<sup>83</sup> Not only does this duty

*Cable Co. v. Jones*, 133 Ala. 217, 32 South. 500; *West Kentucky Tel. Co. v. Pharis*, 78 S. W. 917, 25 Ky. Law Rep. 1838; *Walther v. American Dist. Tel. Co.*, 11 Misc. Rep. 71, 32 N. Y. Supp. 751; *Harton v. Forest City Tel. Co.*, 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. (N. S.) 956, 14 Ann. Cas. 390. The duty of inspection in regard to its frequency cannot be definitely stated, as it depends upon the condition of the weather, season of the year, character of the soil, and other conditions. It cannot be said, however, that so long as a telegraph or telephone wire will carry messages there is no duty to inspect it to ascertain if it is hanging loose or otherwise in a dangerous condition. *Crawford v. Standard Tel. Co.*, supra. See, also, *Eastern Kentucky Tel., etc., Co. v. Hardwick*, 106 S. W. 307, 32 Ky. Law Rep. 582; *Freeman v. Missouri, etc., Tel. Co.*, 160 Mo. App. 271, 142 S. W. 733; *Miner v. Franklin County Tel. Co.*, 83 Vt. 311, 75 Atl. 653, 26 L. R. A. (N. S.) 1195.

Electrical company must inspect. *Alabama, etc., R. Co. v. Appleton*, 171 Ala. 324, 54 South. 638, Ann. Cas. 1913A, 1181; *Owensboro v. Knox*, 116 Ky. 451, 76 S. W. 191; *Warren v. City Elec. R. Co.*, 141 Mich. 298, 104 N. W. 613;

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<sup>83</sup> *Simmons v. Shreveport Gas, etc., Co.*, 116 La. 1033, 41 South. 248; *Polittowitz v. Citizens' Tel. Co.*, 123 Mo. App. 77, 99 S. W. 756; *Southern Bell Tel., etc., Co. v. Howell*, 124 Ga. 1050, 53 S. E. 577, 4 Ann. Cas. 707; *West. U. Tel. Co. v. Griffith*, 111 Ga. 551, 36 S. E. 859; *New York, etc., Tel. Co. v. Bennett*, 62 N. J. Law, 742, 42 Atl. 759; *Fox v. Manchester*, 183 N. Y. 141, 75 N. E. 1116, 2 L. R. A. (N. S.) 474; *Carroll v. Grande Ronde Elec. Co.*, 47 Or. 424, 84 Pac. 389, 6 L. R. A. (N. S.) 290; *Ahern v. Oregon Tel., etc., Co.*, 24 Or. 276, 33 Pac. 403, 35 Pac. 549, 22 L. R. A. 635; *Burton Tel. Co. v. Gordon*, 25 Ohio Cir. Ct. R. 641; *Citizens' Tel. Co. v. Thomas*, 45 Tex. Civ. App. 20, 99 S. W. 879; *Henning v. West. U. Tel. Co. (C. C.)* 41 Fed. 864. See § 194.

"Electricity is the agent by which telephones become the means of communication from one point to another, and it may be conceded, as the appellant contends, that the current needed for their use is not a dangerous one. In this case it may be still further conceded that the current with which the deceased came in contact did not come from the exchange of the appellant; but at the same time it cannot be questioned that it came over one of its wires leading to the telephone of one of its patrons. Though this wire was intended to conduct only a harmless current, the appellant was bound to know that it could become the conductor of a deadly one, and that such a current would pass over it if it was not properly insulated and should come in contact with a wire heavily and dangerously charged. It was therefore as much the duty of the company to see that no such current should thus pass over its wires as it was to send only a harmless one from its own exchange." *Delahunt v. United Tel., etc., Co.*, 215 Pa. 241, 64 Atl. 515, 114 Am. St. Rep. 958. See *Geroski v. Allegheny County L. Co.*, 247 Pa. 304, 93 Atl. 338, L. R. A. 1915D, 560, an accident which it did not have to anticipate. See, also, *Alabama, etc., R. Co. v. Appleton*, 171 Ala. 324, 54 South. 638, Ann. Cas. 1913A, 1181; *Barto v. Iowa Tel. Co.*, 126 Iowa. 241, 101 N. W. 876, 106 Am. St. Rep. 347; *Lewis v. Bowling Green Gaslight Co.*, 135 Ky. 611, 117 S. W. 278, 22 L. R. A. (N. S.) 1169; *Winegarner v. Edison L., etc., Co.*, 83 Kan. 67, 109 Pac. 778, 28 L. R. A. (N. S.) 677; *Humphreys v. Raleigh, etc., Coke Co.*, 73 W. Va. 495, 80 S. E. 803, L. R. A. 1916C, 1270.

devolve upon telegraph, telephone or electrical companies, but also upon a municipality in which they have lines, and, as a result of negligence in this respect, it will be liable for all injuries in consequence thereof.<sup>84</sup> Most of the cases hold, however, that the mu-

Lutolf v. United Elec. L. Co., 184 Mass. 53, 67 N. E. 1025; Economy L., etc., Co. v. Hiller, 203 Ill. 518, 68 N. E. 72; O'Leary v. Glens Falls, etc., Elec., etc., Co., 107 App. Div. 505, 95 N. Y. Supp. 232; Brubaker v. Kansas City Elec., etc., Co., 130 Mo. App. 439, 110 S. W. 12; Lewis v. Bowling Green, etc., Co., 135 Ky. 611, 117 S. W. 278, 22 L. R. A. (N. S.) 1169; Gentzkow v. Portland R. Co., 54 Or. 114, 102 Pac. 614, 135 Am. St. Rep. 821; Fox v. Manchester, 183 N. Y. 141, 75 N. E. 1116, 2 L. R. A. (N. S.) 474; Brown v. Consol. L., etc., Co., 137 Mo. App. 718, 109 S. W. 1032; Columbus R. Co. v. Kitchens, 142 Ga. 677, 83 S. E. 529, L. R. A. 1915C, 570; Kempf v. Spokane, etc., R. Co., 82 Wash. 263, 144 Pac. 77, L. R. A. 1915C, 405; Green v. West Penn. R. Co., 246 Pa. 340, 92 Atl. 341, L. R. A. 1915C, 151; Foley v. Northern Cal. P. Co., 14 Cal. App. 401, 112 Pac. 467; Tackett v. Henderson, 12 Cal. App. 658, 108 Pac. 151; Bergin v. Southern New England Tel. Co., 70 Conn. 54, 38 Atl. 888, 39 L. R. A. 192; Denver Consol. Elec. Co. v. Lawrence, 31 Colo. 301, 73 Pac. 39; Trammell v. Columbus R. Co., 9 Ga. App. 98, 70 S. E. 892; Barto v. Iowa Tel. Co., 126 Iowa, 241, 101 N. W. 876, 106 Am. St. Rep. 347; Musolf v. Electric Co., 108 Minn. 369, 122 N. W. 499, 24 L. R. A. (N. S.) 451; Wilhite v. Huntsville, 167 Mo. App. 155, 151 S. W. 232; Hoover v. Kansas City Elec. Ry. Co., 159 Mo. App. 416, 140 S. W. 321; Luehrmann v. Laclede Gas Lt. Co., 127 Mo. App. 213, 104 S. W. 1128; Bourke v. Butte, etc., P. Co., 33 Mont. 267, 83 Pac. 470; Huscher v. Elec., etc., P. Co., 158 App. Div. 422, 143 N. Y. Supp. 639; Wagner v. Brooklyn Hgts. R. Co., 69 App. Div. 349, 74 N. Y. Supp. 809, affirmed in 174 N. Y. 520, 66 N. E. 1117; Dwyer v. Buffalo, etc., Elec. Co., 20 App. Div. 124, 46 N. Y. Supp. 874; Dugan v. Erie Co. Elec. Co., 241 Pa. 259, 88 Atl. 437; Berstein v. Electric Co., 235 Pa. 53, 83 Atl. 612; Citizens' Tel. Co. v. Thomas, 45 Tex. Civ. App. 20, 99 S. W. 879; Jacksonville, etc., Elec. Co. v. Moses (Tex. Civ. App.) 134 S. W. 379; Bice v. Wheeling Elec. Co., 62 W. Va. 685, 59 S. E. 626; Herlitzke v. La Crosse, etc., Tel. Co., 145 Wis. 185, 130 N. W. 59.

*Sufficiency of inspection.*—The frequency and thoroughness of inspection depends very much upon the voltage, the wires, and their proximity to other wires, and objects, and their age, etc., Warren v. City Elec. Ry. Co., supra; inspection to see whether lights are burning not sufficient, Lutolf v. United Elec. Lt. Co., supra; where line is in rural highway, diligence not the same, Fitch v. Central, etc., Tel. Co., 42 App. Div. 321, 59 N. Y. Supp. 140; question for jury, Alabama City, etc., Ry. Co. v. Appleton, supra; Warren v. City Elec. Ry. Co., supra; Musolf v. Electric Co., supra.

*Inspection after storm.*—Company bound to anticipate that its lines may be out of order after a storm. See Foley v. Northern Cal. P. Co., supra; Warren v. City Elec. Ry. Co., supra; Wilhite v. Huntsville, supra; Jacksonville, etc., Elec. Co. v. Moses, supra; and will be liable where it fails to exercise diligence in its inspection, Brown v. Light, etc., Co., 137 Mo. 718, 109 S. W. 1032; Foley v. Northern Cal. P. Co., supra.

<sup>84</sup> Palestine v. Siler, 225 Ill. 630, 80 N. E. 345, 8 L. R. A. (N. S.) 205; Aiken v. Columbus, 167 Ind. 139, 78 N. E. 657, 12 L. R. A. (N. S.) 416; Fox v. Manchester, 183 N. Y. 141, 75 N. E. 1116, 2 L. R. A. (N. S.) 474, and note; Mooney

municipality is liable for injury resulting from defective electric wires maintained in the streets by other parties only where it had, or by the exercise of reasonable care might have had, notice of the defective condition.<sup>85</sup> The degree of care, prudence, and foresight exacted of a municipality where it owns the wires<sup>86</sup> is, perhaps, not less than that exacted of private companies.<sup>87</sup> In many instances there are city ordinances regulating the manner in which these companies' lines shall be constructed and maintained upon the streets, and in regard to which the courts may take several possible positions as to the effect to be given to the violation of such ordi-

*v. Lazurene*, 186 Pa. 161, 40 Atl. 311, 40 L. R. A. 811; *McKeesport v. McKeesport, etc., R. Co.*, 2 Pa. Super. Ct. 242; *Allentown v. West. U. Tel. Co.*, 148 Pa. 117, 23 Atl. 1070, 33 Am. St. Rep. 820; *West. U. Tel. Co. v. Philadelphia*, 9 Sadler (Pa.) 300, 12 Atl. 144, 22 Wkly. Notes Cas. 39; *Central, etc., Co. v. Conneaut*, 167 Fed. 274, 93 C. C. A. 196; *Merritt v. Kinloch Tel. Co.*, 215 Mo. 299, 115 S. W. 19; *Young v. Town of Gravenhurst*, 24 Ont. L. Rep. 467, Ann. Cas. 1912B, 812, and note; *American Dist. Tel. Co. v. Oldham*, 148 Ky. 320, 146 S. W. 764, Ann. Cas. 1913E, 376, and note; *Davoust v. Alameda*, 149 Cal. 69, 84 Pac. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847.

<sup>85</sup> *Fox v. Manchester*, 183 N. Y. 141, 75 N. E. 1116, 2 L. R. A. (N. S.) 474; *Decatur v. Hamilton*, 89 Ill. App. 561; *West Kentucky Tel. Co. v. Pharis*, 25 Ky. Law Rep. 1838, 78 S. W. 917; *Colbourn v. Wilmington*, 4 Pennewill (Del.) 443, 56 Atl. 605; *Hayes v. Hyde Park*, 153 Mass. 514, 27 N. E. 522, 12 L. R. A. 249; *District of Columbia v. Dempsey*, 13 App. D. C. 533; *Kansas City v. Gillebert*, 65 Kan. 469, 70 Pac. 350; *Schmidt v. Chicago*, 107 Ill. App. 64; *Denver v. Sherret*, 88 Fed. 226, 31 C. C. A. 499, 60 U. S. App. 104; *Mayor v. House*, 104 Tenn. 1, 55 S. W. 153. See *Greenville v. Pitts*, 102 Tex. 1, 107 S. W. 50, 14 L. R. A. (N. S.) 979, 132 Am. St. Rep. 843; *American Dist. Tel. Co. v. Oldham*, 148 Ky. 320, 146 S. W. 764, Ann. Cas. 1913E, 376. And see, also, cases cited in preceding note; *Shawnee v. Sears*, 39 Okl. 789, 137 Pac. 107, 50 L. R. A. (N. S.) 885. The city and company may both be liable: *Hoppe v. Winona*, 113 Minn. 252, 129 N. W. 577, Ann. Cas. 1912A, 247, 33 L. R. A. (N. S.) 449; *Kansas City v. File*, 60 Kan. 157, 55 Pac. 877.

<sup>86</sup> See § 85.

<sup>87</sup> *Sykes v. Portland*, 177 Mich. 290, 143 N. W. 326; *Owensboro v. Knox*, 25 Ky. Law Rep. 680, 76 S. W. 191; *Emery v. Philadelphia*, 208 Pa. 492, 57 Atl. 977; *Herron v. Pittsburg*, 204 Pa. 509, 54 Atl. 311, 93 Am. St. Rep. 798; *Twist v. Rochester*, 37 App. Div. 307, 55 N. Y. Supp. 850, affirmed 165 N. Y. 619, 59 N. E. 1131; *Emporia v. Burns*, 67 Kan. 523, 73 Pac. 94; *Abrams v. Seattle*, 60 Wash. 356, 111 Pac. 168, 140 Am. St. Rep. 916; *Eaton v. City of Weiser*, 12 Idaho, 544, 86 Pac. 541, 118 Am. St. Rep. 225; *Fisher v. New Bern*, 140 N. C. 506, 53 S. E. 342, 5 L. R. A. (N. S.) 542, 111 Am. St. Rep. 857; *Hodgins v. Bay City*, 156 Mich. 687, 121 N. W. 274, 132 Am. St. Rep. 546. See, also, *Aiken v. Columbus*, 167 Ind. 139, 78 N. E. 657, 12 L. R. A. (N. S.) 416; *Palestine v. Siler*, 225 Ill. 630, 80 N. E. 345, 8 L. R. A. (N. S.) 205; *Irvine v. Greenwood*, 89 S. C. 511, 72 S. E. 228, 36 L. R. A. (N. S.) 363; *Thomas v. Somerset*, 30 Ky. Law Rep. 131, 97 S. W. 420, 7 L. R. A. (N. S.) 963. See § 85.



nances.<sup>88</sup> Thus there are ordinances requiring electric wires to be insulated. Where such ordinances exist, and an electric company fails to keep its wires insulated as thereby required, it is *prima facie* evidence of negligence.<sup>89</sup>

§ 200a. **Duty to guard against danger to children.**—No rule can be laid down that would be accepted by all the courts as to the duty of electrical companies in stringing their wires so as to guard against danger to children. The courts are in irreconcilable conflict on questions arising in cases of this nature as they are in the “turntable” cases, and those involving other “attractive nuisances.”

<sup>88</sup> *Violation of ordinance in general.*—The general rule is that the violation of city ordinance is negligence per se. *Southwestern Tel., etc., Co. v. Myane*, 86 Ark. 548, 111 S. W. 987; *Conrad v. Springfield Consol. Ry. Co.*, 240 Ill. 12, 88 N. E. 180, 130 Am. St. Rep. 251; *Com. Elec. Co. v. Rose*, 214 Ill. 545, 73 N. E. 780; *Hausler v. Electric Co.*, 144 Ill. App. 643, affirmed in 240 Ill. 201, 88 N. E. 561; *Moren v. New Orleans, etc., Lt. Co.*, 125 La. 944, 52 South. 106, 136 Am. St. Rep. 344; *Knowlton v. Des Moines, etc., Lt. Co.*, 117 Iowa, 451, 90 N. W. 818; *Clements v. Louisiana Elec. Lt. Co.*, 44 La. Ann. 692, 11 South. 51, 32 Am. St. Rep. 348, 16 L. R. A. 43; *Mitchell v. Raleigh Elec. Co.*, 129 N. C. 166, 39 S. E. 801, 85 Am. St. Rep. 735, 55 L. R. A. 398; *Mize v. Rocky Mountain Bell Tel. Co.*, 38 Mont. 521, 100 Pac. 971, 129 Am. St. Rep. 659, 16 Ann. Cas. 1189; *Ladow v. Oklahoma, etc., Elec. Co.*, 28 Okl. 15, 119 Pac. 250; *Burnett v. Ft. Worth, etc., P. Co.*, 102 Tex. 31, 112 S. W. 1040, 19 L. R. A. (N. S.) 504; *San Antonio, etc., Elec. Co. v. Badders*, 46 Tex. Civ. App. 559, 103 S. W. 229. The inhabitants of the new municipality may take advantage of the company's failure to observe the ordinance. *Conrad v. Springfield Cons. Ry. Co.*, supra; *Clements v. Louisiana Elec. Lt. Co.*, supra. Violation of ordinance does not lessen company's duty. *Postal Tel. Cable Co. v. Likes*, 225 Ill. 249, 80 N. E. 136; *Birmingham, etc., P. Co. v. Cockrum*, 179 Ala. 372, 60 South. 304; *Southwestern Tel., etc., Co. v. Myane*, supra; *Presley v. Kinlock Tel. Co.*, 158 Ill. App. 220. The injured person cannot recover without showing that the injuries were the proximate result of the violation of such ordinance. *Conrad v. Springfield Consol. Ry. Co.*, supra; *Stark v. Muskegon, etc., Lt. Co.*, 141 Mich. 575, 104 N. W. 1100, 1 L. R. A. (N. S.) 822; *Wales v. Pacific Elec. Motor Co.*, 130 Cal. 521, 62 Pac. 932, 1120. Company cannot show as a defense that the ordinance is unwise or that its requirement is not generally adapted. *Conrad v. Springfield Consol. Ry. Co.*, supra. The violation of the ordinance by the person injured may constitute contributory negligence. *Brunelle v. Lowell Elec. Lt. Co.*, 194 Mass. 407, 80 N. E. 466. But see *Blackburn v. Southwest, etc., R. Co.*, 180 Mo. 548, 167 S. W. 457.

<sup>89</sup> *Knowlton v. Des Moines, etc., Lt. Co.*, 117 Iowa, 451, 90 N. W. 818; *Mitchell v. Raleigh Elec. Co.*, 129 N. C. 166, 39 S. E. 801, 55 L. R. A. 398, 85 Am. St. Rep. 735; *Wales v. Pacific Elec., etc., Co.*, 130 Cal. 521, 62 Pac. 932, 1120; *Moren v. New Orleans, etc., Lt. Co.*, 125 La. 944, 52 South. 106, 136 Am. St. Rep. 344; *Mize v. Tel. Co.*, 38 Mont. 521, 100 Pac. 971, 129 Am. St. Rep. 659, 16 Ann. Cas. 1189; *Conrad v. Springfield Ry. Co.*, 240 Ill. 12, 88 N. E. 180, 130 Am. St. Rep. 251.



The tendency of the late decisions is, however, to restrict the principle of the latter cases so as to only hold the company liable when it knows, or when in the exercise of ordinary care it ought to know, that its structure is alluring to children and endangers them. In accordance to these cases, some of the courts have held that damages cannot be recovered for injuries to trespassing children against an electric company where the appliance causing such injury is not in a place ordinarily within reach of children and where the company has no reason to anticipate they will go. Some of the courts hold, however, and on good reason, too, that a company handling and controlling such an extraordinarily dangerous agency as electricity should be required to exercise the very highest degree of care and skill in the stringing of its wires at such places where it is reasonably probable children will go, and a failure of the company to discharge this duty will subject it to liability therefor, even though the children may be trespassers. Furthermore, it is held that these companies will be charged with notice of the immemorial habit of young children to be allured to dangerous places to which those of more mature minds would not dare to go, and, if such children are injured by coming in contact with the company's wires at such places, the latter will be liable therefor.<sup>90</sup>

<sup>90</sup> *Temple v. McComb City Elec., etc., Co.*, 89 Miss. 1, 42 South. 874, 119 Am. St. Rep. 698, 11 L. R. A. (N. S.) 449, 10 Ann. Cas. 924, boy injured while climbing a little oak tree abounding in branches extending almost to the ground, through which an uninsulated wire was strung, and in which the court said: "It is perfectly idle for the appellee to insist that it was not bound to have reasonably expected the small boys of the neighborhood to climb that sort of tree. The fact that such boy would, in all probability, climb that particular tree, being the kind of tree it was, was a fact which, according to every sound principle of law and common sense, this corporation must have anticipated." In accordance with this principle, see *Consol. Elec., etc., Co. v. Healy*, 65 Kan. 798, 70 Pac. 884, where defectively uninsulated wire was laid on a viaduct of street, outside, but close by, the traveled way where boys are in habit of going; *Daltry v. Media Elec., etc., Co.*, 208 Pa. 403, 57 Atl. 833, ten year old boy injured while a trespasser; *Mullen v. Wilkes-Barre, etc., Elec. Co.*, 38 Pa. Super. Ct. 3; *Id.*, 229 Pa. 54, 77 Atl. 1108; *Fitzgerald v. Edison Ill. Co.*, 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732; *Meyer v. Menominee, etc., Lt. etc., Co.*, 151 Wis. 279, 138 N. W. 1008; *Caruso v. Troy Gas Co.*, 153 App. Div. 431, 138 N. Y. Supp. 279. See *Walters v. Denver Consol. Elec. Co.*, 12 Colo. App. 145, 54 Pac. 960; *Id.*, 17 Colo. App. 192, 68 Pac. 117; *Denver Consol. Elec. Co. v. Walters*, 39 Colo. 301, 89 Pac. 815, the strict rule that the duty to exercise the highest degree of care was to be invoked, not where there was "the mere possibility, but a reasonable probability, of accessibility of the appliances to and by children" and that the company was not "obliged to guard these contrivances from wanton assaults by children who might reach them from ladders, or balloons"; *McAllister v.*

§ 201. **Parallel and intersecting wires.**—It is the duty of an electric company to construct its wires, over which dangerous currents of electricity are to pass, so that they will not charge or come in contact with parallel or intersecting wires of others.<sup>91</sup> And, in this respect, it is as much a duty to exercise care and diligence in the maintenance of such wires as is required in the original construction.<sup>92</sup> A company maintaining an uninsulated powerfully charged wire, such as a trolley wire, should protect its wire so as not to come in contact with those of another company maintain-

Jung, 112 Ill. App. 138, one in stringing electric wires should be charged with the duty of affording greater protection to children than to adults; *Simonton v. Citizens' Elec., etc., Co.*, 28 Tex. Civ. App. 376, 67 S. W. 530, poles not such unusual attractive structures to children as to come within doctrine of the turntable cases. But contrary to the rule above laid down, and where liability was denied, see *Sullivan v. Boston, etc., Co.*, 156 Mass. 378, 31 N. E. 128, where boy went on ahead of defendant; *Stark v. Muskegon, etc., Lt. Co.*, 141 Mich. 575, 104 N. W. 1100, 1 L. R. A. (N. S.) 822, boy throwing broken telephone wire over electric wire 20 feet above the ground; *Freeman v. Brooklyn, etc., R. Co.*, 54 App. Div. 596, 66 N. Y. Supp. 1052, boy climbing upon public bridge where wire was strung; similar case, *Wetherby v. Twin State, etc., Co.*, 83 Vt. 189, 75 Atl. 8, 25 L. R. A. (N. S.) 1220, 21 Ann. Cas. 1092, defendant not bound to anticipate one would go into such obvious danger; *Mayfield, etc., Lt. Co. v. Webb*, 33 Ky. Law Rep. 909, 111 S. W. 712, 18 L. R. A. (N. S.) 179, boy climbing guy wire; *Johnston v. New Omaha, etc., L. Co.*, 78 Neb. 24, 27, 110 N. W. 711, 113 N. W. 526, 17 L. R. A. (N. S.) 435, bright, intelligent city boy 12 years walking fence, and taking hold of wire 18 to 30 inches from top of fence; *Charette v. L'Anse*, 154 Mich. 304, 117 N. W. 737; *Keefe v. Narragansett Elec. Lt. Co.*, 21 R. I. 575, 43 Atl. 542, 11 year old girl climbing out into a jet of a house adjoining the one in which she lived; *Graves v. Washington, etc., P. Co.*, 44 Wash. 675, 87 Pac. 956, 11 L. R. A. (N. S.) 452, not bound to anticipate children will be attracted; *Myer v. Union, etc., P. Co.*, 151 Ky. 332, 151 S. W. 941, 43 L. R. A. (N. S.) 136, wire near playground, but inside a walled churchyard; *Trout v. Philadelphia Elec. Co.*, 236 Pa. 506, 84 Atl. 967, 42 L. R. A. (N. S.) 713; *Brown v. Panola L., etc., Co.*, 137 Ga. 352, 73 S. E. 580.

<sup>91</sup> *City Elec. St. Ry. Co. v. Conery*, 61 Ark. 381, 33 S. W. 426, 54 Am. St. Rep. 262, 31 L. R. A. 570; *Atlanta, etc., R. Co. v. Owings*, 97 Ga. 663, 25 S. E. 377, 33 L. R. A. 798; *Burns v. Delaware, etc., Tel. Co.*, 70 N. J. Law, 745, 59 Atl. 220, 592, 67 L. R. A. 956; *Parsons v. Charleston Gas, etc., Co.*, 69 S. C. 305, 48 S. E. 284, 104 Am. St. Rep. 800; *McKay v. Southern Bell Tel., etc., Co.*, 111 Ala. 337, 19 South. 695, 56 Am. St. Rep. 59, 31 L. R. A. 589; *Conrad v. Springfield, etc., R. Co.*, 240 Ill. 12, 88 N. E. 180, 130 Am. St. Rep. 251; *Guinn v. Delaware, etc., Tel. Co.*, 72 N. J. Law, 276, 62 Atl. 412, 111 Am. St. Rep. 668, 3 L. R. A. (N. S.) 988; *Moran v. Corliss, etc., Co.*, 21 R. I. 386, 43 Atl. 874, 45 L. R. A. 267; *State v. Janesville St. Ry. Co.*, 87 Wis. 72, 57 N. W. 970, 41 Am. St. Rep. 23, 22 L. R. A. 759; *Block v. Milwaukee St. Ry. Co.*, 89 Wis. 371, 61 N. W. 1101, 46 Am. St. Rep. 849, 27 L. R. A. 365.

<sup>92</sup> *Atlanta Consol. St. Ry. Co. v. Owings*, 97 Ga. 663, 25 S. E. 377, 33 L. R. A.

ing comparatively harmless electric wires, such as telegraph and telephone wires, by using a degree of care commensurate with the probable consequences of a want of such protection.<sup>93</sup> On the other hand, it is the duty of such telegraph or telephone companies

798; *Paine v. Electric, etc., Co.*, 64 App. Div. 477, 72 N. Y. Supp. 279; *International Light, etc., Co. v. Maxwell*, 27 Tex. Civ. App. 294, 65 S. W. 78; *Daltry v. Media Elect., etc., Co.*, 208 Pa. 403, 57 Atl. 833; *City Elec., etc., Ry. Co. v. Conery*, 61 Ark. 381, 33 S. W. 426, 54 Am. St. Rep. 262, 31 L. R. A. 570; *West. U. Tel. Co. v. State*, 82 Md. 293, 33 Atl. 763, 31 L. R. A. 572, 51 Am. St. Rep. 464; *Electric Ry. Co. v. Shelton*, 89 Tenn. 423, 14 S. W. 863, 24 Am. St. Rep. 614; *Block v. Milwaukee, etc., Ry. Co.*, 89 Wis. 371, 61 N. W. 1101, 27 L. R. A. 365, 46 Am. St. Rep. 849; *Kraatz v. Brush Elec., etc., Co.*, 82 Mich. 457, 46 N. W. 787; *San Antonio Gas, etc., Co. v. Speegle* (Tex. Civ. App.) 60 S. W. 884; *Heidt v. Southern, etc., Tel. Co.*, 122 Ga. 474, 50 S. E. 361; *Parsons v. Charleston Consol., etc., Co.*, 69 S. C. 305, 48 S. E. 284, 104 Am. St. Rep. 800; *Cleburne Elec., etc., Co. v. McCoy* (Tex. Civ. App.) 149 S. W. 534; *Wehner v. Lagerfelt*, 27 Tex. Civ. App. 520, 66 S. W. 221; *Lexington R. Co. v. Fain*, 24 Ky. Law Rep. 1443, 71 S. W. 628; *Pierce v. United, etc., Elec. Co.*, 161 Cal. 176, 118 Pac. 700; *Union Light, etc., Co. v. Lakeman*, 156 Ky. 33, 160 S. W. 723; *Gilbert v. Duluth, etc., Elec. Co.*, 93 Minn. 99, 100 N. W. 653, 106 Am. St. Rep. 430; *Freeman v. Missouri, etc., Tel. Co.*, 160 Mo. App. 271, 142 S. W. 733; *Economy L., etc., Co. v. Hiller*, 203 Ill. 518, 68 N. E. 72. See *United Elec., etc., Co. v. State*, 100 Md. 634, 60 Atl. 248; *Brown v. Northern California P. Co.*, 14 Cal. App. 651, 114 Pac. 54, 74; *Temple Elec., etc., Co. v. Halliburton* (Tex. Civ. App.) 136 S. W. 584; *Weleetka L., etc., Co. v. Northrop*, 42 Okl. 561, 140 Pac. 1140.

<sup>93</sup> *New York, etc., Tel. Co. v. Bennett*, 62 N. J. Law, 742, 42 Atl. 759; *McKay v. Southern Bell Tel. Co.*, 111 Ala. 337, 19 South. 695, 56 Am. St. Rep. 59, 31 L. R. A. 589; *City Elec. St. Ry. Co. v. Conery*, 61 Ark. 381, 33 S. W. 426, 54 Am. St. Rep. 262, 31 L. R. A. 570, holding that a street railway company may be held liable where a telephone wire stretched above its trolley wire falls upon the trolley and conducts electricity therefrom to the injury of one coming in contact with the telephone wire; *McAdam v. Central Ry., etc., Co.*, 67 Conn. 445, 35 Atl. 341; *Kankakee Elec. Ry. Co. v. Whittemore*, 45 Ill. App. 484; *Jones v. Finch*, 128 Ala. 217, 29 South. 182; *Hebert v. Lake Charles Ice, etc., Co.*, 111 La. 522, 35 South. 731, 100 Am. St. Rep. 505, 64 L. R. A. 101; *Hamilton v. Bordentown Elec., etc., Co.*, 68 N. J. Law, 85, 52 Atl. 290; *International Light, etc., Co. v. Maxwell*, 27 Tex. Civ. App. 294, 65 S. W. 78; *Parsons v. Charleston Consol., etc., Elec. Co.*, 69 S. C. 305, 48 S. E. 284, 104 Am. St. Rep. 800; *City Electric St. Ry. Co. v. Conery*, 61 Ark. 381, 33 S. W. 426, 54 Am. St. Rep. 262, 31 L. R. A. 570; *Paducah Lt., etc., Co. v. Parkman*, 156 Ky. 197, 160 S. W. 931, 52 L. R. A. (N. S.) 586; *West. U. Tel. Co. v. State*, 82 Md. 293, 33 Atl. 763, 51 Am. St. Rep. 464, 31 L. R. A. 572; *Mize v. Rocky Mountain Bell Tel. Co.*, 38 Mont. 521, 100 Pac. 971, 129 Am. St. Rep. 659, 16 Ann. Cas. 1189; *Fox v. Manchester*, 183 N. Y. 141, 75 N. E. 1116, 2 L. R. A. (N. S.) 474; *Mooney v. Luzerne Borough*, 186 Pa. 161, 40 Atl. 311, 40 L. R. A. 811; *Block v. Milwaukee St. Ry. Co.*, 89 Wis. 371, 61 N. W. 1101, 46 Am. St. Rep. 849, 27 L. R. A. 365; *Wilbert v. Sheboygan Lt., etc., Co.*, 129 Wis. 1, 106 N. W. 1058, 116 Am. St. Rep. 931.



to use reasonable care to prevent their lines from coming in contact with defectively insulated or uninsulated wires carrying powerful electric currents.<sup>94</sup> So, where wires maintained concurrently by different parties are so erected or strung that one is likely to fall upon or come in contact with the other, thereby producing possible destructive consequences, either or both of them must make efforts to abate such dangerous condition,<sup>95</sup> and if an injury occurs through a neglect of such duty, both are liable.<sup>96</sup> While the general duties of these companies are as stated, yet there is a

<sup>94</sup> *Hamilton v. Bordentown Elec., etc., Co.*, 68 N. J. Law, 85, 52 Atl. 290; *West. U. Tel. Co. v. State*, 82 Md. 293, 33 Atl. 763, 31 L. R. A. 572, 51 Am. St. Rep. 464; *Ahern v. Oregon Tel. Co.*, 24 Or. 276, 33 Pac. 403, 35 Pac. 549, 22 L. R. A. 635; *West. U. Tel. Co. v. Thorn*, 64 Fed. 287, 12 C. C. A. 104. See cases cited in preceding note. See *Citizens' Tel. Co. v. Thomas*, 45 Tex. Civ. App. 20, 99 S. W. 879; *Rowe v. New York, etc., Tel. Co.*, 66 N. J. Law, 19, 48 Atl. 523; *Mize v. Rocky Mountain Bell Tel. Co.*, 38 Mont. 521, 100 Pac. 971, 129 Am. St. Rep. 659, 16 Ann. Cas. 1189; *Hebert v. Lake Charles, etc., Co.*, 111 La. 522, 35 South. 731, 100 Am. St. Rep. 505, 64 L. R. A. 101; *Freeman v. Missouri, etc., Tel. Co.*, 160 Mo. App. 271, 142 S. W. 733; *Central Pennsylvania Tel., etc., Co. v. Wilkes-Barre, etc., Co.*, 11 Pa. Co. Ct. R. 417; *Delahunt v. United Tel., etc., Co.*, 215 Pa. 241, 64 Atl. 515, 114 Am. St. Rep. 958; *Southwestern, etc., Tel. Co. v. Shirley (Tex. Civ. App.)* 155 S. W. 663; *Goodwin v. Columbia Tel. Co.*, 157 Mo. App. 596, 138 S. W. 940; *McKay v. Southern Bell Tel. Co.*, 111 Ala. 337, 19 South. 695, 56 Am. St. Rep. 59, 31 L. R. A. 589; *Southwestern, etc., Tel. Co. v. Myane*, 86 Ark. 548, 111 S. W. 987; *Henning v. West. U. Tel. Co. (C. C.)* 41 Fed. 864; *Southern Bell Tel. Co. v. Davis*, 12 Ga. App. 28, 76 S. E. 786.

<sup>95</sup> *Alabama*.—*McKay v. Southern Bell Tel., etc., Co.*, 111 Ala. 337, 19 South. 695, 56 Am. St. Rep. 59, 31 L. R. A. 589; *R., etc., Co. v. Cockrum*, 179 Ala. 372, 60 South. 304.

*Arkansas*.—*City Electric St. Ry. Co. v. Conery*, 61 Ark. 381, 33 S. W. 426, 54 Am. St. Rep. 262, 31 L. R. A. 570; *Tel., etc., Co. v. Bruce*, 89 Ark. 581, 117 S. W. 564.

*Arizona*.—See *Crandall v. Tel., etc., Co.*, 14 Ariz. 322, 127 Pac. 994.

*California*.—*Dow v. Tel., etc., Co.*, 157 Cal. 182, 106 Pac. 587.

*Georgia*.—*Trammell v. R. Co.*, 9 Ga. App. 98, 70 S. E. 892; *Augusta R. Co. v. Andrews*, 89 Ga. 653, 16 S. E. 203.

*Illinois*.—*Kankakee Electric R. Co. v. Whittimore*, 45 Ill. App. 484; *Gents v. Coal Co.*, 155 Ill. App. 628; *Economy Lt., etc., Co. v. Hiller*, 203 Ill. 518, 68 N. E. 72.

*Indiana*.—*Tel., etc., Co. v. Kranz*, 48 Ind. App. 67, 95 N. E. 371. See *Heat Co. v. Dolby*, 47 Ind. App. 406, 92 N. E. 739.

*Kentucky*.—*Paducah Light, etc., Co. v. Parkman*, 156 Ky. 197, 160 S. W. 931, 52 L. R. A. (N. S.) 586.

*Louisiana*.—*Hebert v. Lake Charles Ice, etc., Co.*, 111 La. 522, 35 South.

<sup>96</sup> See note 96 on following page.

difference of opinion, in the several states, as to their respective liabilities, where, by reason of the crossing or breaking of wires by storms or otherwise, electric light, power, or trolley currents run

731, 100 Am. St. Rep. 505, 64 L. R. A. 101; *Simmons v. Gas, etc., Co.*, 116 La. 1033, 41 South. 248.

*Massachusetts*.—*Illingsworth v. Electric Lt. Co.*, 161 Mass. 583, 37 N. E. 778, 25 L. R. A. 552.

*Minnesota*.—See *Musolf v. Electric Co.*, 108 Minn. 369, 122 N. W. 499, 24 L. R. A. (N. S.) 451.

*Mississippi*.—*Cumberland Tel., etc., Co. v. Cosnahan*, 105 Miss. 615, 62 South. 824.

*Missouri*.—*Wilhite v. Huntsville*, 167 Mo. App. 155, 151 S. W. 232. See *Goodwin v. Tel. Co.*, 157 Mo. App. 596, 138 S. W. 940. Compare *Strack v. Tel. Co.*, 216 Mo. 601, 116 S. W. 526. See *Freeman v. Missouri, etc., Tel. Co.*, 160 Mo. App. 271, 142 S. W. 733.

*Montana*.—*Mize v. Tel. Co.*, 38 Mont. 521, 100 Pac. 971, 129 Am. St. Rep. 659, 16 Ann. Cas. 1189.

*Nebraska*.—*Olson v. Tel. Co.*, 83 Neb. 735, 120 N. W. 421. See *Grimm v. Light, etc., Co.*, 79 Neb. 387, 112 N. W. 620.

*New Jersey*.—*Hamilton v. Bordentown Electric Lt., etc., Co.*, 68 N. J. Law, 85, 52 Atl. 290; *Rowe v. New York, etc., Tel. Co.*, 66 N. J. Law, 19, 48 Atl. 523.

*New York*.—*Paine v. Electric Ill., etc., Co.*, 64 App. Div. 477, 72 N. Y. Supp. 279; *Fox v. Manchester*, 183 N. Y. 141, 75 N. E. 1116, 2 L. R. A. (N. S.) 474.

*North Carolina*.—*Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 19 S. E. 344, 44 Am. St. Rep. 786, 26 L. R. A. 810; *Fisher v. New Bern*, 140 N. C. 506, 53 S. E. 342, 5 L. R. A. (N. S.) 542, 111 Am. St. Rep. 857.

*Oregon*.—*Ahern v. Oregon Tel., etc., Co.*, 24 Or. 276, 33 Pac. 403, 35 Pac. 549, 22 L. R. A. 635; *Genitzkow v. R. Co.*, 54 Or. 114, 102 Pac. 614, 135 Am. St. Rep. 821.

*Pennsylvania*.—*Devlin v. Beacon Light Co.*, 192 Pa. 188, 43 Atl. 962.

*Tennessee*.—*United-Electric R. Co. v. Shelton*, 89 Tenn. 423, 14 S. W. 863, 24 Am. St. Rep. 614.

*Texas*.—*International Light, etc., Co. v. Maxwell*, 27 Tex. Civ. App. 294, 65 S. W. 78; *San Marcos Elec., etc., Co. v. Compton*, 48 Tex. Civ. App. 586, 107 S. W. 1151; *Light, etc., Co. v. Patton*, 105 Tex. 621, 154 S. W. 540, 45 L. R. A. (N. S.) 303.

*Vermont*.—*Drown v. Tel., etc., Co.*, 80 Vt. 1, 66 Atl. 801.

*Virginia*.—*R. Co. v. Rubin*, 102 Va. 809, 47 S. E. 834; *Trac. Co. v. Daily*, 111 Va. 665, 69 S. E. 963.

*Canada*.—*Labombarde v. Gas Co.*, 10 Ont. L. R. 446, 5 Ont. W. R. 534; *Sutton v. Dundas*, 11 Ont. W. R. 501. See *Hinman v. R. Co.*, 16 Manitoba, 16.

*Alabama*.—*McKay v. Southern Bell Tel., etc., Co.*, 111 Ala. 337, 19 So. 695, 56 Am. St. Rep. 59, 31 L. R. A. 589.

*Arkansas*.—*City Electric St. R. Co. v. Conery*, 61 Ark. 381, 33 S. W. 426, 54 Am. St. Rep. 262, 31 L. R. A. 570.

*California*.—*Dow v. Tel., etc., Co.*, 157 Cal. 182, 106 Pac. 587.

*Georgia*.—*West. U. Tel. Co. v. Griffith*, 111 Ga. 551, 36 S. E. 859; *Trammell*

through telegraph or telephone wires and do damage.<sup>97</sup> In most instances, however, the courts submit the whole matter to the jury,

*v. R. Co.*, 9 Ga. App. 98, 70 S. E. 892; *Eining v. Georgia, etc., Elec. Co.*, 133 Ga. 458, 66 S. E. 237.

*Illinois*.—*Economy Lt., etc., Co. v. Hiller*, 203 Ill. 518, 68 N. E. 72; *Cooper v. Light Co.*, 164 Ill. App. 581.

*Indiana*.—*Tel. Co. v. Sokola*, 34 Ind. App. 429, 73 N. E. 143. See *Logansport v. Smith*, 47 Ind. App. 64, 93 N. E. 883.

*Kansas*.—*Biddle v. Light, etc., Co.*, 87 Kan. 604, 125 Pac. 51. See *Kansas City v. File*, 60 Kan. 157, 55 Pac. 877.

*Kentucky*.—*Cumberland Tel., etc., Co. v. Ware*, 74 S. W. 289, 24 Ky. Law Rep. 2519.

*Louisiana*.—*Simmons v. Gas Co.*, 116 La. 1033, 41 South. 248; *Hebert v. Lake Charles Ice, etc., Co.*, 111 La. 522, 35 South. 731, 100 Am. St. Rep. 505, 64 L. R. A. 101.

*Mississippi*.—*Cumberland Tel., etc., Co. v. Cosnahan*, 105 Miss. 615, 62 South. 824.

*Missouri*.—*Harrison v. Kansas City Elec. Lt. Co.*, 195 Mo. 606, 93 S. W. 951, 7 L. R. A. (N. S.) 293.

*Montana*.—*Mize v. Tel. Co.*, 38 Mont. 521, 100 Pac. 971, 129 Am. St. Rep. 659, 16 Ann. Cas. 1189.

*Pennsylvania*.—*Daltry v. Light, etc., Co.*, 208 Pa. 403, 57 Atl. 833.

*Tennessee*.—*United Electric R. Co. v. Shelton*, 89 Tenn. 423, 14 S. W. 863, 24 Am. St. Rep. 614.

*South Carolina*.—*Parsons v. R. Co.*, 69 S. C. 305, 48 S. E. 284, 104 Am. St. Rep. 800.

*Utah*.—See *Swan v. R. Co.*, 41 Utah, 518, 127 Pac. 267.

*United States*.—*Tel., etc., Co. v. Moore*, 179 Fed. 364, 102 C. C. A. 642, 31 L. R. A. (N. S.) 617.

*West Virginia*.—See *Fickeisen v. Wheeling Elec. Co.*, 67 W. Va. 335, 67 S. E. 788, 27 L. R. A. (N. S.) 893.

*Canada*.—*Electric Co. v. Heve*, 32 Can. S. Ct. 462; *Sutton v. Dundas*, 17 Ont. L. R. 556, 11 Ont. W. R. 501, 13 Ont. W. R. 126. See *Earle v. Victoria*, 2 Brit. Col. 156.

<sup>97</sup> *Alabama*.—*Home Tel. Co. v. Fields*, 150 Ala. 306, 43 South. 711, telephone liable; *McKay v. Southern Bell, etc., Tel. Co.*, 111 Ala. 337, 19 South. 695, 56 Am. St. Rep. 59, 31 L. R. A. 589, both liable; *Decatur, etc., Co. v. Newsom*, 179 Ala. 127, 59 South. 615, electric company liable.

*Arizona*.—*Crandall v. Consolidated, etc., Co.*, 14 Ariz. 322, 127 Pac. 994, telephone liable.

*Arkansas*.—*City Electric St. R. Co. v. Conery*, 61 Ark. 381, 33 S. W. 426, 54 Am. St. Rep. 262, 31 L. R. A. 570, jointly liable; *Texarkana, etc., Light Co. v. Orr*, 59 Ark. 215, 27 S. W. 66, 43 Am. St. Rep. 30, question for the jury.

*Delaware*.—*Neal v. Wilmington, etc., Ry.*, 3 Pennewill (Del.) 467, 53 Atl. 338, trolley company liable.

*Georgia*.—*Atlanta, etc., Tel. Co. v. Cheshire*, 12 Ga. App. 652, 78 S. E. 53, telephone liable; *Eining v. Georgia, etc., Co.*, 133 Ga. 458, 66 S. E. 237, both negligent and both liable; *Southern Bell, etc., Tel. Co. v. Davis*, 12 Ga. App. 28, 76 S. E. 786, telephone liable; *Read v. City, etc., Ry.*, 115 Ga. 306, 41 S. E.



and the jury generally proceeds to assess the damages against all the companies.<sup>98</sup>

§ 202. **Duty to place guards over wires.**—Where electrical companies place wires, designed to carry powerful electrical currents, in a street where there are telegraph and telephone wires, thus

629, trolley not liable not having time to discover the defect before the accident.

*Illinois.*—Hayes v. Chicago, etc., Co., 218 Ill. 414, 75 N. E. 1003, 2 L. R. A. (N. S.) 764, telephone not liable where city's wire on same poles caused the accident and was held not liable; Commonwealth, etc., Co. v. Melville, 210 Ill. 70, 70 N. E. 1052, uninsulated electric light wire in open space under sidewalk, owner liable; Economy, etc., Co. v. Hiller, 203 Ill. 518, 68 N. E. 72, both negligent and both liable; Tandrup v. Sampsell, 234 Ill. 526, 85 N. E. 331, 17 L. R. A. (N. S.) 852, may sue any or all several companies jointly liable, and may obtain judgment and then issue execution against one or all, and nothing short of the satisfaction of the demand or a release under seal is a defense to the others; Kankakee, etc., Ry. v. Whittemore, 45 Ill. App. 484, where a telephone wire is above a trolley wire, and the trolley itself slips off the trolley wire and breaks the telephone wire, and the latter falls on the trolley wire, and also to the ground, completing the circuit and killing a horse, the telephone company is liable.

*Kansas.*—Consolidated, etc., Co. v. Koepp, 64 Kan. 735, 68 Pac. 608, electric light company not necessarily liable, where its current passed through private telephone which it had allowed to be strung to its poles.

*Louisiana.*—Simmons v. Shreveport, etc., Co., 116 La. 1033, 41 South. 248, both companies liable, both negligent; Hebert v. Lake Charles, etc., Ice Co., 111 La. 522, 35 South. 731, 100 Am. St. Rep. 505, 64 L. R. A. 101, electric light company liable, where its wire at the point of contact was not insulated; Clements v. Louisiana El., etc., Co., 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348, wire uninsulated as required by ordinance, electric company liable.

*Maryland.*—Annapolis, etc., Co. v. Fredericks, 109 Md. 595, 72 Atl. 534, question for jury where wire sags and is uninsulated; West. U. Tel. Co. v. State, 82 Md. 293, 33 Atl. 763, 31 L. R. A. 572, 51 Am. St. Rep. 464, telegraph company and street railway not liable, where an unused telephone wire strung on the poles of a telegraph company breaks and falls across an electric light wire, strung on the poles of the street railway company, and hangs there for two weeks, and the electric light current passes through it and kills a person, unless negligence on their part is shown.

*Michigan.*—Anthony v. Cass County Tel. Co., 165 Mich. 388, 130 N. W. 659, telephone not liable where its wires have been properly strung; Stark v. Muskegon, etc., Co., 141 Mich. 575, 104 N. W. 1100, 1 L. R. A. (N. S.) 822, electrical company not liable where child throws telephone wire of the former's wire 19 feet above ground and is hurt, although the insulation was defective.

*Missouri.*—Freeman v. Missouri, etc., Tel. Co., 160 Mo. App. 271, 142 S. W. 733, both liable where electric light company strings its wire near a telephone guy wire; Strack v. Missouri, etc., Co., 216 Mo. 601, 116 S. W. 526, neither company liable where the trouble could not have been reasonably foreseen;

<sup>98</sup> See cases in notes 96 and 97.

making the latter wires, which before were harmless, dangerous, it is the duty of the electrical company to guard its wires so that a falling telegraph or telephone wire will not come in contact with them. The duty of the telegraph or telephone company in the

*Luehrmann v. Laclede, etc., Co.*, 127 Mo. App. 213, 104 S. W. 1128, electric light company not liable where boy throws loose wire over its wire, even though the wire was uninsulated at that point.

*Montana*.—*Mize v. Tel. Co.*, 38 Mont. 521, 100 Pac. 971, 129 Am. St. Rep. 659, 16 Ann. Cas. 1189, both companies liable where they did not observe a city ordinance requiring the separation of their wires by at least four feet, where current passed from electric wire to telephone wire, thence to guy wire and then over wire fence.

*New Jersey*.—*Guinn v. Delaware, etc., Co.*, 72 N. J. Law, 276, 62 Atl. 412, 3 L. R. A. (N. S.) 988, 111 Am. St. Rep. 668, where telephone guy wire is erected before electric wire over it, and former falls across latter, the telephone company will be liable, there having been no guard between the two wires; *Spire v. Middlesex, etc., Co.*, 70 N. J. Law, 355, 57 Atl. 424, electric company liable where branch of tree falls on wire and causes it to break; *Hamilton v. Bordentown, etc., Co.*, 68 N. J. Law, 85, 52 Atl. 290, both liable where each has failed to exercise proper precaution; *Rowe v. New York, etc., Co.*, 66 N. J. Law, 19, 48 Atl. 523, both liable inasmuch as guard wires should have been erected; *New York, etc., Tel. Co. v. Bennett*, 62 N. J. Law, 742, 42 Atl. 759, question for jury to determine whether each or both were guilty of negligence; *Newark, etc., Co. v. Ruddy*, 62 N. J. Law, 505, 41 Atl. 712, 57 L. R. A. 624, the presumption is that the company owning the wire causing the accident was guilty of negligence.

*New York*.—*Bamberg v. International Ry. Co.*, 121 App. Div. 1, 105 N. Y. Supp. 621, where both are guilty of negligence, there may be a general verdict against both, and the trial judge cannot set aside the verdict as to one of them; *Horning v. Hudson, etc., Co.*, 111 App. Div. 122, 97 N. Y. Supp. 625, affirmed 186 N. Y. 552, 79 N. E. 1107, where both their wires are caused to sag by fire, both will be liable; *Albany v. Watervliet, etc., R. R.*, 76 Hun, 136, 27 N. Y. Supp. 848, electric company may not be liable where its current passes through a telephone wire fallen on the former's wire and kills a horse; *Gordon v. Ashley*, 77 App. Div. 525, 79 N. Y. Supp. 274, an individual vendor of a line of wires to a company not individually liable; *Polito v. Pitriello*, 196 N. Y. 517, 89 N. E. 425, electric company not liable where proximate cause being the act of another.

*North Carolina*.—*Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786, electric light current passing through an electric guy wire, thence through trolley feed wire, thence through another unused electric light guy wire, the first is liable.

*Oregon*.—*Ahern v. Oregon Tel. Co.*, 24 Or. 276, 33 Pac. 403, 35 Pac. 549, 22 L. R. A. 635, telephone company liable; *Gentzkow v. Portland Ry. Co.*, 54 Or. 114, 102 Pac. 614, 135 Am. St. Rep. 821, both liable.

*Pennsylvania*.—*Kahn v. Kittanning, etc., Co.*, 238 Pa. 70, 85 Atl. 1117, electric company not liable unless negligence is shown; *Stark v. Pennsylvania Tel. Co.*, 225 Pa. 390, 74 Atl. 222, telephone company not liable unless it is shown it is customary to have guards between the two sets of wires and that

premises is not so palpable, but probably it also exists.<sup>99</sup> At least, the duty of the latter companies may be enlarged with the changed

the guard would have prevented the accident in case of storm; *Stark v. Lancaster, etc., Co.*, 218 Pa. 575, 67 Atl. 909, where telephone wire falls on electric light wire, the latter not liable because of not having a screen above its wire, there not being proof that said screen would have prevented the accident; *Delahunt v. United, etc., Co.*, 215 Pa. 241, 64 Atl. 515, 114 Am. St. Rep. 958, telephone liable where current from electric wires passes over the former and injures patron; *Fitzgerald v. Edison, etc., Co.*, 207 Pa. 118, 56 Atl. 350, question for jury where painter on house came in contact with uninsulated wire; *Fitzgerald v. Edison, etc., Co.*, 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732, similar case where company was liable to a painter on house.

*South Carolina*.—*Lundy v. Southern Bell, etc., Tel. Co.*, 90 S. C. 25, 72 S. E. 558, error to charge jury that the company was bound to keep its wires perfectly insulated; *Laughlin v. Southern, etc., Corp.*, 83 S. C. 62, 64 S. E. 1010, one company liable for acts of another acting as the former's agent.

*Tennessee*.—*United-Electric R. Co. v. Shelton*, 89 Tenn. 423, 14 S. W. 863, 24 Am. St. Rep. 614, both companies liable.

*Texas*.—*Panhandle, etc., Tel. Co. v. Harris* (Tex. Civ. App.) 136 S. W. 1129, telephone company liable for injuries to party on house where its wire comes in contact with electric wire; *City of Greenville v. Pitts*, 102 Tex. 1, 107 S. W. 50, 14 L. R. A. (N. S.) 979, 132 Am. St. Rep. 843, policeman cannot recover where wire belongs to city, although any other might have recovered; *Wehner v. Lagerfelt*, 27 Tex. Civ. App. 520, 66 S. W. 221, electric company liable, although wire belongs to another where it has remained on its wires for two weeks.

*Washington*.—*Metz v. Washington, etc., Co.*, 72 Wash. 188, 130 Pac. 343, both companies liable.

*Wisconsin*.—*Ryan v. Oshkosh, etc., Co.*, 138 Wis. 466, 120 N. W. 264, a day sufficient time to charge company with notice of displacement of guy wire; *Rasmussen v. Wisconsin, etc., Co.*, 133 Wis. 205, 113 N. W. 453, electric company may not be liable where wire is insulated sufficient for its own protection; *Nagle v. Hake*, 123 Wis. 256, 101 N. W. 409, displacement of wire by house mover, the latter may be liable although a settlement has already been made with the electric company.

*Federal court*.—See *Southwestern, etc., Tel. Co. v. Robinson*, 50 Fed. 810, 1 C. C. A. 684, 16 L. R. A. 545; *Henning v. West. U. Tel. Co.* (C. C.) 41 Fed. 864.

As affected by permission to string wires of one company on poles of another company, see *Fox v. Manchester*, 183 N. Y. 141, 75 N. E. 1116, 2 L. R. A. (N. S.) 474; *Consol. Elec., etc., Co. v. Koepp*, 64 Kan. 735, 68 Pac. 608. See § 211.

<sup>99</sup> *Rowe v. New York, etc., Tel. Co.*, 66 N. J. Law, 19, 48 Atl. 523; *Electric Ry. Co. v. Shelton*, 89 Tenn. 423, 14 S. W. 863, 24 Am. St. Rep. 614; *Richmond, etc., Ry. Co. v. Rubin*, 102 Va. 809, 47 S. E. 834. But see, contra, *Albany v. Watervliet, etc., R. Co.*, 76 Hun, 136, 27 N. Y. Supp. 848; *Block v. Milwaukee St. Ry. Co.*, 89 Wis. 371, 61 N. W. 1101, 46 Am. St. Rep. 849, 27 L. R. A. 365; *McKay v. Southern Bell Tel. Co.*, 111 Ala. 337, 19 South. 695, 31 L. R. A. 589, 56 Am. St. Rep. 59, where the trolleys are maintained in the manner that other trolley wires are erected and maintained by prudent and well-managed companies conducting a similar business in other cities, not sufficient to exonerate it for negligence in this respect. See *Spires v. Middlesex, etc., Power Co.*, 70



circumstances;<sup>100</sup> and it has been held that it is permissible for the jury to infer that the omission of a guard between the two wires was an act of negligence.<sup>101</sup>

§ 203. **Duty and liability of railway companies.**—An electric railway company which has the authority to use the streets and public highways for its line must exercise a very high degree of care in the construction, maintenance, and operation of said line and appliances, so that the danger to the public will practically be no greater after than it was before the construction of said line. Therefore, in order to discharge this duty, every reasonable precaution known to those possessed of the skill and knowledge requisite to the safe conduct and control of such an agency should be employed by the company.<sup>102</sup> In some cases the doctrine of

N. J. Law, 355, 57 Atl. 424, guard wires under tree limbs; *Guinn v. Delaware*, etc., Tel. Co., 72 N. J. Law, 276, 62 Atl. 412, 3 L. R. A. (N. S.) 988, 111 Am. St. Rep. 668, must guard guy wires. See, also, *New York*, etc., Tel. Co. v. *Bennett*, 62 N. J. Law, 742, 42 Atl. 759; *West. U. Tel. Co. v. State*, 82 Md. 293, 33 Atl. 763, 51 Am. St. Rep. 464, 31 L. R. A. 572; *Mize v. Rocky Mountain Bell Tel. Co.*, 38 Mont. 521, 100 Pac. 971, 129 Am. St. Rep. 659, 16 Ann. Cas. 1189; *Parsons v. Charleston Consol.*, etc., Elec. Co., 69 S. C. 305, 48 S. E. 284, 104 Am. St. Rep. 800; *Cumberland Tel.*, etc., Co., 48 Ind. App. 67, 95 N. E. 371; *Hebert v. Lake Charles L.*, etc., Co., 111 La. 522, 35 South. 731, 100 Am. St. Rep. 505, 64 L. R. A. 101; *Heidt v. Southern Tel.*, etc., Co., 122 Ga. 474, 50 S. E. 361; *Birmingham L.*, etc., Co. v. *Cockrum*, 179 Ala. 372, 60 South. 304; *Jones v. Finch*, 128 Ala. 217, 29 South. 182.

<sup>100</sup> *Guinn v. Delaware*, etc., Tel. Co., 72 N. J. Law, 276, 62 Atl. 412, 111 Am. St. Rep. 668, 3 L. R. A. (N. S.) 988.

<sup>101</sup> *Guinn v. Delaware*, etc., Tel. Co., 72 N. J. Law, 276, 62 Atl. 412, 111 Am. St. Rep. 668, 3 L. R. A. (N. S.) 988. See, also, *Spires v. Middlesex*, etc., P. Co., 70 N. J. Law, 355, 57 Atl. 424; *Rowe v. New York*, etc., Tel. Co., 66 N. J. Law, 19, 48 Atl. 523; *Mahan v. Newton*, etc., Ry. Co., 189 Mass. 1, 75 N. E. 59; *Metropolitan St. Ry. Co. v. Gilbert*, 70 Kan. 261, 78 Pac. 807, 3 Ann. Cas. 256; *Birmingham*, etc., P. Co. v. *Cockrum*, 179 Ala. 372, 60 South. 304; *Horning v. Hudson River Tel. Co.*, 111 App. Div. 122, 97 N. Y. Supp. 625, affirmed in 186 N. Y. 552, 79 N. E. 1107; *Burton Tel. Co. v. Gordon*, 25 Ohio Cir. Ct. R. 641; *Block v. Milwaukee St. Ry. Co.*, 89 Wis. 351, 61 N. W. 1101, 46 Am. St. Rep. 849, 27 L. R. A. 365.

<sup>102</sup> *McAdam v. Central Ry.*, etc., Co., 67 Conn. 445, 35 Atl. 341; *Chattanooga Elec. Ry. Co. v. Mingle*, 103 Tenn. 667, 56 S. W. 23, 76 Am. St. Rep. 703; *Memphis Street Ry. Co. v. Kartright*, 110 Tenn. 277, 75 S. W. 719, 100 Am. St. Rep. 807; *Kankakee Elec. Co. v. Whittemore*, 45 Ill. App. 484; *Southwestern*, etc., Tel. Co. v. *Myane*, 86 Ark. 548, 111 S. W. 987; *Richmond*, etc., Elec. Co. v. *Rubin*, 102 Va. 809, 47 S. E. 834; *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269; *Baltimore*, etc., Ry. Co. v. *Nugent*, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161; *Steverman v. Boston*, etc., Ry. Co., 205 Mass. 508, 91 N. E. 919; *Donovan v. Kansas City*, etc., Ry. Co., 157 Mo. App. 649, 138 S. W. 679; *Brod*

*res ipsa loquitur* applies.<sup>103</sup> Thus, if its trolley wire, when heavily charged with electricity, should fall on or near a public street, negligence will be presumed, although such fall was caused by a slipping of the trolley pole of a passing car.<sup>104</sup> So also, if a person or an animal comes in contact with an unprotected third rail, it will ordinarily be liable for the consequences.<sup>105</sup> A *prima facie* case of negligence is made out where a passenger testifies that while riding in an electric car she became alarmed at flames shooting out of the controller box, and, in leaving the car, received an electric shock in stepping on or over the metal doorsill at the rear of the car.<sup>106</sup>

v. St. Louis Tr. Co., 115 Mo. App. 202, 91 S. W. 993; Horan v. Rockwell, 110 App. Div. 522, 96 N. Y. Supp. 973; Keator v. Scranton Tr. Co., 191 Pa. 102, 43 Atl. 86, 44 L. R. A. 546, 71 Am. St. Rep. 758; Dallas, etc., Ry. Co. v. Broadhurst, 28 Tex. Civ. App. 630, 68 S. W. 315; Mannon v. Camden, etc., R. Co., 56 W. Va. 554, 49 S. E. 450.

<sup>103</sup> Memphis St. Ry. Co. v. Kartright, 110 Tenn. 277, 75 S. W. 719, 100 Am. St. Rep. 807; Trenton, etc., Ry. Co. v. Cooper, 60 N. J. Law, 219, 37 Atl. 730, 38 L. R. A. 637, 64 Am. St. Rep. 592; Ludwig v. Metropolitan St. Ry. Co., 71 App. Div. 210, 75 N. Y. Supp. 667; Braham v. Nassau Elec. R. R. Co., 72 App. Div. 456, 76 N. Y. Supp. 578. See notes to Walter v. Baltimore Elec. Co., 22 L. R. A. (N. S.) 1178, and Lanning v. Pittsburg R. Co., 32 L. R. A. (N. S.) 1043. See St. Louis v. Bay State, etc., R. Co., 216 Mass. 255, 103 N. E. 639, 49 L. R. A. (N. S.) 447, Ann. Cas. 1915B, 706.

<sup>104</sup> Memphis St. Ry. Co. v. Kartright, 110 Tenn. 277, 75 S. W. 719, 100 Am. St. Rep. 807; Chicago, etc., R. Co. v. Carroll, 102 Ill. App. 202; Kirkpatrick v. Metropolitan St. Ry. Co., 161 Mo. App. 515, 143 S. W. 865; Keator v. Scranton Tr. Co., 191 Pa. 102, 43 Atl. 86, 44 L. R. A. 546, 71 Am. St. Rep. 758; Cincinnati Tr. Co. v. Holzenkamp, 74 Ohio St. 379, 78 N. E. 529, 113 Am. St. Rep. 980, 6 L. R. A. (N. S.) 800.

*Cable slot.*—Company may be liable where the slot was constructed or permitted to become wider than necessary, Griveaud v. St. Louis, etc., Ry. Co., 33 Mo. App. 458. See Miller v. United Ry., etc., Co., 108 Md. 84, 69 Atl. 636, 17 L. R. A. (N. S.) 978, not negligent.

<sup>105</sup> St. Louis v. Bay State, etc., Ry. Co., 216 Mass. 255, 103 N. E. 639, 49 L. R. A. (N. S.) 447, Ann. Cas. 1915B, 706. Anderson v. Seattle-Tacoma Interurban R. Co., 36 Wash. 387, 78 Pac. 1013, 104 Am. St. Rep. 962. But see Riedel v. West Jersey, etc., R. Co., 177 Fed. 374, 101 C. C. A. 428, 28 L. R. A. (N. S.) 98, 21 Ann. Cas. 746, where rail securely fenced; Sutton v. West Jersey, etc., R. Co., 78 N. J. Law, 17, 73 Atl. 256; McAllister v. Jung, 112 Ill. App. 138.

*Liability for injury caused by electricity communicated from track, not third rail.*—See Wood v. Wilmington City R. Co., 5 Pennewill (Del.) 369, 64 Atl. 246; Trenton Passenger R. Co. v. Cooper, 60 N. J. Law, 219, 37 Atl. 730, 64 Am. St. Rep. 592, 38 L. R. A. 637; St. Louis v. Bay State, etc., R. Co., supra; May v. Charleston Interurban R. Co., 75 W. Va. 797, 84 S. E. 893, doctrine *res ipsa loquitur* applies.

<sup>106</sup> Buckbee v. Third Ave. R. Co., 64 App. Div. 360, 72 N. Y. Supp. 217;

§ 204. Same continued—crossing highways and railroads.—It is the duty of these companies to construct their lines sufficiently high when crossing streets, highways and railroad tracks as not

blowing or burning out of controller, *Firebaugh v. Seattle Elec. Co.*, 40 Wash. 658, 82 Pac. 995, 2 L. R. A. (N. S.) 836, 111 Am. St. Rep. 990; *German v. Brooklyn, etc., R. Co.*, 107 App. Div. 354, 95 N. Y. Supp. 112, burning out of fuse, *Lord v. Manchester St. Ry.*, 74 N. H. 295, 67 Atl. 639; *Cassady v. Old Colony St. Ry. Co.*, 184 Mass. 156, 68 N. E. 10, 63 L. R. A. 285; *Williams v. New York, etc., R. Co.*, 97 App. Div. 133, 39 N. Y. Supp. 669; *Poulsen v. Nassau Elec. Ry. Co.*, 18 App. Div. 221, 45 N. Y. Supp. 941.

*Electrical shocks.*—Failure to control currents, whereby metal parts of the car become charged, company liable for injury. *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269; *S. Covington, etc., Ry. Co. v. Smith*, 27 Ky. Law Rep. 811, 86 S. W. 970; *East St. Louis, etc., Ry. Co. v. Steger*, 65 Ill. App. 312; *McDonough v. Boston, etc., Ry. Co.*, 208 Mass. 436, 94 N. E. 809; *Black v. Metropolitan, etc., R. Co.*, 162 Mo. App. 90, 144 S. W. 131; *McRae v. Metropolitan St. Ry. Co.*, 125 Mo. App. 562, 102 S. W. 1032; *D'Arcy v. Westchester Elec. Ry. Co.*, 82 App. Div. 263, 81 N. Y. Supp. 952; *Denison, etc., Ry. Co. v. Johnson*, 36 Tex. Civ. App. 115, 81 S. W. 780; *Burt v. Douglas Co. St. Ry. Co.*, 83 Wis. 229, 53 N. W. 447, 18 L. R. A. 479. But see, *Chittick v. Rapid Tr. Co.*, 224 Pa. 13, 73 Atl. 4, 22 L. R. A. (N. S.) 1073, bystander cannot recover; *Beebe v. St. Louis Tr. Co.*, 206 Mo. 419, 103 S. W. 1019, 12 L. R. A. (N. S.) 760, explosion in controller, not liable to employé.

*Charged wire.*—Street car company must avoid injuries to its passengers from breaking of wires, highest degree of care required. *Baltimore, etc., R. Co. v. Nugent*, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161; *Richmond, etc., Elec. Co. v. Bowles*, 92 Va. 738, 24 S. E. 388; *Hopkins v. Michigan Tr. Co.*, 144 Mich. 359, 107 N. W. 909; *Burt v. Douglas Co. St. Ry. Co.*, 83 Wis. 229, 53 N. W. 447, 18 L. R. A. 479, passenger not guilty of contributory negligence.

*Collision with post in proximity to track.*—Street car companies must exercise the highest degree of care to prevent injuries to its passengers from posts and other objects beside the track, *Cameron v. Lewiston, etc., R.*, 103 Me. 482, 70 Atl. 534, 18 L. R. A. (N. S.) 497, 125 Am. St. Rep. 315; leaning of posts toward the track, *Pomeroy v. Boston, etc., R. Co.*, 193 Mass. 507, 79 N. E. 767; cross-beams, *Gardner v. Metropolitan, etc., R. Co.*, 223 Mo. 389, 122 S. W. 1068, 18 Ann. Cas. 1166; where high speed of car causes an oscillation which throws the passenger toward the poles, *Schmidt v. Coney Island, etc., R. Co.*, 26 App. Div. 391, 49 N. Y. Supp. 777; riding on running board does not in all cases constitute contributory negligence, *Hesse v. Meridenn, etc., Tramway*, 75 Conn. 571, 54 Atl. 299; *Cameron v. Lewiston, etc., St. Ry.*, supra; *Elliott v. Newport, etc., R.*, 18 R. I. 707, 28 Atl. 338, 31 Atl. 694, 23 L. R. A. 208; so as to deny damages for coming in contact with a pole; *Cameron v. Lewiston, etc., St. Ry.*, supra; *Elliott v. Newport, etc., R.*, supra; *Burns v. Johnstown, etc., R. Co.*, 213 Pa. 143, 62 Atl. 564, 2 L. R. A. (N. S.) 1191.

*Projection of body beyond side of car*, where contributory negligence depends on circumstances, *Wichita, etc., Lt. Co. v. Cummings*, 72 Kan. 694, 84 Pac. 121; *Christensen v. Metropolitan, etc., R. Co.*, 137 Fed. 708, 70 C. C. A. 657; *Salmon v. Elec. Ry. Co.*, 124 Ga. 1056, 53 S. E. 575. Poles of another company, *Preisich v. Butte, etc., R. Co.*, 47 Mont. 170, 131 Pac. 25, not generally liable.



to interfere with travel or the working of the employés of railroad companies. In towns and cities it often happens that vehicles travel the streets with loads reaching rather high from the pavement, and in order that any property or person should not be injured by the coming in contact of such vehicles with the lines of these companies crossing the streets, they should be constructed and kept reasonably high to avoid all such occurrences; on a failure to do so the company will be liable.<sup>107</sup> The same duty is imposed upon such companies whose wires are crossing the country highways;<sup>108</sup> but there may be some variances allowed with respect to the height of wires crossing country highways.<sup>109</sup> It is very often the case that telegraph, telephone, and electric lines cross and recross railroad tracks; when they do, the wires should be

<sup>107</sup> *Dickey v. Maine Tel. Co.*, 46 Me. 483; *North Arkansas Tel. Co. v. Peters*, 103 Ark. 564, 148 S. W. 273; *Williams v. Louisiana, etc., Power Co.*, 43 La. Ann. 295, 8 South. 938; *Winegarner v. Edison, etc., Co.*, 83 Kan. 67, 109 Pac. 778, 28 L. R. A. (N. S.) 677; *Crawford v. Standard, etc., Co.*, 139 Iowa, 331, 115 N. W. 878, question of fact; *Cumberland, etc., Co. v. Pierson*, 170 Ind. 543, 84 N. E. 1088, as to pleadings; *Weaver v. Dawson, etc., Co.*, 82 Neb. 696, 118 N. W. 650, 22 L. R. A. (N. S.) 1189, lower than statutory requirement; *Texarkana, etc., Elec. Co. v. Orr*, 59 Ark. 215, 27 S. W. 66, 43 Am. St. Rep. 30; *New England, etc., Tel. Co. v. Moore*, 179 Fed. 364, 102 C. C. A. 642, 31 L. R. A. (N. S.) 617; *Diller v. Northern Cal. P. Co.*, 162 Cal. 531, 123 Pac. 359, Ann. Cas. 1913D, 908; *Foley v. Northern Cal. P. Co.*, 14 Cal. App. 401, 112 Pac. 467; *Elec. Co. v. Soper*, 38 Colo. 126, 88 Pac. 161; *Denver Consol. Elec. Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566; *Larson v. Central Ry. Co.*, 56 Ill. App. 263; *Augusta Ry., etc., Co. v. Weekly*, 124 Ga. 384, 52 S. E. 444; *Aiken v. City of Columbus*, 167 Ind. 139, 78 N. E. 657, 12 L. R. A. (N. S.) 416; *Emporia v. White*, 74 Kan. 864, 86 Pac. 295; *Kansas City v. Gilbert*, 65 Kan. 469, 70 Pac. 350; *Kansas City v. File*, 60 Kan. 157, 55 Pac. 877; *Macon v. Paducah St. Ry. Co.*, 110 Ky. 680, 62 S. W. 496; *Leavenworth Coal Co. v. Ratchford*, 5 Kan. App. 150, 48 Pac. 927; *Walter v. Baltimore Elec. Co.*, 109 Md. 513, 71 Atl. 953, 22 L. R. A. (N. S.) 1178; *State v. Crisfield, etc., Mfg. Co.*, 118 Md. 521, 85 Atl. 615; *Sykes v. Portland*, 177 Mich. 290, 143 N. W. 326; *Johnson v. Ray City*, 164 Mich. 251, 129 N. W. 29, Ann. Cas. 1912B, 866; *Prince v. Lowell Elec. Lt. Corp.*, 201 Mass. 276, 87 N. E. 558; *Linton v. Weymouth, etc., P. Co.*, 188 Mass. 276, 74 N. E. 321; *Potera v. Brookhaven*, 95 Miss. 774, 49 South. 617; *Davenport v. Electric Co.*, 242 Mo. 111, 145 S. W. 454; *Gannon v. Laclede Gas Lt. Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505; *Newark Elec., etc., P. Co. v. Ruddy*, 62 N. J. Law, 507, 41 Atl. 712, 57 L. R. A. 624; *Hebert v. Hudson River Elec. Co.*, 136 App. Div. 107, 120 N. Y. Supp. 672; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 19 S. E. 344, 41 Am. St. Rep. 786, 26 L. R. A. 810; *Carroll v. Electric Co.*, 47 Or. 424, 84 Pac. 389, 6 L. R. A. (N. S.) 290; *Boyd v. Portland Elec. Co.*, 40 Or. 126, 66 Pac. 576, 57 L. R. A. 619; *Snyder v. Wheeling Elec. Co.*, 43 W. Va. 661, 28 S. E. 733, 64 Am. St. Rep. 922, 39 L. R. A. 499.

<sup>108</sup> *Pennsylvania Tel. Co. v. Varnau (Pa.)* 15 Atl. 624.

<sup>109</sup> *Postal Tel. Cable Co. v. Jones*, 133 Ala. 217, 32 South. 500.

stretched sufficiently high at these places as not to interfere with the running of trains, or to endanger the employés of the railroad companies.<sup>110</sup>

§ 205. **Negligence, basis of action.**—The liability of telegraph, telephone, or electrical companies for injuries caused by the improper location or maintenance of their lines depends upon the question whether they have been guilty of negligence in this respect.<sup>111</sup> While there must be negligence in order that the company may be held liable, yet this may be presumed;<sup>112</sup> and in some cases the facts, when undisputed, may be so strong as to hold the company guilty of negligence *per se*.<sup>113</sup> When this is the case it is a question of law to be decided by the court;<sup>114</sup> but if the facts are disputed, the question of negligence then becomes a mixed question of law and fact.<sup>115</sup>

§ 206. **Negligence, what constitutes—duty to perform.**—There are necessarily three elements essential to the existence of negli-

<sup>110</sup> *American, etc., Co. v. Kersh*, 27 Tex. Civ. App. 127, 66 S. W. 74; employés may hold railroad liable, *Meyers v. Detroit, etc., R. R.*, 166 Mich. 403, 132 N. W. 109; or both the railroad and telephone company, *Southwestern, etc., Tel. Co. v. Crank* (Tex. Civ. App.) 27 S. W. 38, affirmed *Dillingham v. Crank*, 87 Tex. 104, 27 S. W. 93; telephone company not liable when line is stretched by patron, and connected to former's line, *Southwestern, etc., Tel. Co. v. Corbett* (Tex. Civ. App.) 148 S. W. 826. See §§ 74, 181. See also, *McGowan v. State*, 146 Ala. 679, 40 South. 142; *St. Louis, etc., R. Co. v. Batesville, etc., Tel. Co.*, 80 Ark. 499, 97 S. W. 660; *Philadelphia, etc., R. Co. v. Wilmington, etc., R. Co.*, 8 Del. Ch. 134, 38 Atl. 1067; *West Jersey R. Co. v. Camden, etc., R. Co.*, 52 N. J. Eq. 31, 29 Atl. 423; *Louisville, etc., R. Co. v. Bowling Green R. Co.*, 110 Ky. 788, 63 S. W. 4; *Cincinnati, etc., R. Co. v. Cincinnati, etc., R. Co.*, 12 O. C. D. 113; *Alt v. State*, 88 Neb. 259, 129 N. W. 432, 35 L. R. A. (N. S.) 1212; *New York, etc., R. Co. v. Electric Co.*, 219 Mass. 85, 106 N. E. 506, L. R. A. 1915B, 822.

<sup>111</sup> *Cumberland Tel., etc., Co. v. Coats*, 100 Ill. App. 519; *Allen v. Atlantic, etc., Tel. Co.*, 21 Hun (N. Y.) 22; *Monahan v. Miami Tel. Co.*, 9 Ohio Dec. 532, 7 Ohio N. P. 95; *Barrett v. Independent Tel. Co.* (Tex. Civ. App.) 65 S. W. 1128; *Roberts v. Wisconsin Tel. Co.*, 77 Wis. 589, 46 N. W. 800, 20 Am. St. Rep. 143. See also, *Lee v. Maryland Tel., etc., Co.*, 97 Md. 692, 55 Atl. 680; *Borell v. Cumberland Tel., etc., Co.*, 133 La. 630, 63 South. 247, L. R. A. 1916D, 1064, repairing after storm; *Mullen v. Otter Tail Power Co.*, 130 Minn. 386, 153 N. W. 746, L. R. A. 1916D, 447.

<sup>112</sup> See § 207.

<sup>113</sup> See § 207.

<sup>114</sup> *Roberts v. Wisconsin Tel. Co.*, 77 Wis. 589, 46 N. W. 800, 20 Am. St. Rep. 143.

<sup>115</sup> *Southwestern Tel., etc., Co. v. Robinson*, 50 Fed. 810, 1 C. C. A. 684, 16 L. R. A. 545. See § 201. See also, *Riley v. City of Independence*, 258 Mo. 671, 167 S. W. 1022, Ann. Cas. 1915D, 748. See also, § 519 et seq. See *Turner v. Southern P. Co.*, 154 N. C. 131, 69 S. E. 767, 32 L. R. A. (N. S.) 848; *Braun v. Elec. Co.*, 200 N. Y. 484, 94 N. E. 206, 35 L. R. A. (N. S.) 1089, 140 Am. St. Rep. 645, 21 Ann. Cas. 370; *Lewis v. Bowling Green Gaslight Co.*, 135 Ky. 611, 117

gence: The existence of a duty on the part of one toward another; a failure to perform that duty; and an injury resulting thereby.<sup>116</sup> This principle applies to telegraph, telephone, and electrical companies in the construction and maintenance of their lines. In the first place, it is the duty of these companies to so construct and maintain their lines as not to endanger the public.<sup>117</sup> This is a duty imposed upon all enterprises which undertake to carry on a public business; and the courts will therefore take judicial notice that it is the duty of these companies to exercise care to prevent their lines from interfering with or endangering public travel.<sup>118</sup> There may be instances where an injury has been inflicted

S. W. 278, 22 L. R. A. (N. S.) 1169; Fox v. Manchester, 183 N. Y. 141, 75 N. E. 1116, 2 L. R. A. (N. S.) 474; Musolf v. Edison Elec. Co., 108 Minn. 369, 122 N. W. 499, 24 L. R. A. (N. S.) 451; Meck v. Nebraska Tel. Co., 96 Neb. 539, 148 N. W. 325.

<sup>116</sup> Faris v. Hoberg, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261; Gibson v. Leonard, 143 Ill. 182, 32 N. E. 182, 17 L. R. A. 588, 36 Am. St. Rep. 376; Gunn v. Ohio, etc., R. Co., 36 W. Va. 165, 14 S. E. 465, 32 Am. St. Rep. 842; Montgomery v. Muskegon Booming Co., 88 Mich. 635, 50 N. W. 729, 26 Am. St. Rep. 308; Roddy v. Missouri Pac. R. Co., 104 Mo. 234, 15 S. W. 1112, 24 Am. St. Rep. 333, 12 L. R. A. 746.

<sup>117</sup> See § 194 et seq.

<sup>118</sup> Postal Tel. Cable Co. v. Jones, 133 Ala. 217, 32 South. 500; Guinn v. Delaware, etc., Tel. Co., 72 N. J. Law, 276, 62 Atl. 412, 3 L. R. A. (N. S.) 988, 111 Am. St. Rep. 668.

*Judicial notice—properties of electricity.*—The courts take judicial notice of the properties of electricity. Crawfordville v. Braden, 130 Ind. 149, 28 N. E. 849, 30 Am. St. Rep. 214, 14 L. R. A. 268; Electric Emp. Co. v. San Francisco (C. C.) 45 Fed. 593, 13 L. R. A. 131, setting fires; Brinekkord v. West. U. Tel. Co., 58 Hun, 610, 12 N. Y. Supp. 534.

*Danger of electricity.*—Courts take judicial notice of the fact that electric currents are dangerous. De Kallands v. Washtenaw Home Tel. Co., 153 Mich. 25, 116 N. W. 564, 15 Ann. Cas. 593; Taggart v. Newport St. Ry. Co., 16 R. I. 668, 19 Atl. 326, 7 L. R. A. 205; Winegarner v. Edison, etc., P. Co., 83 Kan. 67, 109 Pac. 778, 28 L. R. A. (N. S.) 677; Johnston v. New Omaha, etc., Lt. Co., 78 Neb. 24, 110 N. W. 711, 17 L. R. A. (N. S.) 435.

*Generation and transmission of electricity.*—The courts usually take judicial notice of the nature and effect of the generation and transmission of electric currents. Crawfordville v. Braden, 130 Ind. 149, 28 N. E. 849, 30 Am. St. Rep. 214, 14 L. R. A. 268; Consol. Elec. Lt. Co. v. People, 94 Ala. 372, 10 South. 440; Central Union Tel. Co. v. Comeaut, 167 Fed. 274, 93 C. C. A. 196; Owen v. Portage Tel. Co., 126 Wis. 412, 105 N. W. 924.

*Electric lights.*—The courts take judicial notice of the fact that buildings and streets are frequently illuminated by electricity. Crawfordville v. Braden, supra; Consol. Elec. Lt. Co. v. People, supra. See Carthage v. Carthage Lt. Co., 97 Mo. App. 20, 70 S. W. 936.

*Lightning.*—The courts will take judicial notice of the nature, operation and effect of lightning. Southern Bell Tel. Co. v. McTyer, 137 Ala. 601, 34 South. 1020, 97 Am. St. Rep. 62; Wells v. Northeastern Tel. Co., 101 Me. 371, 64 Atl.



by some cause for which these companies would not be liable, in that they were not under any obligations to protect the injured party from such injury; <sup>119</sup> but, nevertheless, it is a duty imposed upon them to properly locate and maintain their lines so that the public shall be as free from danger after as before their construction. <sup>120</sup>

§ 207. **Same continued—failure to perform duty—presumption of negligence.**—In order for the injured party to recover, it must be further shown that the company has failed to perform the duty of constructing and maintaining its lines in a proper manner; and among the three elements necessary to constitute the existence of negligence, this is the most essential. As said in the preceding paragraph, the courts will take judicial notice of the duties of these companies toward the public with respect to the construction and maintenance of their lines, but it must be shown by some kind of testimony that the failure on their part to perform such duties was the cause of the injury. <sup>121</sup> The proof of such failure may be a mixed

648; *Starr v. Southern Bell Tel., etc., Co.*, 156 N. C. 435, 72 S. E. 484; *Owen v. Tel. Co.*, 126 Wis. 412, 105 N. W. 924; *Jackson v. Wisc. Tel. Co.*, 88 Wis. 243, 60 N. W. 430, 26 L. R. A. 101; *Peninsular Tel. Co. v. McCaskill*, 64 Fla. 420, 60 South. 338, Ann. Cas. 1914B, 1029.

*Electric companies.*—Courts will take judicial knowledge of the fact that electric power companies supply electricity to the public. *Hill v. Pacific Gas, etc., Co.*, 22 Cal. App. 788, 136 Pac. 492; *State v. Consumers' P. Co.*, 119 Minn. 225, 137 N. W. 1104, 41 L. R. A. (N. S.) 1181, Ann. Cas. 1914B, 19.

*Telephone and telegraph companies.*—The courts take judicial notice of the general nature and operation of telegraph and telephonic communications. *State v. Murphy*, 130 Mo. 10, 31 S. W. 594, 31 L. R. A. 798, affirmed in 170 U. S. 78, 18 Sup. Ct. 505, 42 L. Ed. 955; use of electricity for transmission, *State v. Helena*, 34 Mont. 67, 85 Pac. 744; *Chamberlayne*, Modern Law of Ev. § 839.

<sup>119</sup> See § 211 et seq.

<sup>120</sup> See § 196 et seq. See, also, *West. U. Tel. Co. v. State*, 82 Md. 293, 33 Atl. 763, 31 L. R. A. 572, 57 Am. St. Rep. 464.

<sup>121</sup> *Dickey v. Maine Tel. Co.*, 43 Me. 492, injury by contact with telegraph wire across highway; *Pennsylvania Tel. Co. v. Varnau (Pa.)* 15 Atl. 624, death caused by sagging wire across highway; *Wood v. Tel., etc., Co.*, 151 Ky. 77, 151 S. W. 29; *Harton v. Forest City Tel. Co.*, 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. (N. S.) 956, 14 Ann. Cas. 390. See § 209.

*Relation of doctrine res ipsa loquitur to burden of proof.*—The doctrine of *res ipsa loquitur* does not dispense with the rule that he who alleges negligence must prove it. It is simply a mode of proving negligence, and does not change the burden of proof. See §§ 195, 198, 507, and cases cited thereunder. Compare *Pittsburgh, etc., R. Co. v. Higgs*, 165 Ind. 694, 76 N. E. 299, 4 L. R. A. (N. S.) 1081; *Lyles v. Brannon, etc., Co.*, 140 N. C. 25, 52 S. E. 233; *Thurston v. Detroit, etc., R. Co.*, 137 Mich. 231, 100 N. W. 395; *Furnish v. Missouri, etc., R. Co.*, 102 Mo. 438, 13 S. W. 1044, 22 Am. St. Rep. 781.

question of law and fact,<sup>122</sup> but if the proof of such failure is undisputed and it is sufficiently clear that the duty has not been performed, the court should settle the case as a question of law; or the testimony may be disputed and still it would be a question of law to be settled by the court. For instance, if a wire is left swinging across the streets for several days, to the knowledge of the company, which has had reasonable time to remove it but fails to do so, whereby injury is sustained, the court should say whether the company has failed to perform its duty; and yet this might be a question for the jury, where there is doubt as to whether the company has had a reasonable time to remedy the defect in the line.<sup>123</sup> In some cases it may be presumed that the company has failed to perform its duty in maintaining its lines.<sup>124</sup> Thus, if the circumstances are of such a nature that it may fairly be inferred upon the most reasonable probability that the accident was caused by the failure

<sup>122</sup> *Southwestern Tel. Co. v. Robinson*, 50 Fed. 810, 1 C. C. A. 684, 16 L. R. A. 545. See, also, §§ 199, 201, 209.

<sup>123</sup> *Postal Tel. Cable Co. v. Jones*, 133 Ala. 217, 32 South. 500. See § 196.

<sup>124</sup> *West. U. Tel. Co. v. State*, 82 Md. 293, 83 Atl. 763, 51 Am. St. Rep. 464, 31 L. R. A. 572, note; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 19 S. E. 344, 41 Am. St. Rep. 786, 26 L. R. A. 810; *Giraudi v. Electric Imp. Co.*, 107 Cal. 120, 40 Pac. 108, 48 Am. St. Rep. 114, 28 L. R. A. 596; *Jacks v. Reeves*, 78 Ark. 426, 95 S. W. 781, proof of a defect in a telephone line and injury therefrom to plaintiff raises a presumption of negligence on the part of the defendant; *Thomas v. West. U. Tel. Co.*, 100 Mass. 156, telegraph line allowed to swing so low across highway as to obstruct ordinary travel, evidence of some negligence, and unless explained will be sufficient to support verdict. See note to *Hart v. Washington Park Club*, 48 Am. St. Rep. 305, and also note to *Long v. Penn. R. Co.*, 30 Am. St. Rep. 736. Proof that a live electric wire is broken and lying or hanging in the public streets, and that injury results from contact therewith, makes out a *prima facie* case. *Gannon v. Lacledé Gaslight Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505; *Newark Elec., etc., Co. v. Ruddy*, 62 N. J. Law, 505, 41 Atl. 712, 57 L. R. A. 624, affirmed in 63 N. J. Law, 357, 46 Atl. 1100, 57 L. R. A. 624; *Snyder v. Wheeling Elec. Co.*, 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922; *Boyd v. Portland Elec. Co.*, 40 Or. 126, 66 Pac. 576, 57 L. R. A. 619; *Chaperon v. Portland Gen. Elec. Co.*, 41 Or. 39, 67 Pac. 928; *Walter v. Baltimore Elec. Co.*, 109 Md. 513, 71 Atl. 953, 22 L. R. A. (N. S.) 1178; *Runyan v. Kanawha Water, etc., Co.*, 68 W. Va. 609, 71 S. E. 239, 35 L. R. A. (N. S.) 430. Falling of trolley wires raises a presumption of negligence. *O'Flaherty v. Nassau Elec. R. R. Co.*, 34 App. Div. 74, 54 N. Y. Supp. 96, affirmed in 165 N. Y. 624, 59 N. E. 1128; *Smith v. Brooklyn Heights R. R. Co.*, 82 App. Div. 531, 81 N. Y. Supp. 538; *St. Louis v. Bay State Street R. Co.*, 216 Mass. 255, 103 N. E. 639, 49 L. R. A. (N. S.) 447, Ann. Cas. 1915B, 706; *Memphis St. R. Co. v. Kartright*, 110 Tenn. 277, 75 S. W. 719, 100 Am. St. Rep. 807; *Clancy v. New York, etc., R. R. Co.*, 82 App. Div. 563, 81 N. Y. Supp. 875; *Chattanooga Elec. R. Co. v. Mingle*, 103 Tenn. 667, 56 S. W. 23, 76 Am. St. Rep. 703; *Clarke*

of the company to exercise proper precaution, a presumption of negligence arises.<sup>125</sup> And, further, the facts may go to show that the manner in which the company's lines are maintained were such within themselves as to give the court the power to decide the case; or, in other words, the company may be guilty of negligence per se for the manner in which it constructs and maintains its lines.<sup>126</sup> While in some cases the question whether the company has failed to perform its duty in properly constructing and maintaining its lines may be so clear and convincing as that the court should decide it as a question of law,<sup>127</sup> yet in a majority of cases the question should be left to the determination of a jury, as there are almost always some controverted facts with respect to the failure of the company to perform its duty.<sup>128</sup> In some instances, as will hereafter be discussed, it may be attempted to be shown that the party

v. Nassau Elec. R. R. Co., 9 App. Div. 51, 41 N. Y. Supp. 78. But see Lanning v. Pittsburg Ry., 229 Pa. 575, 79 Atl. 136, 32 L. R. A. (N. S.) 1043; Diller v. Northern California Power Co., 162 Cal. 531, 123 Pac. 359, Ann. Cas. 1913D, 908, and note. Application of *res ipsa loquitur*, see §§ 194 and 198.

<sup>125</sup> Hart v. Washington Park Club Co., 157 Ill. 9, 41 N. E. 620, 48 Am. St. Rep. 298, 29 L. R. A. 492; Howser v. Cumberland, etc., R. Co., 80 Md. 146, 30 Atl. 906, 45 Am. St. Rep. 332, 27 L. R. A. 154. See notes to Philadelphia, etc., R. Co. v. Anderson, 20 Am. St. Rep. 490; Huey v. Gahlenbeck, 6 Am. St. Rep. 794; Fleming v. Pittsburg, etc., R. Co., 38 Am. St. Rep. 837. See, also, other cases cited in note 124.

Application of *res ipsa loquitur*, see §§ 194, 198.

<sup>126</sup> Southern Bell, etc., Tel. Co. v. McTyler, 137 Ala. 601, 34 South. 1020, 97 Am. St. Rep. 62, abandoned wires left in private house.

<sup>127</sup> See Harton v. Forest City Tel. Co., 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. (N. S.) 956, 14 Ann. Cas. 390; Citizens' Tel. Co. v. Westcott, 124 Ky. 684, 99 S. W. 1153, 30 Ky. Law Rep. 922; Hayes v. Chicago Tel. Co., 218 Ill. 414, 75 N. E. 1003, 2 L. R. A. (N. S.) 764; Shinzel v. Philadelphia Bell Tel. Co., 31 Pa. Super. Ct. 221; Southern Bell Tel. Co. v. McTyler, 137 Ala. 601, 34 South. 1020, 97 Am. St. Rep. 62.

<sup>128</sup> Postal Tel. Cable Co. v. Jones, 133 Ala. 217, 32 South. 500; Friesenhan v. Michigan Tel. Co., 134 Mich. 292, 96 N. W. 501; Crawford v. Standard Tel. Co., 139 Iowa, 331, 115 N. W. 878; Flack v. West. U. Tel. Co., 106 Minn. 337, 118 N. W. 1022; Campbell v. Delaware, etc., Tel., etc., Co., 70 N. J. Law, 195, 56 Atl. 303; New York, etc., Tel. Co. v. Bennett, 62 N. J. Law, 742, 42 Atl. 759; Ensign v. Central New York Tel., etc., Co., 79 App. Div. 244, 79 N. Y. Supp. 799, affirmed in 179 N. Y. 539, 71 N. E. 1130; Varnau v. Pennsylvania Tel. Co., 5 Lanc. Law Rev. (Pa.) 97, affirmed in (Pa.) 15 Atl. 624; South Texas Tel. Co. v. Tabb, 52 Tex. Civ. App. 213, 114 S. W. 448; Randall v. Northwestern Tel. Co., 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17; Reid v. Tel. Co., 151 App. Div. 96, 135 N. Y. Supp. 846; Snee v. Tel. Co., 24 S. D. 361, 123 N. W. 729; Poudre v. Cable Co., 167 Mo. App. 533, 152 S. W. 114; Musolf v. Duluth Edison Elec. Co., 108 Minn. 369, 122 N. W. 499, 24 L. R. A. (N. S.) 451. See Davidson v. Utah Independent Tel. Co., 34 Utah, 249, 97 Pac. 124. See, also, §§ 199,



sustained his injury by his own contributory negligence.<sup>129</sup> When this is the case the question can only be settled by a jury after having been properly charged as to the law in the case.<sup>130</sup>

**§ 208. Same continued—an injury sustained—proximate cause.** The company may fail to perform the duty of maintaining its lines, which it is under obligation to the public to perform, but still, if there is no injury sustained by any one for such failure, the company will not be liable.<sup>131</sup> It may commit a wrong or violate its public duties, for which the public may have recourse, but if no one has sustained an injury, or if his injuries are no greater than those suffered by the public in general, the company can only be liable for a public prosecution. It is not enough that the party should have been injured, but the injury must be the result of the failure on the part of the company to perform its duty, and this failure must be the proximate cause of the injury and not some agency put in force by the negligence of another.<sup>132</sup> The failure of the company to perform its duty in maintaining its lines may be actionable or not actionable. That is, it may proximately inflict an injury, or it may result harmlessly, or be but the remote cause or mere condition of an injury, of which some intervening act or negligence is the efficient and proximate cause. It follows, therefore, that there must not only be a causal connection between the said failure of the company to maintain its lines properly or the negligence complained of and the injury suffered, but the connection must be by a natural and unbroken sequence—without intervening efficient causes—so that but for the negligence of the company the injury would not have occurred.<sup>133</sup> It must not only be a cause but it

201; *Lewis v. Bowling Green Gaslight Co.*, 135 Ky. 611, 117 S. W. 278, 22 L. R. A. (N. S.) 1169; *Fox v. Manchester*, 183 N. Y. 141, 75 N. E. 1116, 2 L. R. A. (N. S.) 474.

<sup>129</sup> See § 210.

<sup>130</sup> See § 210.

<sup>131</sup> *West. U. Tel. Co. v. State*, 82 Md. 293, 83 Atl. 763, 31 L. R. A. 572, 51 Am. St. Rep. 464; *Varnau v. Pennsylvania Tel. Co.*, 5 Lanc. Law Rev. (Pa.) 97. See *Ochs v. Public Service R. Co.*, 81 N. J. Law, 661, 80 Atl. 495, 36 L. R. A. (N. S.) 240, Ann. Cas. 1912D, 255.

<sup>132</sup> *Allen v. Atlantic, etc., Tel. Co.*, 21 Hun (N. Y.) 22. See, also, *Henning v. West. U. Tel. Co. (C. C.)* 43 Fed. 131; *Davis v. Dudley*, 4 Allen (Mass.) 557; *Harton v. Forest City Tel. Co.*, 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. (N. S.) 956, 14 Ann. Cas. 390. See, also, cases cited in following notes.

<sup>133</sup> *Seith v. Commonwealth Elec. Co.*, 241 Ill. 252, 89 N. E. 425, 24 L. R. A. (N. S.) 978, 132 Am. St. Rep. 204; *Harton v. Forest City Tel. Co.*, 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. (N. S.) 956, 14 Ann. Cas. 390; *Smith v. Missouri, etc., Tel. Co.*, 113 Mo. App. 429, 87 S. W. 71; *Citizens' Tel. Co. v. Thomas*, 45 Tex. Civ. App. 20, 99 S. W. 879; *Chattanooga Light, etc., Co. v. Hodges*, 109

must be the proximate cause; that is, the direct and immediate cause of the injury.<sup>134</sup> Thus it would not be liable for an injury one of the concurrent causes of which was the presence of its wires, as where the poles and wires interfered with the operations of a fire company and prevented the extinguishment of the fire;<sup>135</sup> nor would it be liable for an injury caused by a broken pole or line,

Tenn. 331, 70 S. W. 616, 60 L. R. A. 459, 97 Am. St. Rep. 844; Georgetown Tel. Co. v. McCullough, 118 Ky. 182, 80 S. W. 782, 111 Am. St. Rep. 294. See note to Gilson v. Delaware, etc., Canal Co., 36 Am. St. Rep. 807. See, also, Mize v. Rocky Mountain Bell Tel. Co., 38 Mont. 521, 100 Pac. 971, 129 Am. St. Rep. 659, 16 Ann. Cas. 1189; Johnston v. New Omaha Thompson-Houston Elec. L. Co., 78 Neb. 24, 27, 110 N. W. 711, 113 N. W. 526, 17 L. R. A. (N. S.) 435.

<sup>134</sup> Seith v. Commonwealth Elec. Co., 241 Ill. 252, 89 N. E. 425, 132 Am. St. Rep. 204, 24 L. R. A. (N. S.) 978; Harton v. Forest City Tel. Co., 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. (N. S.) 956, 14 Ann. Cas. 390; Smith v. Missouri, etc., Tel. Co., 113 Mo. App. 429, 87 S. W. 71; Citizens' Tel. Co. v. Thomas, 45 Tex. Civ. App. 20, 99 S. W. 879; Mize v. Rocky Mountain Bell Tel. Co., 38 Mont. 521, 100 Pac. 971, 129 Am. St. Rep. 659, 16 Ann. Cas. 1189; Hebert v. Lake Charles, etc., Light Co., 111 La. 522, 35 South. 731, 64 L. R. A. 101, 100 Am. St. Rep. 505; Stark v. Muskegon Trac., etc., Co., 141 Mich. 575, 104 N. W. 1100, 1 L. R. A. (N. S.) 822; Musolf v. Duluth Edison Elec. Co., 108 Minn. 369, 122 N. W. 499, 24 L. R. A. (N. S.) 451; American District Tel. Co. v. Oldham, 148 Ky. 320, 146 S. W. 764, Ann. Cas. 1913E, 376; Home Tel. Co. v. Fields, 150 Ala. 306, 43 South. 711; Home Tel. Co. v. Gasper, 123 Ky. 128, 93 S. W. 1057, 9 L. R. A. (N. S.) 548.

*The intervening act, that of a child.*—The general rule seems to be that the fact that the person responsible for the intervening act is a child does not affect the case, but, if the act itself is an intervening efficient cause, it will break the causal connection between the defendant's negligence and the plaintiff's injury, even though it is the act of an irresponsible child. See Trout v. Philadelphia Elec. Co., 236 Pa. 506, 84 Atl. 967, 42 L. R. A. (N. S.) 713; Wetherby v. Twin State, etc., Elec. Co., 83 Vt. 189, 75 Atl. 8, 25 L. R. A. (N. S.) 1220, 21 Ann. Cas. 1092; Sheffield Co. v. Morton, 161 Ala. 153, 49 South. 772; Mayfield, etc., Light Co. v. Webb, 33 Ky. Law Rep. 909, 111 S. W. 712, 18 L. R. A. (N. S.) 179; Johnston v. New Omaha Thompson Elec. Light Co., 78 Neb. 24, 27, 110 N. W. 711, 113 N. W. 526, 17 L. R. A. (N. S.) 435; Charette v. L'Anse, 154 Mich. 304, 117 N. W. 737. See Akin v. Bradley, etc., Machinery Co., 48 Wash. 97, 92 Pac. 903, 14 L. R. A. (N. S.) 586. But see contra, Temple v. McCombs City Elec. Co., 89 Miss. 1, 42 South. 874, 11 L. R. A. (N. S.) 449, 119 Am. St. Rep. 698, 10 Ann. Cas. 924; Consolidated Elec., etc., Co., 65 Kan. 798, 70 Pac. 884; Daltry v. Media Elec., etc., Co., 208 Pa. 403, 57 Atl. 833; Denver Con. Elec. Co. v. Walters, 39 Colo. 301, 89 Pac. 815; Simonton v. Citizens' Elec., etc., Co., 28 Tex. Civ. App. 376, 67 S. W. 530. But see Stark Muskegon Trac., etc., Co., 141 Mich. 575, 104 N. W. 1100, 1 L. R. A. (N. S.) 822; Keefe v. Narragansett Elec., etc., Co., 21 R. I. 575, 43 Atl. 542; Graves v. Washington, etc., Co., 44 Wash. 675, 87 Pac. 956, 11 L. R. A. (N. S.) 452. See Ruehl v. Ligerwood Rural Tel. Co., 23 N. D. 6, 135 N. W. 793, Ann. Cas. 1914C, 680, question for jury.

<sup>135</sup> Chaffe v. Tel., etc., Const. Co., 77 Mich. 625, 43 N. W. 1064, 6 L. R. A.

when the defect in the line has been caused by a severe storm;<sup>136</sup> but if the defective part is allowed to remain unrepaired unreasonably long, and a new force intervened, with the creation of which the company was not responsible and which would have been harmless but for the defective line, the company will be liable on the ground that the proximate cause was—not altogether the defect in the line—the negligence in repairing the line within a reasonable time after the breakage.<sup>137</sup> In other words, if the company is negligent, and its negligence combines with that of another, or with any other intervening cause, it is liable, although its negligence was not the sole negligence, or the sole proximate cause, and although its negligence, without such other independent intervening cause, would not have produced the injury.<sup>138</sup>

§ 209. **Evidence of negligence.**—In the absence of any presumption of the company's negligence, the injured party must prove,

455, 18 Am. St. Rep. 424; *Nichols v. Minneapolis*, 33 Minn. 430, 23 N. W. 868, 53 Am. Rep. 56.

*Duty to shut off current in case of fire.*—An electric company is not charged with a duty to cut off, at its own instance and in the absence of an ordinance to that effect, the current from some certain district merely upon knowledge being brought to it that a building within that district is on fire. So there is no negligence imputed to it because of the fact that one of its employés, at the time off duty, was present when a house was afire during the night, and, seeing one of the company's wires disconnected from the building and sputtering on the ground, "did nothing." *Pennebaker v. San Joaquin, etc., Power Co.*, 158 Cal. 579, 112 Pac. 459, 31 L. R. A. (N. S.) 1099, 139 Am. St. Rep. 202, citing *New Omaha Thompson-Houston Elec. Light Co. v. Anderson*, 73 Neb. 84, 102 N. W. 89, and *Trouton v. Omaha Thompson-Houston Elec. Light Co.*, 77 Neb. 821, 110 N. W. 569. Compare *Gannon v. Laclede Gaslight Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505. The utmost that will be exacted of the company in this regard is that it shall hold itself in readiness to cut off the current when the necessity arises and it is informed by the proper authority. *Pennebaker v. San Joaquin, etc., Power Co.*, *supra*. Defendant, under contract with plaintiff, a merchant, supplied electric current to his store. A fire broke out in a restaurant in the rear of the store and separated from it by a solid partition. Defendant severed the wires supplying the store with electric current, and plaintiff, by reason of the darkness, was unable to remove his stock and fixtures. The action was brought to recover the value of such property, which was entirely destroyed by the fire. Held, that the defendant had the right to sever the wires, providing it was reasonably necessary to do so in order to save loss or damage to its own property, but no such right arose until the act became necessary. It was conceded that the wires were cut forty minutes before there was any such necessity and that the defendant knew that plaintiff would need light to save his property. Held, also, that the evidence sustained a finding that cutting the wires at the time and under the circumstances was an actionable breach of defendant's duty to plaintiff. *Mullen v. Otter Tail Power Co.*, 130 Minn. 386, 153 N. W. 746, L. R. A. 1916D, 447. See § 218.

<sup>136</sup> *Ward v. Atlantic, etc., Pac. Tel. Co.*, 71 N. Y. 81, 27 Am. Rep. 10.

<sup>137</sup> *Southwestern Tel., etc., Co. v. Robinson*, 50 Fed. 810, 1 C. C. A. 684, 16 L. R. A. 545; *Southern Tel., etc., Co. v. McTyer*, 137 Ala. 601, 34 South. 1020, 97 Am. St. Rep. 62. See § 199. See other cases in note 134, *supra*.

<sup>138</sup> *Harrison v. Kansas City Elec. L. Co.*, 195 Mo. 606, 93 S. W. 951, 7



by a fair preponderance of the evidence, facts which establish the negligence of the company as being the proximate cause of his injury;<sup>139</sup> and having done this, he is entitled to recover except in those jurisdictions which hold that he must also take the burden of

L. R. A. (N. S.) 293, injury resulting to a person coming in contact with the grounded current of an electric company, and which would not have occurred except for the act of a stranger in making a second ground at another place; *Horning v. Hudson R. Tel. Co.*, 111 App. Div. 122, 97 N. Y. Supp. 625, abandoned telephone wire, through which a current passed from an uninsulated electric wire, and but for such uninsulated wire the injury would not have occurred; *City Elec. S. R. Co. v. Conery*, 61 Ark. 381, 33 S. W. 426, 54 Am. St. Rep. 262, 31 L. R. A. 570, negligence of telephone and electric companies both the proximate cause and both liable. Where unprotected or negligently strung telephone wires come in contact with heavily charged uninsulated or unguarded wires, owned or controlled by a separate company, thereby causing injury. See *McKay v. Southern Bell, etc., Tel. Co.*, 111 Ala. 337, 19 South. 695, 56 Am. St. Rep. 59, 31 L. R. A. 589; *Jones v. Finch*, 128 Ala. 217, 29 South. 182; *Cumberland, etc., Tel. Co. v. Ware*, 115 Ky. 581, 74 S. W. 289; *Economy L., etc., Co. v. Hiller*, 203 Ill. 518, 68 N. E. 72; *United Elec. R. Co. v. Shelton*, 89 Tenn. 423, 14 S. W. 863, 24 Am. St. Rep. 614; *West. U. Tel. Co. v. State*, 82 Md. 293, 33 Atl. 763, 51 Am. St. Rep. 464, 31 L. R. A. 572; *Hebert v. Lake Charles, etc., Co.*, 111 La. 522, 35 South. 731, 100 Am. St. Rep. 505, 64 L. R. A. 101; *Kankakee Elec. R. Co. v. Whittemore*, 45 Ill. App. 484; *Standard L., etc., Co. v. Muncey*, 33 Tex. Civ. App. 416, 76 S. W. 931; *San Antonio, etc., Elec. Co. v. Speegle* (Tex. Civ. App.) 60 S. W. 884; *Twist v. Rochester*, 37 App. Div. 307, 55 N. Y. Supp. 850, affirmed in 165 N. Y. 619, 59 N. E. 1131, holding city owning an uninsulated patrol wire liable. See, also, § 200. See *Trammell v. Columbus R. Co.*, 9 Ga. App. 98, 70 S. E. 892; *Home Tel. Co. v. Fields*, 150 Ala. 306, 43 South. 711; *Crandall v. Consol., etc., Tel. Co.*, 14 Ariz. 322, 127 Pac. 994; *Cumberland Tel., etc., Co. v. Woodham*, 99 Miss. 318, 54 South. 890; *Campbell v. United R. Co.*, 243 Mo. 141, 147 S. W. 788; *Garretson v. Tacoma R., etc., Co.*, 50 Wash. 24, 96 Pac. 511; *Luehrmann v. Laclede, etc., Co.*, 127 Mo. App. 213, 104 S. W. 1128.  
<sup>139</sup> *Dickey v. Maine Tel. Co.*, 43 Me. 492; *Pennsylvania Tel. Co. v. Varnau* (Pa.) 15 Atl. 624; *Arkansas Tel. Co. v. Ratteree*, 57 Ark. 429, 21 S. W. 1059; *Diller v. Northern California Power Co.*, 162 Cal. 531, 123 Pac. 359, Ann. Cas. 1913D, 908; *Southern Bell Tel. Co. v. Lynch*, 95 Ga. 529, 20 S. E. 500; *Mize v. Rocky Mountain Tel. Co.*, 38 Mont. 521, 100 Pac. 971, 129 Am. St. Rep. 659, 16 Ann. Cas. 1189.

Sufficient to support verdict, see *Postal Tel. Cable Co. v. Jones*, 133 Ala. 217, 32 South. 500; *Wells v. Northeastern Tel. Co.*, 101 Me. 371, 64 Atl. 648; *Louisville Home Tel. Co. v. Gasper*, 123 Ky. 128, 93 S. W. 1057, 29 Ky. Law Rep. 578, 9 L. R. A. (N. S.) 548; *Walther v. American Dist. Tel. Co.*, 11 Misc. Rep. 71, 32 N. Y. Supp. 751; *Southern Tel., etc., Co. v. Evans*, 54 Tex. Civ. App. 63, 116 S. W. 418; *Bishop v. Rocky Mountain Bell Tel. Co.*, 33 Utah, 464, 94 Pac. 976; *Jackson v. Wisconsin Tel. Co.*, 88 Wis. 243, 60 N. W. 430, 26 L. R. A. 101; *Tel. Co. v. Peters*, 103 Ark. 564, 148 S. W. 273; *Reid v. Tel. Co.*, 151 App. Div. 96, 135 N. Y. Supp. 846; *Thompson v. Reed*, 29 S. D. 85, 135 N. W. 679; *Tel. Co. v. Asbury*, 147 Ky. 307, 143 S. W. 1050; *Stuhr v. Tel. Co.*, 119 Minn. 508, 138 N. W. 693; *Realty, etc., Co. v. Tel., etc., Co.*, 122 Minn. 424, 142 N. W. 807; *Thomas v. West. U. Tel. Co.*, 100 Mass. 156.

Insufficient to support verdict, see *Jacks v. Reeves*, 78 Ark. 426, 95 S. W. 781; *Lee v. Maryland Tel., etc., Co.*, 97 Md. 692, 55 Atl. 680; *Johnson v. Northwestern Tel. Exch.*, 54 Minn. 37, 55 N. W. 829; *Brinckkord v. West. U. Tel. Co.*, 58 Hun, 610, 12 N. Y. Supp. 534; *Fitch v. Central New York Tel., etc., Co.*, 42 App. Div. 321, 59 N. Y. Supp. 140; *Tel. Co. v. Fleming*, 53 Ind. App. 555, 102 N. E. 163; *Wood v. Tel., etc., Co.*, 151 Ky. 77, 151 S. W. 29.

negating contributory negligence on his own part.<sup>140</sup> Where the burden is on the injured party to prove negligence on the part of the company, it generally becomes a question to be decided by the jury;<sup>141</sup> as, where there was evidence that the company's wires had been detached from a pole so as to obstruct a highway for two days prior to an injury occasioned thereby, it was a question for the jury whether or not the company had exercised due care in discovering and remedying the condition of the wires.<sup>142</sup> Evidence to the effect that the wire became detached because of being fastened to a rotten arm was sufficient to warrant a finding that the use of the cross-arm was negligence, proximately causing plaintiff's injury.<sup>143</sup> But the question of admissibility of evidence should be left to the court.<sup>144</sup> So where an action for damages for injuries sustained by being thrown over a telephone wire, it is a question as to whether evidence should be admitted to show that shortly after the accident the defendant raised its wires at that point. It has been held that such evidence was admissible.<sup>145</sup> Evidence has been admitted to show the height of the wires on a prior day;<sup>146</sup> this is not, however, the general doctrine.<sup>147</sup> Upon

<sup>140</sup> *Dickey v. Maine Tel. Co.*, 43 Me. 492; *Tel. Co. v. Fleming*, 53 Ind. App. 555, 102 N. E. 163.

<sup>141</sup> See § 207.

<sup>142</sup> *Postal Tel. Cable Co. v. Jones*, 133 Ala. 217, 32 South. 500.

<sup>143</sup> *Clairain v. West. U. Tel. Co.*, 40 La. Ann. 178, 30 South. 625. See *Meek v. Nebraska Tel. Co.*, 96 Neb. 539, 148 N. W. 325.

<sup>144</sup> *West. U. Tel. Co. v. Levi*, 47 Ind. 552; *Southwestern Tel., etc., Co. v. Whiteman*, 36 Tex. Civ. App. 163, 81 S. W. 76; *Fish v. Waverly Elec., etc., Co.*, 189 N. Y. 336, 82 N. E. 150, 13 L. R. A. (N. S.) 226, opinion evidence; *Pennebaker v. San Joaquin L., etc., Co.*, 158 Cal. 579, 112 Pac. 459, 31 L. R. A. (N. S.) 1099, 139 Am. St. Rep. 202; *Harrison v. Kansas City Elec., etc., Co.*, 195 Mo. 606, 93 S. W. 951, 7 L. R. A. (N. S.) 293, not admissible.

<sup>145</sup> *Pennsylvania Tel. Co. v. Varnau* (Pa.) 15 Atl. 624. See *Snyder v. Mutual Tel. Co.*, 135 Iowa, 215, 112 N. W. 776, 14 L. R. A. (N. S.) 321; *Musolf v. Edison Elec. Co.*, 108 Minn. 369, 122 N. W. 499, 24 L. R. A. (N. S.) 451.

<sup>146</sup> *Pennsylvania Tel. Co. v. Varnau* (Pa.) 15 Atl. 624; *Gloucester Elec.*

<sup>147</sup> *Nalley v. Hartford, etc., Co.*, 51 Conn. 524, 50 Am. Rep. 47; *Delaney v. Hilton*, 50 N. Y. Super. Ct. 341; *Henkel v. Murr*, 31 Hun (N. Y.) 28; *Martin v. Towle*, 59 N. H. 31; *Tyler v. Todd*, 36 Conn. 220; *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1; *Wooley v. Grand St., etc., R. Co.*, 83 N. Y. 121; *Sewell v. Cohoes*, 75 N. Y. 45, 31 Am. Rep. 418; *Hudson v. Chicago, etc., R. Co.*, 59 Iowa, 581, 13 N. W. 735, 44 Am. Rep. 692; *Cramer v. Burlington*, 45 Iowa, 627; *Morrell v. Peck*, 24 Hun (N. Y.) 37; *Terre Haute, etc., R. Co. v. Clem*, 123 Ind. 15, 23 N. E. 965, 7 L. R. A. 588, 18 Am. St. Rep. 303; *Ely v. St. Louis, etc., R. Co.*, 77 Mo. 34; *Dale v. Delaware, etc., R. Co.*, 73 N. Y. 471; *Morse v. Minneapolis, etc., R. Co.*, 30 Minn. 465, 16 N. W. 358; *Baird v. Daly*, 68 N. Y. 551; *Id.*, 57 N. Y. 236, 15 Am. Rep. 488.

an issue as to the soundness of certain poles which had fallen, it is error to admit evidence of the soundness of other poles near them, without showing some proof that their condition ought to be the same as that of the others.<sup>148</sup> Evidence that after the occurrence of the injury the company repaired the place where the injury occurred, or discharged a negligent servant, is inadmissible; since to admit such would be to place a premium upon the continuance of negligence.<sup>149</sup> And evidence which tends to prove that other parties had passed safely along the place of the accident should not be admitted, as this is not proof of the exercise of proper care by the company.<sup>150</sup> But evidence may be admitted to show that others received injuries at the same place and in the same manner;<sup>151</sup> yet this has been otherwise held by some of the courts.<sup>152</sup> In determining relevancy or admissibility of evidence, the court should al-

Co. v. Kankas, 120 Fed. 490, 56 C. C. A. 640, where position of wire has not been materially changed, the testimony of a witness as to the height of the wire where the injury occurred, five or ten minutes after the accident, is competent as showing the position of the wire at the time of the injury in respect to exposing people unreasonably and negligently to danger. See *Randall v. Northwestern Tel. Co.*, 54 Wis. 142, 11 N. W. 419, 41 Am. Rep. 17, wires and posts frequently down for a few months before accident; *East Tennessee Tel. Co. v. Simm*, 99 Ky. 404, 36 S. W. 171; *Same v. Sim*, 20 Ky. Law Rep. 1330, 38 S. W. 131, wire overcharged on prior occasions; *Consolidated Gas, etc., Co. v. State*, 109 Md. 186, 72 Atl. 651, condition of wires two weeks prior to accident; *Rondeau v. Sayles*, 30 R. I. 228, 74 Atl. 785, light frequently gone out in wire for five years prior to accident, all held admissible. See note to 32 L. R. A. (N. S.) 1084.

<sup>148</sup> *West, U. Tel. Co. v. Levi*, 47 Ind. 552; *Snyder v. Mutual Tel. Co.*, 135 Iowa, 215, 112 N. W. 776, 14 L. R. A. (N. S.) 321; *West v. Bayfield Mill Co.*, 144 Wis. 106, 128 N. W. 992, 45 L. R. A. (N. S.) 134, as to condition of insulation at other times.

<sup>149</sup> *Readman v. Conway*, 126 Mass. 374; *Sewell v. Cohoes*, 11 Hun (N. Y.) 626; *Couch v. Watson Coal Co.*, 46 Iowa, 17; *Campbell v. Chicago, etc., R. Co.*, 45 Iowa, 76. But see *Pennsylvania Tel. Co. v. Varnau* (Pa.) 15 Atl. 624. See, also, *Colorado Elec. Co. v. Lubbers*, 11 Colo. 505, 19 Pac. 479, 7 Am. St. Rep. 255; *Ziehm v. United Elec., etc., Co.*, 104 Md. 48, 64 Atl. 61; *Kraatz v. Brush Elec. Lt. Co.*, 82 Mich. 457, 46 N. W. 787; *Wynnewood v. Cox*, 31 Okl. 563, 122 Pac. 528, Ann. Cas. 1913E, 349; *Geer v. New York, etc., Tel. Co.*, 144 App. Div. 874, 129 N. Y. Supp. 784; *Harrington v. Com'rs*, 153 N. C. 437, 69 S. E. 399. See, also, § 516. See, also, *Riley v. City of Independence*, 258 Mo. 671, 167 S. W. 1022, Ann. Cas. 1915D, 748.

<sup>150</sup> *Branch v. Libbey*, 78 Me. 321, 5 Atl. 71, 57 Am. Rep. 810; *Hudson v. Chicago, etc., R. Co.*, 59 Iowa, 581, 13 N. W. 735, 44 Am. Rep. 692; *Hubbard v. Concord*, 35 N. H. 52, 69 Am. Dec. 520.

<sup>151</sup> *Wooley v. Grand St., etc., R. Co.*, 83 N. Y. 121; *Phelps v. Winona, etc., R. Co.*, 37 Minn. 485, 35 N. W. 273, 5 Am. St. Rep. 867.

<sup>152</sup> *Hubbard v. Concord*, 35 N. H. 52, 69 Am. Dec. 520; *Piollet v. Simmers*,



ways forbid the admission of testimony to a collateral fact which furnishes no legal inference as to the principal fact in dispute.<sup>153</sup> To state the numberless decisions on the relevancy or admissibility of certain evidence in negligent cases would be an almost impossible task, but the general rule governing the admission of evidence in civil cases applies as well to the subject under consideration as elsewhere.<sup>154</sup> Therefore it will hardly be advisable to enter into a discussion of any length on this subject, but refer the reader to treatises on this particular subject.

§ 210. **Contributory and imputed negligence.**—As in other cases of negligence, contributory negligence on the part of the plaintiff in an action for injury done by any of these electrical companies in the construction or maintenance of their lines precludes recovery.<sup>155</sup> This rule applies as well where the injury is to the plain-

106 Pa. 95, 51 Am. Rep. 496; *Aldrich v. Inhabitants of Pelham*, 1 Gray (Mass.) 510; *Johnson v. Manhattan R. Co.*, 52 Hun, 111, 4 N. Y. Supp. 848.

<sup>153</sup> 1 Whart. on Ev. §§ 29, 40; *Collins v. Dorchester*, 6 Cush. (Mass.) 397; *Aldrich v. Inhabitants of Pelham*, 1 Gray (Mass.) 510.

<sup>154</sup> Wharton on Ev. §§ 40-44; 1 Greenleaf on Ev. § 49c, p. 72 (14th Ed.). The clothing worn by a person at the time of coming in contact with a wire is admissible as tending to illustrate the manner in which an injury was caused. *Quincy Gas, etc., Co. v. Baumann*, 203 Ill. 295, 67 N. E. 807. See *Walters v. Syracuse, etc., Ry. Co.*, 178 N. Y. 50, 70 N. E. 98.

Photographs, laying foundation for admission of enlargement, see *Diller v. Northern California Power Co.*, 162 Cal. 531, 123 Pac. 359, Ann. Cas. 1913D, 908.

Admissions and declarations, admissions of corporate agents, see *Diller v. Northern California Power Co.*, 162 Cal. 531, 123 Pac. 359, Ann. Cas. 1913D, 908. But see *Randall v. Northwestern Tel. Co.*, 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17; *Brunke v. Missouri, etc., Tel. Co.*, 115 Mo. App. 36, 90 S. W. 753, an action for injury to a pedestrian by a tool thrown from one lineman to another, in which evidence was admitted to show that it was customary to pass tools by means of a line. See *Leeds v. New York Tel. Co.*, 79 App. Div. 121, 80 N. Y. Supp. 114; *Thompson v. Reed*, 29 S. D. 85, 135 N. W. 679. See *Riley v. City of Independence*, 258 Mo. 671, 167 S. W. 1022, Ann. Cas. 1915D, 748, defective switch box.

<sup>155</sup> *Katafiasz v. Toledo Consol. Elec. Co.*, 24 Ohio Cir. Ct. R. 127; *Pennebaker v. San Joaquin Lt., etc., Co.*, 158 Cal. 579, 112 Pac. 459, 31 L. R. A. (N. S.) 1099, 139 Am. St. Rep. 202; *Lofton v. Elec. Co.*, 61 Fla. 293, 54 South. 959; *Foley v. Power Co.*, 14 Cal. App. 401, 112 Pac. 467; *Brunelle v. Light Corp.*, 188 Mass. 493, 74 N. E. 676; *Id.*, 194 Mass. 407, 80 N. E. 466; *Winkelman v. Light Co.*, 110 Mo. App. 184, 85 S. W. 99; *Charette v. L'Anse*, 154 Mich. 304, 117 N. W. 737; *Carroll v. Elec. Co.*, 52 Or. 370, 97 Pac. 552; *Gentzkow v. R. Co.*, 54 Or. 114, 102 Pac. 614, 135 Am. St. Rep. 821; *Weir v. Light Co.*, 221 Pa. 611, 70 Atl. 874; *Haertel v. Light, etc., Co.*, 219 Pa. 640, 69 Atl. 282; *Everett v. Elec. Co.*, 228 Pa. 241, 77 Atl. 460; *Edmundson v. Light Co.*, 223 Pa. 93, 72 Atl. 268; *Milne v. Tel. Co.*, 29 R. I. 504, 72 Atl. 716;

tiff's property as where it is to his person.<sup>156</sup> Thus one who has notice of the dangerous condition of a wire or other electrical appliance and voluntarily brings himself into contact with it cannot hold the company for the resulting injuries.<sup>157</sup> However, to give rise to this defense, it must be shown that the plaintiff in coming in

*Billington v. R., etc., Co.*, 137 Wis. 416, 119 N. W. 127; *Requena de Molina v. Light, etc., Co.*, 4 Porto Rico Fed. 356; *Light, etc., Co. v. Laurence*, 39 Can. S. Ct. 326; *Randall v. Elec. Co.*, 6 Ont. L. R. 619, 2 Ont. W. R. 146; *Borell v. Tel. Co.*, 133 La. 630, 63 South. 247. See *Tel. Co. v. Arnold* (Ky.) 119 S. W. 811; *Hodgins v. Bay City*, 156 Mich. 687, 121 N. W. 274, 132 Am. St. Rep. 546. See, also, *Ergo v. Merced Falls Gas, etc., Co.*, 161 Cal. 334, 119 Pac. 101, 41 L. R. A. (N. S.) 79; *Clements v. Louisiana Elec. Lt. Co.*, 44 La. Ann. 692, 11 South. 51, 32 Am. St. Rep. 348, 16 L. R. A. 43; *Stark v. Muskegon Tr., etc., Co.*, 141 Mich. 575, 104 N. W. 1100, 1 L. R. A. (N. S.) 822; *Carroll v. Elec. Co.*, 47 Or. 424, 84 Pac. 389, 6 L. R. A. (N. S.) 290; *Burnett v. Ft. Worth, etc., Co.*, 102 Tex. 31, 112 S. W. 1040, 19 L. R. A. (N. S.) 504; *Anderson v. Inland Tel., etc., Co.*, 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410.

<sup>156</sup> See § 196. See *Southern Bell, etc., Tel. Co. v. Watts*, 66 Fed. 460, 13 C. C. A. 579.

<sup>157</sup> *Cook v. Wilmington City Elec. Co.*, 9 Houst. (Del.) 306, 32 Atl. 643; *Columbus R. Co. v. Dorsey*, 119 Ga. 363, 46 S. E. 635; *Frauenthal v. Laclede Gaslight Co.*, 67 Mo. App. 1; *Katafiasz v. Toledo Consol. Elec. Co.*, 24 Ohio Cir. Ct. R. 127; *Gas, etc., Co. v. Davis*, 138 Ky. 628, 128 S. W. 1062; *Shade v. Power Co.*, 152 Cal. 10, 92 Pac. 62; *Woodward v. Taunton*, 203 Mass. 63, 89 N. E. 114; *Johnston v. Light Co.*, 78 Neb. 27, 113 N. W. 526, 17 L. R. A. (N. S.) 435; *Hickok v. Power Co.*, 200 N. Y. 464, 93 N. E. 1113; *McNamee v. Tel. Co.*, 140 App. Div. 874, 125 N. Y. Supp. 622; *Carroll v. Elec. Co.*, 47 Or. 424, 84 Pac. 389, 6 L. R. A. (N. S.) 290; *Requena de Molina v. Light, etc., Co.*, 4 Porto Rico Fed. 356; *Billington v. R., etc., Co.*, 137 Wis. 416, 119 N. W. 127; *Junior v. Missouri Elec. etc., Co.*, 127 Mo. 79, 29 S. W. 988; *Tri-City Ry. Co. v. Killeen*, 92 Ill. App. 57; *Dansville St. Car. Co. v. Watkins*, 97 Va. 713, 34 S. E. 884; *Anderson v. Jersey City Elec., etc., Co.*, 64 N. J. Law, 664, 46 Atl. 593; *Wood v. Diamond Elec. Co.*, 185 Pa. 529, 39 Atl. 1111; *Stark v. Muskegon Tr. Co.*, 141 Mich. 575, 104 N. W. 1100, 1 L. R. A. (N. S.) 822, and note. But see *Diller v. Northern California Power Co.*, 162 Cal. 531, 123 Pac. 359, Ann. Cas. 1913D, 908; *Clements v. Louisiana Elec., etc., Co.*, 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348; *Leavenworth v. Ratchford*, 5 Kan. App. 150, 48 Pac. 927; *Dillon v. Allegheny, etc., L. Co.*, 179 Pa. 482, 36 Atl. 164; *Snyder v. Mutual Tel. Co.*, 135 Iowa, 215, 112 N. W. 776, 14 L. R. A. (N. S.) 321; *Musolf v. Duluth Edison Elec. Co.*, 108 Minn. 349, 122 N. W. 499, 24 L. R. A. (N. S.) 451; *Weaver v. Dawson County, etc. Tel. Co.*, 82 Neb. 696, 118 N. W. 650, 22 L. R. A. (N. S.) 1189, not bound to anticipate danger; *Ryan v. St. Louis Tr. Co.*, 190 Mo. 621, 89 S. W. 865, 2 L. R. A. (N. S.) 777; *Mangan v. Louisville Elec. L. Co.*, 122 Ky. 476, 91 S. W. 703, 6 L. R. A. (N. S.) 459; *Ferrell v. Dixie Cotton Mills*, 157 N. C. 528, 73 S. E. 142, 37 L. R. A. (N. S.) 64; *Braun v. Buffalo, etc., Elec. Co.*, 200 N. Y. 484, 94 N. E. 206, 35 L. R. A. (N. S.) 1089, 140 Am. St. Rep. 645, 21 Ann. Cas. 370; *Miner v. Franklin County Tel. Co.*, 83 Vt. 311, 75 Atl. 653, 26 L. R. A. (N. S.)

contact with the appliances voluntarily and unnecessarily exposed himself to danger,<sup>158</sup> and, if reasonable men might honestly differ on the question, the court will not hold the plaintiff guilty of contributory negligence as a matter of law.<sup>159</sup> While in most jurisdictions negligence of the parents, or others *in loco parentis*, cannot be imputed to a child to support the plea of contributory negligence,

1195. A person traveling in a public street or highway has a right to assume that it is free from dangerous obstacles. *Brush Elec. Co. v. Kelley*, 126 Ind. 220, 25 N. E. 812, 10 L. R. A. 250; *Suburban Elec. Co. v. Nugent*, 58 N. J. Law, 658, 34 Atl. 1069, 32 L. R. A. 700; *Hovey v. Michigan Tel., etc., Co.*, 124 Mich. 607, 83 N. W. 600; *Devlin v. Beacon Light Co.*, 192 Pa. 188, 43 Atl. 962.

<sup>158</sup> *Clements v. Louisiana Elec. L. Co.*, 44 La. Ann. 692, 11 South. 51, 32 Am. St. Rep. 348, 16 L. R. A. 43; *Wolpers v. New York, etc., Elec. L., etc., Co.*, 91 App. Div. 424, 86 N. Y. Supp. 845; *Pierce v. Gas, etc., Co.*, 161 Cal. 176, 118 Pac. 700; *Tackett v. Henderson Bros. Co.*, 12 Cal. App. 658, 108 Pac. 151; *Lighting Co. v. Tyler*, 177 Ind. 278, 96 N. E. 768; *Tel. Co. v. Westcott*, 124 Ky. 684, 99 S. W. 1153, 30 Ky. Law Rep. 922; *Lydon v. Illum. Co.*, 209 Mass. 529, 95 N. E. 936; *Gilbert v. Elec. Co.*, 93 Minn. 99, 100 N. W. 653, 106 Am. St. Rep. 430; *Trout v. Gaslight Co.*, 151 Mo. App. 207, 132 S. W. 58; *Goodwin v. Tel. Co.*, 157 Mo. App. 596, 138 S. W. 940; *Campbell v. R. Co.*, 243 Mo. 141, 147 S. W. 788; *Buckley v. Lighting Co.*, 93 App. Div. 436, 87 N. Y. Supp. 763; *McCabe v. Lighting Co.*, 26 R. I. 427, 59 Atl. 112; *Milne v. Tel. Co.*, 29 R. I. 504, 72 Atl. 716; *Ice Co. v. Moses (Tex. Civ. App.)* 134 S. W. 379; *Drown v. Tel., etc., Co.*, 80 Vt. 1, 66 Atl. 801; *Railroad Co. v. Rubin*, 102 Va. 809, 47 S. E. 834; *Danville v. Thornton*, 110 Va. 541, 66 S. E. 839; *Dover v. Elec. Co. (C. C.)* 155 Fed. 256; *Randall v. Ahearn*, 34 Can. S. Ct. 698.

<sup>159</sup> *Jones v. Finch*, 128 Ala. 217, 29 South. 182; *Giraudi v. Elec. Imp. Co.*, 107 Cal. 120, 40 Pac. 108, 48 Am. St. Rep. 114, 28 L. R. A. 596; *Denver Tr. Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269; *Brush Elec. L. Co. v. Kelley*, 126 Ind. 220, 25 N. E. 812, 10 L. R. A. 250; *Leavenworth Coal Co. v. Ratchford*, 5 Kan. App. 150, 48 Pac. 927; *Williams v. Louisiana Elec. L., etc., Co.*, 43 La. Ann. 295, 8 South. 938; *Suburban Elec. Co. v. Nugent*, 58 N. J. Law, 658, 34 Atl. 1069, 32 L. R. A. 700; *Dillon v. Allegheny County L. Co.*, 179 Pa. 482, 36 Atl. 164; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 19 S. E. 344, 41 Am. St. Rep. 786, 26 L. R. A. 810; *Denver v. Sherret*, 88 Fed. 226, 31 C. C. A. 499; *Pierce v. Gas, etc., Co.*, 161 Cal. 176, 118 Pac. 700; *Prince v. Light Co.*, 201 Mass. 276, 87 N. E. 558; *Hodgins v. Bay City*, 156 Mich. 687, 121 N. W. 274, 132 Am. St. Rep. 546; *Smith v. Tel. Co.*, 113 Mo. App. 429, 87 S. W. 71; *Sommer v. Service Corp.*, 79 N. J. Law, 349, 75 Atl. 892; *Harrington v. Wadesboro*, 153 N. C. 437, 69 S. E. 399; *Frantz v. Elec. Co.*, 231 Pa. 589, 80 Atl. 1106; *Light, etc., Co. v. Arntson*, 157 Fed. 540, 87 C. C. A. 1; *Dunn v. Cavanaugh*, 185 Fed. 451, 107 C. C. A. 521; *Tel., etc., Co. v. Davis*, 12 Ga. App. 28, 76 S. E. 786; *Gas, etc., Co. v. Dibka*, 54 Ind. App. 248, 100 N. E. 877; *State v. Mfg. Co.*, 118 Md. 521, 85 Atl. 615.

Right to assume that electrical appliances in order. *Mangan v. Light Co.*, 122 Ky. 476, 91 S. W. 703, 29 Ky. Law Rep. 38, 6 L. R. A. (N. S.) 459; *Hausler v. Elec. Co.*, 144 Ill. App. 643; *Light Co. v. Dean*, 142 Ky. 678, 134 S. W. 1115; *Ryan v. Transit Co.*, 190 Mo. 621, 89 S. W. 865, 2 L. R. A. (N. S.) 777;



when the action is for the child's benefit,<sup>160</sup> yet when the action is by the parent, in his own right, or for his benefit, the contributory negligence of the parent may be shown in evidence in bar of the action, and this although the action is brought by one parent and the negligence was that of another.<sup>161</sup> And the negligence of the company's servant may be imputed to the company.<sup>162</sup> In cases where the defense of contributory negligence is set up by the company, it will usually be a question of fact to be settled by a jury.<sup>163</sup>

*Clements v. Louisiana Elec. L. Co.*, 44 La. Ann. 692, 11 South. 51, 32 Am. St. Rep. 348, 16 L. R. A. 43; *Knowlton v. Des Moines Edison L. Co.*, 117 Iowa, 451, 90 N. W. 818; *Mitchell v. Raleigh Elec. Co.*, 129 N. C. 166, 39 S. E. 801, 85 Am. St. Rep. 735, 55 L. R. A. 398; *Thomas v. Wheeling Elec. Co.*, 54 W. Va. 395, 46 S. E. 217; *White v. Elec. Co.*, 75 Wash. 139, 134 Pac. 807.

Failure to protect hands does not necessarily constitute negligence. *Snyder v. Mutual Tel. Co.*, 135 Iowa, 215, 112 N. W. 776, 14 L. R. A. (N. S.) 321; *Trout v. Gaslight Co.*, 151 Mo. App. 207, 132 S. W. 58; *Paine v. Elec. Ill.*, etc., Co., 64 App. Div. 477, 72 N. Y. Supp. 279; *Geismann v. Missouri Edison Elec. Co.*, 173 Mo. 654, 73 S. W. 654; *Kelly v. Elec. Co.*, 167 Ill. App. 210.

<sup>160</sup> *Flaherty v. Butte Elec. R. Co.*, 40 Mont. 454, 107 Pac. 416, 135 Am. St. Rep. 630; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786. See note to *Hampel v. Detroit*, etc., R. Co., 110 Am. St. Rep. 278, for cases collated on subject. But see, contra, *Mayor*, etc., of *Cumberland v. Lottig*, 95 Md. 42, 51 Atl. 841. Child may be negligent itself. *Johnston v. Elec. L. Co.*, 78 Neb. 24, 27, 110 N. W. 711, 113 N. W. 526, 17 L. R. A. (N. S.) 435.

<sup>161</sup> See *West. U. Tel. Co. v. Hoffman*, 80 Tex. 420, 15 S. W. 1048, 26 Am. St. Rep. 759. See *Ruehl v. Ledgerwood Rural Tel. Co.*, 23 N. D. 6, 135 N. W. 793, Ann. Cas. 1914C, 680, not negligence to play in yard while poles are being constructed; to same effect *Ferrell v. Dixie Cotton Mills*, 157 N. C. 528, 73 S. E. 142, 37 L. R. A. (N. S.) 64.

<sup>162</sup> *Harrison v. Kansas City Elec. L. Co.*, 195 Mo. 606, 93 S. W. 951, 7 L. R. A. (N. S.) 293, negligence of child not imputed to its father.

<sup>163</sup> *Thomas v. West. U. Tel. Co.*, 100 Mass. 156; *Friesenhan v. Michigan Tel. Co.*, 134 Mich. 292, 96 N. W. 501; *Kyes v. Valley Tel. Co.*, 132 Mich. 281, 93 N. W. 623; *Nebraska Tel. Co. v. Jones*, 60 Neb. 396, 83 N. W. 197; *Campbell v. Delaware*, etc., Tel., etc., Co., 70 N. J. Law, 195, 56 Atl. 303; *New York*, etc., Tel. Co. v. *Bennett*, 62 N. J. Law, 742, 42 Atl. 759; *Little v. Central Dist.*, etc., Tel. Co., 213 Pa. 229, 62 Atl. 848; *Alice*, etc., Tel. Co. v. *Billingsley*, 33 Tex. Civ. App. 452, 77 S. W. 255; *Randall v. Northwestern Tel. Co.*, 54 Wis. 140, 11 N. W. 419, 41 Am. St. Rep. 17; *Dobbins v. Tel. Co.*, 163 Ala. 222, 50 South. 919, 136 Am. St. Rep. 69; *Longlevy v. Tel.*, etc., Co., 205 Mass. 46, 90 N. E. 1145; *Snee v. Tel. Co.*, 24 S. D. 361, 123 N. W. 729; *Texarkana Gas*, etc., Co. v. *Orr*, 59 Ark. 215, 27 S. W. 66, 43 Am. St. Rep. 30; *Bergin v. Southern*, etc., Tel. Co., 70 Conn. 54, 38 Atl. 888, 39 L. R. A. 192; *Cosgrove v. Kennebec L.*, etc., Co., 98 Me. 473, 57 Atl. 841; *Reagan v. Boston Elec.*, etc., Co., 167 Mass. 406, 45 N. E. 743; *Proctor v. San Antonio St. R. Co.*, 26 Tex. Civ. App. 148, 62 S. W. 938, 939; *Southern Bell Tel.* etc., Co. v. *Davis*, 12 Ga. App. 28, 76 S. E. 786; *Michigan*, etc., Elec. Co. v. *Dibka*, 54 Ind. App. 248, 100 N. E. 877; *Lewis v. Bowling Green Gaslight Co.*, 135 Ky. 611, 117 S. W. 278, 22 L. R. A. (N. S.)

In the absence of Employers' Liability Laws, or other statutes abrogating the defense, an employ   may not recover from his company damages for injuries, where his negligence contributed to the receipt of the injury.<sup>164</sup>

§ 211. Injuries to servants—under common law.—The question whether servants or employ  s of telegraph, telephone, and electri-

1169; *Goodwin v. Columbia Tel. Co.*, 157 Mo. App. 596, 138 S. W. 940; *Miller v. Lewiston Elec. L., etc., Co.*, 212 Pa. 593, 62 Atl. 32; *Fox v. Manchester*, 183 N. Y. 141, 75 N. E. 1116, 2 L. R. A. (N. S.) 474; *Braun v. Elec. Co.*, 200 N. Y. 484, 94 N. E. 206, 35 L. R. A. (N. S.) 1089, 140 Am. St. Rep. 645, 21 Ann. Cas. 370.

Contributory negligence as a question of law, see *Citizens' Tel. Co. v. Westcott*, 124 Ky. 684, 99 S. W. 1153, 30 Ky. Law Rep. 922; *Johnston v. New Omaha Thomson-Houston E. L. Co.*, 78 Neb. 27, 113 N. W. 526, 17 L. R. A. (N. S.) 435.

<sup>164</sup> Question for jury, *O'Donnel v. Louisville Elec. Lt. Co.*, 21 Ky. Law Rep. 1362, 55 S. W. 202; *Martin v. New Jersey St. Ry. Co.*, 81 N. J. Law, 562, 80 Atl. 477, Ann. Cas. 1912D, 212; however it may be a question of law, *Dixon v. Louisiana Elec. Lt., etc., Co.*, 47 La. Ann. 1147, 17 South. 696; *Mulligan v. McCaffery*, 182 Mass. 420, 65 N. E. 831; handling of wire itself not contributory negligence, *Myhan v. Louisiana Elec. Lt., etc., Co.*, 41 La. Ann. 964, 6 South. 799, 17 Am. St. Rep. 436, 7 L. R. A. 122; may assume that company has not enhanced danger, *Birmingham Ry., etc., Co. v. Canfield*, 177 Ala. 422, 59 South. 217; *Myhan v. Louisiana Elec., etc., Co.*, supra; *Hubbard v. Central, etc., R. Co.*, 131 Ga. 658, 63 S. E. 19, 19 L. R. A. (N. S.) 738, Alabama's Liability Act.

*Failure to use rubber gloves* when necessary, contributory negligence. *Junior v. Missouri, etc., P. Co.*, 127 Mo. 79, 29 S. W. 988; *Larkin v. Queensborough Gas, etc., Co.*, 158 App. Div. 414, 143 N. Y. Supp. 578; *Hart v. Allegheny Co., Lt. Co.*, 201 Pa. 234, 50 Atl. 1010; the rule otherwise if the servant had no reasonable knowledge that the wire was charged, *Harroun v. Brush Elec., etc., Co.*, 12 App. Div. 126, 42 N. Y. Supp. 716; *Marion Lt., etc., Co. v. Vermilion*, 51 Ind. App. 677, 99 N. E. 55, 100 N. E. 100; *Id.*, 94 N. E. 1038.

*Use of safety belt.*—The failure to use safety belt when necessary contributory negligence. *Roberts v. Missouri, etc., Tel. Co.*, 166 Mo. 370, 66 S. W. 155; *Smithgall v. American Union Tel. Co.*, 45 Pa. Super. Ct. 378, will not ordinarily be inferred.

*Contact with appliances known to be dangerous.*—Should not be allowed to recover for injuries therefrom. *Sweezo v. Cheyboygan Elec. Lt., etc., Co.*, 166 Mich. 25, 131 N. W. 125; *Anglin v. American Const., etc., Co.*, 109 App. Div. 237, 96 N. Y. Supp. 49; *Woelflen v. Lewiston, etc., Co.*, 49 Wash. 407, 95 Pac. 493; *Ergo v. Merced, etc., Elec. Co.*, 161 Cal. 334, 119 Pac. 101, 41 L. R. A. (N. S.) 79; *Epperson v. Postal Tel. Cable Co.*, 155 Mo. 346, 50 S. W. 795, 55 S. W. 1050. See *East Tennessee Tel. Co. v. Bowen*, 143 Ky. 777, 137 S. W. 523.

*Contact with appliance not known to be dangerous.*—Should be allowed to recover damages for. *Jordan v. Missouri, etc., Tel. Co.*, 136 Mo. App. 192, 116 S. W. 432; *Poor v. Madison River P. Co.*, 38 Mont. 341, 99 Pac. 947; *Latimer v. General Elec. Co.*, 81 S. C. 374, 62 S. E. 438; *Cessna v. Metropolitan St. Ry.*, 118 Mo. App. 659, 95 S. W. 277; *Smith v. Milwaukee Elec., etc., Lt. Co.*, 127 Wis. 253, 106 N. W. 829, question for jury; *Reeve v. Colusa Gas, etc., Co.*, 152

cal companies may recover damages from them for injuries sustained while discharging their duties thereunder, must be settled by the rules applicable to master and servant.<sup>165</sup> Where this rule

Cal. 99, 92 Pac. 89; Tel. Co. v. St. Clair, 168 Fed. 645, 94 C. C. A. 109; Haworth v. Mineral Belt Tel. Co., 105 Mo. App. 161, 79 S. W. 727; Raab v. Hudson River Tel. Co., 139 App. Div. 286, 123 N. Y. Supp. 1037; Southern Bell Tel., etc., Co. v. Shamos, 12 Ga. App. 463, 77 S. E. 312, "riding the cable"; Grimm v. Omaha Elec., etc., Co., 79 Neb. 387, 395, 112 N. W. 620, 114 N. W. 769; Memphis Consol. Gas, etc., Co. v. Simpson (Tenn.) 109 S. W. 1155, where defect or danger may be observed, rule otherwise.

*Touching wire while grounded.*—Where an experienced lineman knowingly touches grounded wire, guilty of contributory negligence. Smart v. Louisiana Elec. Lt. Co., 47 La. Ann. 869, 17 South. 346; Piedmont Elec. Ill. Co. v. Paterson, 84 Va. 747, 6 S. E. 4.

*Defect in pole, failure to discover.*—Defect in a pole which could have been discovered by reasonable inspection, failure so to do by an experienced lineman who is injured as the result, cannot recover. Livingway v. Houghton Co., etc., R. Co., 145 Mich. 86, 108 N. W. 662; West. U. Tel. Co. v. Holtby, 29 Ky. Law Rep. 523, 93 S. W. 652; Walsh v. New York, etc., R. Co., 80 App. Div. 316, 80 N. Y. Supp. 767; Terrell v. Washington, 158 N. C. 281, 73 S. E. 888; Jones v. Postal Tel. Cable Co., 91 S. C. 273, 74 S. E. 492; Berley v. West. U. Tel. Co., 82 S. C. 360, 64 S. E. 157; Abiline, etc., Water Co. v. Robinson, 62 Tex. Civ. App. 219, 131 S. W. 299; Southern Bell Tel., etc., Co. v. Clements, 98 Va. 1, 34 S. E. 951; Johnston v. Syracuse Lighting Co., 193 N. Y. 592, 86 N. E. 539, 127 Am. St. Rep. 988, defect in cross-arm.

*Disobedience of orders or rules.*—When employé disobeys the orders of the company or fails to observe its rules, cannot ordinarily recover. West Kentucky Coal Co. v. Kuykendall, 151 Ky. 384, 151 S. W. 928; Lapsley v. United Electric Co., 79 N. J. Law, 131, 74 Atl. 283; Illinois Steel Co. v. Kinnare, 100 Ill. App. 208; McIsaac v. Electric Co. (R. I.) 83 Atl. 754, if the rules have not been rescinded or abrogated; Southern Bell Tel., etc., Co. v. Shamos, 12 Ga. App. 463, 77 S. E. 312; West. U. Tel. Co. v. Tweed (Tex. Civ. App.) 138 S. W. 1155.

*Employé acting in emergencies.*—Not ordinarily guilty of contributory negligence. Sandquist v. Independent Tel. Co., 38 Wash. 313, 80 Pac. 539; Kansas City, etc., Ry. Co. v. Rogers, 203 Fed. 462, 121 C. C. A. 586; Jacksonville Elec. Co. v. Sloan, 52 Fla. 257, 42 South. 516; Mehan v. Lowell Elec., etc., Corp., 192 Mass. 53, 78 N. E. 385, question for jury.

<sup>165</sup> West. U. Tel. Co. v. Tracy, 114 Fed. 282, 52 C. C. A. 168; Bergin v. Southern New Eng. Tel. Co., 70 Conn. 54, 38 Atl. 888, 39 L. R. A. 192; McGorty v. Southern New Eng. Tel. Co., 69 Conn. 635, 38 Atl. 359, 61 Am. St. Rep. 62; Jenney Elec. L., etc., Co. v. Murphy, 115 Ind. 566, 18 N. E. 30; Clairain v. West. U. Tel. Co., 40 Ia. Ann. 178, 30 South. 625; Maryland Tel., etc., Co. v. Cloman, 97 Md. 620, 55 Atl. 681; Flood v. West. U. Tel. Co., 61 Hun, 619, 15 N. Y. Supp. 400; Chalmers v. Paterson, etc., Tel. Co., 66 N. J. Law, 41, 48 Atl. 993; Postal Tel. Cable Co. v. Coote (Tex. Civ. App.) 57 S. W. 912; General Elec. Co. v. Murray, 32 Tex. Civ. App. 226, 74 S. W. 50; Davis v. Port Huron Engine, etc., Co., 126 Mich. 429, 85 N. W. 1125; Carr v. Manchester Elec. Co., 70 N. H. 308, 48 Atl. 286; Junior v. Missouri Elec., etc., Co., 127 Mo. 79, 29 S. W. 988; Newnom v. Southwestern, etc., Tel. Co. (Tex. Civ. App.) 47 S. W. 669; Pell Tel. Co. v. Detharding, 148 Fed. 371, 78 C. C. A. 185; Ambre v. Postal



has not been changed by legislation, it is well settled that a servant assumes the obvious risks of the service into which he enters, even if the business be ever so dangerous.<sup>166</sup> This is implied in his voluntary undertaking, and it comes within a principle which has a much broader and more general application, and which is expressed in the maxim, *Volenti non fit injuria*. The reason on which it is founded is that, whatever may be the master's general duty to conduct his business safely in reference to persons who may be affected by it, he owes no legal duty in that respect to one who contracts to work in the business as it is.<sup>167</sup> So the general rule is that an experienced lineman assumes the risk of the breaking of any pole he is called upon to climb in the course of his employment, if the defect which caused the pole to break was not of original construction, and that, therefore, the company owes him no duty to inspect the pole before sending him upon it.<sup>168</sup> However, the rule

Tel. Cable Co., 43 Ind. App. 47, 86 N. E. 871; Cahill v. New Eng., etc., Tel. Co., 193 Mass. 415, 79 N. E. 821; Shore v. Spokane, etc., R. Co., 57 Wash. 212, 106 Pac. 753; Chisholm v. New England, etc., Tel. Co., 176 Mass. 125, 57 N. E. 383; Fritz v. Salt Lake, etc., Elec. Co., 18 Utah, 493, 56 Pac. 90; De Kallands v. Washtenaw Home Tel. Co., 153 Mich. 25, 116 N. W. 564, 15 Ann. Cas. 593; Harrison v. Detroit, etc., R. Co., 137 Mich. 78, 100 N. W. 451; Mobile Elec. Co. v. Sanges, 169 Ala. 341, 53 South. 176, Ann. Cas. 1912B, 461.

<sup>166</sup> Southwestern Tel. Co. v. Woughter, 56 Ark. 206, 19 S. W. 575; Ambre v. Postal Tel. Cable Co., 43 Ind. App. 47, 86 N. E. 871; Clark v. Johnson Co. Tel. Co., 137 Iowa, 81, 114 N. W. 554; Barto v. Iowa Tel. Co., 126 Iowa, 241, 101 N. W. 876, 106 Am. St. Rep. 347; West. U. Tel. Co. v. McMullen, 58 N. J. Law. 155, 33 Atl. 384, 32 L. R. A. 351; West. U. Tel. Co. v. Burton, 53 Tex. Civ. App. 378, 115 S. W. 364; Miner v. Franklin Co. Tel. Co., 83 Vt. 311, 75 Atl. 653, 26 L. R. A. (N. S.) 1195; Anderson v. Inland Tel. Co., 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410. He does not assume the risk of his employer's negligence, Erwin v. Missouri, etc., Tel. Co., 173 Mo. App. 508, 158 S. W. 913, unless he has actual knowledge thereof or are so obvious as to charge him with constructive notice, Burke v. Union Coal, etc., Co., 157 Fed. 178, 84 C. C. A. 626; Kath v. East St. Louis, etc., R. Co., 232 Ill. 126, 83 N. E. 533, 15 L. R. A. (N. S.) 1109; West. U. Tel. Co. v. McMullen, supra; Mobile Elec. Co. v. Sanges, 169 Ala. 341, 53 South. 176, Ann. Cas. 1912B, 461; Willis v. Plymouth, etc., Tel. Co., 75 N. H. 453, 75 Atl. 877, 30 L. R. A. (N. S.) 477; McGuire v. Bell Tel. Co., 167 N. Y. 208, 60 N. E. 433, 52 L. R. A. 437; Nordstrom v. Spokane, etc., R. Co., 55 Wash. 521, 104 Pac. 809, 25 L. R. A. (N. S.) 364; Consolidated Gas, etc., Co. v. Chambers, 112 Md. 324, 75 Atl. 241, 26 L. R. A. (N. S.) 509; Lynch v. Saginaw Valley Tr. Co., 153 Mich. 174, 116 N. W. 983, 21 L. R. A. (N. S.) 774; Ashton v. Boston, etc., R. Co., 222 Mass. 65, 109 N. E. 820, L. R. A. 1916B, 1281; Borell v. Cumberland Tel., etc., Co., 133 La. 630, 63 South. 247, L. R. A. 1916D, 1064; Perry v. Ohio Valley Elect. R. Co., 72 W. Va. 282, 78 S. E. 692, L. R. A. 1916D, 962.

<sup>167</sup> See Fitzgerald v. Connecticut Paper Co., 155 Mass. 155, 29 N. E. 464, 31 Am. St. Rep. 537; Rolseth v. Smith, 38 Minn. 14, 35 N. W. 565, 8 Am. St. Rep. 637.

<sup>168</sup> Britton v. Central U. Tel. Co., 131 Fed. 844, 65 C. C. A. 598; Mobile Elec.

would be otherwise if it is shown that it was the custom and practice of the company to inspect its poles;<sup>169</sup> and some authorities

*Co. v. Sanges*, 169 Ala. 341, 53 South. 176, Ann. Cas. 1912B, 461; *Dixon v. West. U. Tel. Co. (C. C.)* 68 Fed. 630; *McGorty v. Southern New Eng. Tel. Co.*, 69 Conn. 635, 38 Atl. 359, 61 Am. St. Rep. 62; *Lynch v. Saginaw Valley Tr. Co.*, 153 Mich. 174, 116 N. W. 983, 21 L. R. A. (N. S.) 774; *Krimmel v. Edison Illum. Co.*, 130 Mich. 613, 90 N. W. 336; *Saxton v. Northwestern Tel. Exch. Co.*, 81 Minn. 314, 84 N. W. 109; *Leach v. Central New York Tel., etc., Co.*, 81 App. Div. 637, 80 N. Y. Supp. 1037; *Cumberland Tel. Co. v. Loomis*, 87 Tenn. 504, 11 S. W. 356; *Southwestern, etc., Tel. Co. v. Tucker*, 102 Tex. 224, 114 S. W. 790, reversed 50 Tex. Civ. App. 476, 110 S. W. 481; *Kellogg v. Denver City Tramway Co.*, 18 Colo. App. 475, 72 Pac. 609; *Peoria Gen. Elec. Co. v. Gallagher*, 68 Ill. App. 248; *Ewald v. Michigan C. R. Co.*, 107 Ill. App. 294; *Evansville, etc., L. Co. v. Raley*, 38 Ind. App. 342, 76 N. E. 548, 78 N. E. 254; *McIsaac v. Northampton Elec. L. Co.*, 172 Mass. 89, 51 N. E. 524, 70 Am. St. Rep. 244; *Tanner v. New York, etc., R. Co.*, 180 Mass. 572, 62 N. E. 993; *Broderick v. St. Paul City R. Co.*, 74 Minn. 163, 77 N. W. 28; *De Frates v. Central U. Tel. Co.*, 243 Ill. 356, 90 N. E. 719; *Eigenbrod v. Cumberland, etc., Tel. Co.*, 121 La. 228, 46 South. 219; *Goddard v. Interstate Tel. Co.*, 56 Wash. 536, 106 Pac. 188. But see *Jennison v. Waltham Gaslight Co.*, 201 Mass. 352, 87 N. E. 594; *Clark v. Johnson County Tel. Co.*, 146 Iowa, 428, 123 N. W. 327; *Holden v. Gary Tel. Co.*, 109 Minn. 59, 122 N. W. 1018. Should make inspection himself. *La Duke v. Hudson R. Tel. Co.*, 124 App. Div. 106, 108 N. Y. Supp. 189; *Sias v. Consol. L. Co.*, 73 Vt. 35, 50 Atl. 554; *Consol. Gas, etc., Co. v. Chambers*, 112 Md. 324, 75 Atl. 241, 26 L. R. A. (N. S.) 509, although poles belong to another company. But the means and opportunity must be given to lineman to make such inspection. *La Duke v. Hudson R. Tel. Co.*, 136 App. Div. 136, 120 N. Y. Supp. 171; *McGuire v. Bell Tel. Co.*, 167 N. Y. 208, 60 N. E. 433, 52 L. R. A. 437; *Riker v. New York, etc., R. Co.*, 64 App. Div. 357, 72 N. Y. Supp. 168; *Munroe v. Fred T. Ley & Co.*, 156 Fed. 468, 84 C. C. A. 278; *Lynch v. Saginaw Valley Tr. Co.*, 153 Mich. 174, 116 N. W. 983, 21 L. R. A. (N. S.) 774; *Jones v. Postal Tel. Cable Co.*, 91 S. C. 273, 74 S. E. 492; *Hord v. Pacific Tel., etc., Co.*, 68 Wash. 119, 122 Pac. 598.

<sup>169</sup> *McGuire v. Bell Tel. Co.*, 167 N. Y. 208, 60 N. E. 433, 52 L. R. A. 437. See, also, *West. U. Tel. Co. v. Tracy*, 114 Fed. 282, 52 C. C. A. 168; *Cumberland Tel., etc., Co. v. Bills*, 128 Fed. 272, 62 C. C. A. 620; *Weiden v. Brush Elec. L. Co.*, 73 Mich. 268, 41 N. W. 269; *Essex County Elec. Co. v. Kelly*, 60 N. J. Law, 306, 37 Atl. 619; *Walsh v. New York, etc., R. Co.*, 80 App. Div. 316, 80 N. Y. Supp. 767; *Id.*, 178 N. Y. 588, 70 N. E. 1111; *McDonald v. Postal Tel. Co.*, 22 R. I. 131, 46 Atl. 407; *West. U. Tel. Co. v. Holtby*, 29 Ky. Law Rep. 523, 93 S. W. 652; *Southern Bell, etc., Tel. Co. v. Clements*, 98 Va. 1, 34 S. E. 951; *Dixon v. West. U. Tel. Co. (C. C.)* 71 Fed. 143, rule not affected by the fact that the poles do not belong to employer; *Jackson Fibre Co. v. Meadows*, 159 Fed. 110, 86 C. C. A. 300; *Munroe v. Ley & Co.*, 156 Fed. 468, 84 C. C. A. 278; *Mobile Elec. Co. v. Sanges*, 169 Ala. 341, 53 South. 176, Ann. Cas. 1912B, 461; *Southwestern Tel. Co. v. Woughter*, 56 Ark. 206, 19 S. W. 575; *McIsaac v. Northampton Elec. Lt. Co.*, 172 Mass. 89, 51 N. E. 524, 70 Am. St. Rep. 244; *Willis v. Plymouth, etc., Tel. Co.*, 75 N. H. 453, 75 Atl. 877, 30 L. R. A. (N. S.) 477; *Jones v. Postal Tel. Cable Co.*, 91 S. C. 273, 74 S. E. 492; *Corby v. Missouri, etc., Tel. Co.*, 231 Mo. 417,

seem to impose the duty of inspecting poles upon the companies as a matter of law.<sup>170</sup> The same rules of law are applicable to cross-arms,<sup>171</sup> and to spikes or steps of poles.<sup>172</sup> But it seems that a lineman will not be held to assume the risks arising from defects in the original construction of the poles or its appurtenances;<sup>173</sup> nor does the rule apply to the case of inexperienced linemen;<sup>174</sup> nor to em-

132 S. W. 712; *Hulse v. Home Tel. Co.*, 164 Mo. App. 126, 147 S. W. 1124; *Southwestern Tel., etc., Co. v. Tucker*, 50 Tex. Civ. App. 476, 110 S. W. 481; *Murphy v. Pacific Tel., etc., Co.*, 68 Wash. 643, 124 Pac. 114.

<sup>170</sup> *San Antonio Edison Co. v. Dixon*, 17 Tex. Civ. App. 320, 42 S. W. 1009; *Dupree v. Alexander*, 29 Tex. Civ. App. 31, 68 S. W. 739; *Clairain v. West U. Tel. Co.*, 40 La. Ann. 178, 3 South. 625; *Berley v. West U. Tel. Co.*, 82 S. C. 360, 64 S. E. 157.

<sup>171</sup> *Roberts v. Missouri, etc., Tel. Co.*, 166 Mo. 371, 66 S. W. 155; *Flood v. West U. Tel. Co.*, 131 N. Y. 603, 30 N. E. 196; *Johnston v. Syracuse Lighting Co.*, 193 N. Y. 592, 86 N. E. 539, 127 Am. St. Rep. 988; *Southern Bell Tel. Co. v. Starnes*, 122 Ga. 602, 50 S. E. 343, defect concealed by paint; *Lincoln Gas, etc., L. Co. v. Thomas*, 74 Neb. 257, 104 N. W. 153, safety belt being unbuckled by pole, company not liable; *Consol. Gas, etc., Co. v. Chambers*, 112 Md. 324, 75 Atl. 241, 26 L. R. A. (N. S.) 509. But see *Indianapolis Tel. Co. v. Sproul*, 49 Ind. App. 613, 93 N. E. 463; *Jennison v. Waltham Gas Lt. Co.*, 201 Mass. 352, 87 N. E. 594; *Rutledge v. Swinney*, 170 Mo. App. 251, 156 S. W. 478; *McDonald v. Postal Tel. Co.*, 22 R. I. 131, 46 Atl. 407.

<sup>172</sup> *Little v. Hyde Park Elec. L. Co.*, 191 Mass. 386, 77 N. E. 716; *Foley v. Jersey City Elec. L. Co.*, 54 N. J. Law, 411, 24 Atl. 487; *Gibbons v. Brush Elec. Ill. Co.*, 36 App. Div. 140, 55 N. Y. Supp. 378, frame and hood falling due to rusty condition of screws with which they were fastened to pole; *Greene v. West U. Tel. Co. (C. C.)* 72 Fed. 250, insufficiently guyed "gin" pole; *Mulligan v. McCaffery*, 182 Mass. 420, 65 N. E. 831, lineman using appliances furnished him by company for a purpose for which they were not intended, company not liable; *Towne v. United Elec., etc., P. Co.*, 146 Cal. 766, 81 Pac. 124, 70 L. R. A. 214, 2 Ann. Cas. 905, pole falling because of pike pole used by fellow servant, not penetrating pole. See *Blust v. Pacific Tel. Co.*, 48 Or. 34, 84 Pac. 847, assumes risk of cable falling.

<sup>173</sup> *Chisholm v. New Eng. Tel. Co.*, 185 Mass. 82, 69 N. E. 1042; *Livingway v. Houghton County St. R. Co.*, 145 Mich. 86, 108 N. W. 682; *Bland v. Shreveport Belt R. Co.*, 48 La. Ann. 1057, 20 South. 284, 36 L. R. A. 114; *Kelly v. Erie, etc., Tel. Co.*, 34 Minn. 321, 25 N. W. 706; *Riker v. New York, etc., R. Co.*, 64 App. Div. 357, 72 N. Y. Supp. 168. See, also, *Ault v. Nebraska Tel. Co.*, 82 Neb. 434, 118 N. W. 73, 130 Am. St. Rep. 686; *Eastern Kentucky Home Tel. Co. v. Mellon (Ky.)* 116 S. W. 709; *McDonald v. Postal Tel. Co.*, 22 R. I. 131, 46 Atl. 407. But the company is not liable for latent defects which could be discovered by any precaution which reason could prescribe. *Essex County Elec. Co. v. Kelly*, 57 N. J. Law, 100, 29 Atl. 427; *Maryland, etc., Tel. Co. v. Cloman*, 97 Md. 620, 55 Atl. 681; *Atlantic, etc., R. Co. v. Reynolds*, 117 Ga. 47, 43 S. E. 456.

<sup>174</sup> *Jackson Fiber Co. v. Meadows*, 159 Fed. 110, 86 C. C. A. 300; *Lord v. Wakefield*, 185 Mass. 214, 70 N. E. 123, holding that he should, however, exercise precaution; *West U. Tel. Co. v. Burgess*, 108 Fed. 26, 47 C. C. A. 168,



ployés of a company using the poles and cross-arms of another company which is being sued.<sup>175</sup> And an electric company owes to its employés the duty of exercising a very high degree of care for their protection against any injury arising from the use of high currents of electricity.<sup>176</sup> So these companies must take precautions to protect their employés from injuries from the accidental crossing or contact of wires with others heavily charged with electricity.<sup>177</sup> Moreover, the rule that a master is responsible for dangerous conditions existing near the servant's place of work is frequently applied in cases where a telephone or telegraph company has permitted an electric company to string its high-tension wires upon the poles of the former, whose servants are injured thereby;<sup>178</sup> however, it is

writ of certiorari denied in 181 U. S. 620, 21 Sup. Ct. 924, 45 L. Ed. 1031; Britton v. Central U. Tel. Co., 131 Fed. 844, 65 C. C. A. 598; Dawson v. Lawrence Gaslight Co., 188 Mass. 481, 74 N. E. 912; Sias v. Consol. Lighting Co., 79 Vt. 224, 64 Atl. 1104; Jennison v. Waltham Gaslight Co., 201 Mass. 352, 87 N. E. 594; Clark v. Johnson County Tel. Co., 146 Iowa, 428, 123 N. W. 327; Holden v. Gary Tel. Co., 109 Minn. 59, 122 N. W. 1018; La Duke v. Hudson R. Tel. Co., 136 App. Div. 136, 120 N. Y. Supp. 171.

<sup>175</sup> Consol. Gas, etc., Elec., etc., Co. v. Chambers, 112 Md. 324, 74 Atl. 241, 26 L. R. A. (N. S.) 509; New York, etc., Tel. Co. v. Speicher, 59 N. J. Law. 23, 39 Atl. 661, not liable to an employé of the city. See Denison, etc., P. Co. v. Patton, 105 Tex. 621, 154 S. W. 540, 45 L. R. A. (N. S.) 303; Louisville Home Tel. Co. v. Beeler, 125 Ky. 366, 101 S. W. 397; Augusta R. Co. v. Andrews, 89 Ga. 653, 16 S. E. 203. But see Dixon v. West. U. Tel. Co. (C. C.) 71 Fed. 143; McGuire v. Bell Tel. Co., 167 N. Y. 208, 60 N. E. 433, 52 L. R. A. 437.

<sup>176</sup> *Duty to warn employés* of such dangers which are or should be known to company, but which are unknown to the employés. Tel. Co. v. St. Clair, 168 Fed. 645, 94 C. C. A. 109; Britton v. Central Union Tel. Co., 131 Fed. 844, 65 C. C. A. 598; Cumberland Tel., etc., Co. v. Bills, 128 Fed. 272, 62 C. C. A. 620; Reeve v. Colusa Gas, etc., Co., 152 Cal. 99, 92 Pac. 89; Tedford v. Los Angeles Elec. Co., 134 Cal. 76, 66 Pac. 76, 54 L. R. A. 85; Myhan v. Louisiana Elec. Lt., etc., Co., 41 La. Ann. 964, 6 South. 799, 17 Am. St. Rep. 436, 7 L. R. A. 172; Willis v. Plymouth, etc., Tel. Co., 75 N. H. 453, 75 Atl. 877, 30 L. R. A. (N. S.) 477; West. U. Tel. Co. v. McMullen, 58 N. J. Law. 155, 33 Atl. 384, 32 L. R. A. 351; Cetofonte v. Camden Coke Co., 78 N. J. Law, 662, 75 Atl. 913, 27 L. R. A. (N. S.) 1058, loading cars near steel rails.

<sup>177</sup> Moran v. Corliss Steam Engine Co., 21 R. I. 386, 43 Atl. 874, 45 L. R. A. 267. See, also, General Elec. Co. v. Murray, 32 Tex. Civ. App. 226, 74 S. W. 50. See § 200; Cumberland Tel., etc., Co. v. Ware, 115 Ky. 581, 74 S. W. 289; Dow v. Sunset Tel., etc., Co., 157 Cal. 182, 106 Pac. 587.

<sup>178</sup> Barto v. Iowa Tel. Co., 126 Iowa, 241, 101 N. W. 876, 106 Am. St. Rep. 347; Olson v. Nebraska Tel. Co., 87 Neb. 593, 127 N. W. 916; Raab v. Hudson R. Tel. Co., 139 App. Div. 286, 123 N. Y. Supp. 1037; Miner v. Franklin County Tel. Co., 83 Vt. 311, 75 Atl. 653, 26 L. R. A. (N. S.) 1195; Drown v. New England Tel., etc., Co., 81 Vt. 358, 70 Atl. 599. See Geer v. New York, etc., Tel. Co., 144 App. Div. 874, 129 N. Y. Supp. 784. Compare Clark v.

necessary to show that the injury was one which might have been anticipated by the company.<sup>179</sup> Each of these companies owes to the servants of the other the duty to construct and maintain its wires and appliances so that they will not be a menace to the safety of such servants when they are about their respective duties as linemen or otherwise.<sup>180</sup> So a company maintaining wires, over which a dangerous current of electricity passes, upon a pole used jointly by others is bound to know that linemen of the other company may come in contact with its wires, and must use reasonable

Union Iron, etc., Co., 234 Mo. 436, 137 S. W. 577, 45 L. R. A. (N. S.) 295. See Denison, etc., P. Co. v. Patton, 105 Tex. 621, 154 S. W. 540, 45 L. R. A. (N. S.) 303; Fox v. Manchester, 183 N. Y. 141, 75 N. E. 1116, 2 L. R. A. (N. S.) 474. But see Consol. Elec., etc., Co. v. Koepp, 64 Kan. 735, 68 Pac. 608. See Mulsolf v. Elec. Co., 108 Minn. 369, 122 N. W. 499, 24 L. R. A. (N. S.) 451.

*Does not assume risk from unknown dangers* in the appliances of other companies not discoverable by an exercise of reasonable care. Tel. Co. v. St. Clair, 168 Fed. 645, 94 C. C. A. 109; Postal Tel. Cable Co. v. Likes, 225 Ill. 249, 80 N. E. 136; Ambre v. Postal Tel. Cable Co., 43 Ind. App. 47, 86 N. E. 871; Biddle v. Leavenworth, etc., P. Co., 87 Kan. 604, 125 Pac. 51; Cumberland Tel., etc., Co. v. Graves, 31 Ky. Law Rep. 972, 104 S. W. 356; Snyder v. New York, etc., Tel. Co., 73 N. J. Law, 535, 64 Atl. 122; West. U. Tel. Co. v. McMullen, 58 N. J. Law, 155, 33 Atl. 384, 32 L. R. A. 351; Speight v. Rocky Mountain Bell Tel. Co., 36 Utah, 483, 107 Pac. 742; Barto v. Iowa Tel. Co., 126 Iowa, 241, 101 N. W. 876, 106 Am. St. Rep. 347.

<sup>179</sup> See Richmond v. New York, etc., R. Co., 8 App. Div. 382, 40 N. Y. Supp. 812; Dalton v. Atlantic, etc., R. Co., 4 Hughes, 180, Fed. Cas. No. 3,550; Southern R. Co. v. Carr, 153 Fed. 106, 82 C. C. A. 240; Calumet Elec., etc., Co. v. Grosse, 70 Ill. App. 381.

<sup>180</sup> Atlanta Consol., etc., R. Co. v. Owings, 97 Ga. 663, 25 S. E. 377, 33 L. R. A. 798; Barker v. Boston Elec., etc., Co., 178 Mass. 503, 60 N. E. 2; Wagner v. Brooklyn Heights R. Co., 69 App. Div. 349, 74 N. Y. Supp. 809, affirmed in 174 N. Y. 520, 66 N. E. 1117; Standard Light, etc., Co. v. Muncey, 33 Tex. Civ. App. 416, 76 S. W. 931; Dallas, etc., Co. v. Mitchell, 33 Tex. Civ. App. 424, 76 S. W. 935; Huber v. La Crosse City R. Co., 92 Wis. 636, 66 N. W. 708, 31 L. R. A. 583, 53 Am. St. Rep. 940; Newark Elec., etc., Co. v. Garden, 78 Fed. 74, 23 C. C. A. 649, 37 L. R. A. 725. But see Denison Light, etc., P. Co., 105 Tex. 621, 154 S. W. 540, 45 L. R. A. (N. S.) 303. See Mahan v. Newton, etc., R. Co., 189 Mass. 1, 75 N. E. 59; Paine v. Elec. Ill., etc., Co., 64 App. Div. 477, 72 N. Y. Supp. 279; Toledo, etc., L. Co. v. Rippon, 28 Ohio Cir. Ct. R. 561, affirmed 75 Ohio St. 609, 80 N. E. 1133; Dannenhower v. West. U. Tel. Co., 218 Pa. 216, 67 Atl. 207; Wilkins v. Water, etc., L. Co., 92 Neb. 513, 138 N. W. 754; Trammell v. Columbus R. Co., 9 Ga. App. 98, 70 S. E. 892; New England Tel. Co. v. Moore, 179 Fed. 364, 102 C. C. A. 642, 31 L. R. A. (N. S.) 617; Logansport v. Smith, 47 Ind. App. 64, 93 N. E. 883; Cumberland Tel., etc., Co. v. Cosnahan, 105 Miss. 615, 62 South. 824. But see Borell v. Cumberland Tel., etc., Co., 133 La. 630, 63 South. 247; Martin v. Citizens' General Elec. Co., 29 Ky. Law Rep. 103, 92 S. W. 547; Augusta R. Co. v. Andrews, 89 Ga. 653, 16 S. E. 203.

care in insulating such wires for their protection;<sup>181</sup> but this duty does not exist as to parts of the line where no one could reasonably be expected to come in contact with the wire;<sup>182</sup> nor does it apply to a company and its employes who are mere volunteers or naked licensees in the use of defendant's poles.<sup>183</sup>

**§ 212. Must furnish suitable appliances and safe place to work.**

Notwithstanding that, under the common law, the employes of telephone, telegraph, and electric companies assume the risks and dangers to which they may be subjected while in the discharge of

<sup>181</sup> *Illingsworth v. Boston Elec. L. Co.*, 161 Mass. 583, 37 N. E. 778, 25 L. R. A. 552; *Barker v. Boston Elec. L. Co.*, 178 Mass. 503, 60 N. E. 2; *Newark Elec. L., etc., P. Co. v. Garden*, 78 Fed. 74, 23 C. C. A. 649, 37 L. R. A. 725; *Beaning v. South Bend Elec. Co.*, 45 Ind. App. 261, 90 N. E. 786; *Knowlton v. Des Moines Edison Light Co.*, 117 Iowa, 451, 90 N. W. 818; *Wagner v. Brooklyn Heights R. Co.*, 69 App. Div. 349, 74 N. Y. Supp. 809, affirmed in 174 N. Y. 520, 66 N. E. 1117; *Mangan v. Hudson R. Tel. Co.*, 50 Misc. Rep. 388, 100 N. Y. Supp. 539; *Standard Light, etc., P. Co., v. Muncey*, 33 Tex. Civ. App. 416, 76 S. W. 931; *Dallas Elec. Co. v. Mitchell*, 33 Tex. Civ. App. 424, 76 S. W. 935; *Musolf v. Duluth Edison Elec. Co.*, 108 Minn. 369, 122 N. W. 499, 24 L. R. A. (N. S.) 451; *Aaron v. Tel. Co.*, 89 Kan. 186, 131 Pac. 582, 45 L. R. A. (N. S.) 309.

The following cases hold that the highest degree of care and skill is required: *Bowling Green Gaslight Co. v. Dean*, 142 Ky. 678, 134 S. W. 1115; *Von Trebra v. Laeledge Gaslight Co.*, 209 Mo. 648, 108 S. W. 559; *Trout v. Laeledge Gaslight Co.*, 151 Mo. App. 207, 132 S. W. 58; *Downs v. Missouri, etc., Tel. Co.*, 161 Mo. App. 274, 143 S. W. 889; *Gentzkow v. Portland R. Co.*, 54 Or. 114, 102 Pac. 614, 135 Am. St. Rep. 821; *Hodgins v. Bay City*, 156 Mich. 687, 121 N. W. 274, 132 Am. St. Rep. 546; *Cincinnati Gas, etc., Elec. Co. v. Archdeacon*, 80 Ohio St. 27, 88 N. E. 125.

*Use of poles without consent.*—Where one company is maintaining its wires upon the poles of another without its consent, except that implied through possessive acquiescence, and without any compensation, accommodation, privilege, or benefit on account of the use of the poles by the owner thereof, so that the company and its employes, in going upon and using such poles, are mere volunteers or naked licensees, the owner of the poles owes them the sole duty of abstaining from inflicting intentional or wanton injury. *Heskell v. Auburn Lt., etc., Co.*, 209 N. Y. 86, 102 N. E. 540, L. R. A. 1915B, 1127; *Denison Lt., etc., Co. v. Patton*, 105 Tex. 621, 154 S. W. 540, 45 L. R. A. (N. S.) 303.

<sup>182</sup> *Hector v. Boston Elec. L. Co.*, 174 Mass. 212, 54 N. E. 539, 75 Am. St. Rep. 300; *Sias v. Lowell, etc., St. R. Co.*, 179 Mass. 343, 60 N. E. 974.

Where the employes are guilty of contributory negligence, they cannot recover in these classes of cases. See *Columbus R. Co. v. Dorsey*, 119 Ga. 363, 46 S. E. 635; *Milne v. Providence Tel. Co.*, 29 R. I. 504, 72 Atl. 716; *Leque v. Madison, etc., Elec. Co.*, 133 Wis. 547, 113 N. W. 946.

<sup>183</sup> *Heskell v. Auburn Light, etc., P. Co.*, 209 N. Y. 86, 102 N. E. 540, L. R. A. 1915B, 1127; *Denison Light, etc., Co. v. Patton*, 105 Tex. 621, 154 S. W. 540, 45 L. R. A. (N. S.) 303; *Consolidated Gas, etc., Co. v. Chambers*, 112 Md. 324, 75 Atl. 241, 26 L. R. A. (N. S.) 509.



their duties, yet these companies must furnish proper appliances for their employés as well as a safe place to work.<sup>184</sup> This duty, on the part of these companies, is an affirmative and continuing duty,<sup>185</sup> and one that cannot be delegated;<sup>186</sup> where, however, the place in which the work is to be done and the appliances to be used are in themselves as safe as can reasonably be expected, and the danger arises necessarily in the doing of the work, ordinarily the company has discharged its duty when it has furnished to its em-

<sup>184</sup> *Clairain v. West. U. Tel. Co.*, 40 La. Ann. 178, 3 South. 625; *Ault v. Nebraska Tel. Co.*, 82 Neb. 434, 118 N. W. 73, 130 Am. St. Rep. 686; *Barto v. Iowa Tel. Co.*, 126 Iowa, 241, 101 N. W. 876, 106 Am. St. Rep. 347; *Paducah R., etc., Co. v. Bell*, 27 Ky. Law Rep. 428, 85 S. W. 216; *New Omaha Thomson-Houston Elec. L. Co. v. Rombold*, 68 Neb. 54, 93 N. W. 966, 97 N. W. 1030; *General Elec. Co. v. Murray*, 32 Tex. Civ. App. 226, 74 S. W. 50; *Tel. Co. v. Pemberton*, 86 Ark. 329, 111 S. W. 257; *Cahill v. Tel., etc., Co.*, 193 Mass. 415, 79 N. E. 821; *Clonts v. Gaslight Co.*, 144 Mo. App. 582, 129 S. W. 238; *Id.*, 160 Mo. App. 456, 140 S. W. 970; *Orr v. Tel. Co.*, 130 N. C. 627, 41 S. E. 880; *Id.*, 132 N. C. 691, 44 S. E. 401; *Ilicks v. Tel. Co.*, 157 N. C. 519, 73 S. E. 139; *Hyland v. Southern Bell, etc., Tel. Co.*, 70 S. C. 315, 49 S. E. 879; *La Duke v. Hudson R. Tel. Co.*, 136 App. Div. 136, 120 N. Y. Supp. 171; *Miner v. Franklin County Tel. Co.*, 83 Vt. 311, 75 Atl. 653, 26 L. R. A. (N. S.) 1195; *Postal Tel., etc., Co. v. Grantham*, 187 Fed. 52, 109 C. C. A. 370; *Kansas City, etc., Ry. v. Rogers*, 203 Fed. 462, 121 C. C. A. 586; *Weiden v. Brush Elec. L. Co.*, 73 Mich. 268, 41 N. W. 269; *Willis v. Plymouth, etc., Tel. Co.*, 75 N. H. 453, 75 Atl. 877, 30 L. R. A. (N. S.) 477; *Cable Co. v. Likes*, 124 Ill. App. 459; *De Frates v. Tel. Co.*, 149 Ill. App. 569; *Tel. Co. v. Wakefield (Ky.)* 126 S. W. 127; *Horne v. Light, etc., Co.*, 144 N. C. 375, 57 S. E. 19; *Fibre Co. v. Meadows*, 159 Fed. 110, 86 C. C. A. 300; *Colorado Elec. Co. v. Lubbers*, 11 Colo. 505, 19 Pac. 479, 7 Am. St. Rep. 255, employé injured by a sudden turning on the current, or by a "live" wire sagging upon a "dead" one. See *Bridges v. Los Angeles, etc., R. Co.*, 156 Cal. 492, 105 Pac. 586, 25 L. R. A. (N. S.) 914. And see note to *Brazil, etc., Co. v. Gibson*, 98 Am. St. Rep. 289.

Poles held an appliance, and not a place for work. See *Britton v. Central U. Tel. Co.*, 131 Fed. 844, 65 C. C. A. 598.

<sup>185</sup> *Barto v. Iowa Tel. Co.*, 126 Iowa, 241, 101 N. W. 876, 106 Am. St. Rep. 347.

<sup>186</sup> *Bridges v. Los Angeles, etc., R. Co.*, 156 Cal. 492, 105 Pac. 586, 25 L. R. A. (N. S.) 914; *Cumberland Tel., etc., Co. v. Bills*, 128 Fed. 272, 66 C. C. A. 620; *Evansville Gas, etc., Co. v. Robertson*, 55 Ind. App. 353, 100 N. E. 689; *Keeley v. Boston Elec. Ry. Co.*, 192 Mass. 481, 78 N. E. 490; *Choctaw Elec. Co. v. Clark*, 28 Okl. 399, 114 Pac. 730; *Williams v. North Wisconsin Lumber Co.*, 124 Wis. 328, 102 N. W. 589; *Stephens v. Pacific Elec. Ry. Co.*, 16 Cal. App. 512, 117 Pac. 559; *Twombly v. Consol. Elec. Lt. Co.*, 98 Me. 353, 57 Atl. 85, 64 L. R. A. 551; *Chisholm v. New England Tel., etc., Co.*, 185 Mass. 82, 69 N. E. 1042; *Kelly v. Erie Tel., etc., Co.*, 34 Minn. 321, 25 N. W. 706; *Moran v. Corliss Steam Eng. Co.*, 21 R. I. 386, 43 Atl. 874, 44 L. R. A. 267; *Mitchell v. United States Coal etc., Co.*, 67 W. Va. 480, 68 S. E. 366.

ployés all the suitable means of obviating the danger.<sup>187</sup> The duty to furnish suitable appliances does not, however, require these companies to keep tools and apparatus in good condition after they are furnished, if they were in proper condition when first provided.<sup>188</sup> And the rule does not go so far as to require the company to provide the best machinery obtainable, but only such as is reasonably safe.<sup>189</sup> Neither is it their duty to provide rules and regulations for the doing of their work.<sup>190</sup>

§ 213. **Fellow servant doctrine—where vice principal not involved.**—A telegraph, telephone, or an electric company each owes to its respective employés the duty of exercising reasonable care in the selection and retention of their fellow servants;<sup>191</sup> and, when this duty has been discharged, one among the assumed risks of such employés is the risk of injury which is likely to arise from the negligence of such fellow servants. While this is the general rule, under the common law, yet it is sometimes difficult to determine who are “fellow servants” within the meaning of the rule, because of the fact that the term is not only used in two distinct senses, but, furthermore, there are two entirely distinct tests applied in the different jurisdictions to determine this question. “Two servants” may not be “fellow servants” although employed by the same company, because the two may be engaged in work which is entirely disconnected, or, although connected or being in the same department, one servant may be intrusted with a certain degree of superintendence over the other, so as to be, in the view of the law, a vice

<sup>187</sup> *Bridges v. Los Angeles, etc., R. Co.*, 156 Cal. 492, 105 Pac. 586, 25 L. R. A. (N. S.) 914; *Mullin v. Genesee, etc., Gas Co.*, 202 N. Y. 275, 95 N. E. 689; *Long v. Johnson Co. Tel. Co.*, 134 Iowa, 336, 111 N. W. 984; *Wight v. Cumberland Tel., etc., Co.*, 137 Ky. 299, 125 S. W. 719. See *Corby v. Missouri, etc., Tel. Co.*, 231 Mo. 417, 132 S. W. 712. See, also, *Beebe v. St. Louis Tr. Co.*, 206 Mo. 419, 103 S. W. 1019, 12 L. R. A. (N. S.) 760, explosion inside controller not liable for; *Lancaster v. Central City Light, etc., Co.*, 137 Ky. 355, 125 S. W. 739, 27 L. R. A. (N. S.) 181.

<sup>188</sup> *Towne v. U. Elec., etc., Co.*, 146 Cal. 766, 81 Pac. 124, 70 L. R. A. 214, 2 Ann. Cas. 905, where pike poles were not kept properly sharpened by the employés who used them; *Mulligan v. McCaffery*, 182 Mass. 420, 65 N. E. 831, using appliances for purposes other than those for which they were not furnished; *Lancaster v. Central City, etc., P. Co.*, 137 Ky. 355, 125 S. W. 739, 27 L. R. A. (N. S.) 181; *Blust v. Pacific, etc., Tel. Co.*, 48 Or. 34, 84 Pac. 847.

<sup>189</sup> *Blust v. Pacific, etc., Co.*, 48 Or. 34, 84 Pac. 847.

<sup>190</sup> *Blust v. Pacific, etc., Co.*, 48 Or. 34, 84 Pac. 847.

<sup>191</sup> *Chandler v. Atlantic Coast Elec. R. Co.*, 61 N. J. Law, 380, 39 Atl. 674; *Gier v. Los Angeles Consol. Elec. R. Co.*, 108 Cal. 129, 41 Pac. 22. See § 212.

principal. So, if the work of the two servants is disconnected, and the question of vice principal is not involved, they are not considered fellow servants. Thus it is generally held that the linemen are not fellow servants of members of the gang who erected the poles<sup>192</sup> and their appliances;<sup>193</sup> nor are the linemen fellow servants of those digging holes and setting poles.<sup>194</sup> However, if the work is only somewhat different, but performed by members of the same gang, they are fellow servants.<sup>195</sup>

§ 214. **Same—where vice principal is involved.**—It has been held in those jurisdictions where the so-called “superior servant” doctrine is adopted that a telegraph or telephone company was liable to a lineman for injuries resulting from the negligence of another servant who was in charge of the work and who was superior to the lineman.<sup>196</sup> On the other hand, while much conflict exists in cases presenting very similar facts,<sup>197</sup> the majority of the courts determine the liability of the company by the character of the act causing the injury, or by the nature of the duty intrusted to the servant or the capacity in which he acted while doing the particular act complained of, and not by his grade or rank.<sup>198</sup> So, when the company intrusts some duty to a servant which the company owes to another servant, and which cannot, therefore, be delegated by the company, and the duty is not performed, or is negligently performed, the negligent servant is a vice principal, since he must be

<sup>192</sup> *Livingway v. Houghton County Street R. Co.*, 145 Mich. 86, 108 N. W. 662, where poles had been constructed two years before the accident.

<sup>193</sup> *Chisholm v. New England Tel., etc., Co.*, 185 Mass. 82, 69 N. E. 1042; *Eastern Kentucky Home Tel. Co. v. Mellon (Ky.)* 116 S. W. 709; *Welty v. Lake Superior, etc., R. Co.*, 100 Wis. 128, 75 N. W. 1022.

<sup>194</sup> *Ault v. Nebraska Tel. Co.*, 82 Neb. 434, 118 N. W. 73, 130 Am. St. Rep. 686.

<sup>195</sup> *Wight v. Cumberland, etc., Tel. Co.*, 137 Ky. 299, 125 S. W. 718; *Eastern Kentucky Home Tel. Co. v. Mellon (Ky.)* 116 S. W. 709; *Wagner v. Portland*, 40 Or. 389, 60 Pac. 985, 67 Pac. 300; *Neal v. Northern, etc., R. Co.*, 57 Minn. 365, 59 N. W. 312. See, also, § 212.

Telegraph operators are fellow servants of train employes, see *Rogers v. Pere Marquette R. Co.*, 166 Mich. 42, 131 N. W. 159, 52 L. R. A. (N. S.) 1123, Ann. Cas. 1912D, 881.

<sup>196</sup> *Cumberland Tel., etc., Co. v. Graves*, 31 Ky. Law Rep. 972, 104 S. W. 356; *Cumberland Tel., etc., Co. v. Ware*, 115 Ky. 581, 74 S. W. 289; *West. U. Tel. Co. v. Holtby*, 29 Ky. Law Rep. 523, 93 S. W. 652.

<sup>197</sup> *Fritz v. West. U. Tel. Co.*, 25 Utah, 263, 71 Pac. 209; *West. U. Tel. Co. v. Nolan*, 132 Ill. App. 427, may be a question of fact for the jury; *Hillis v. Spokane, etc., R. Co.*, 60 Wash. 7, 110 Pac. 624.

<sup>198</sup> *Texarkana Tel. Co. v. Pemberton*, 86 Ark. 329, 111 S. W. 257; *New Omaha Thomson-Houston Elec. L. Co. v. Baldwin*, 62 Neb. 180, 87 N. W. 27; *Sandquist v. Independent Tel. Co.*, 38 Wash. 313, 80 Pac. 539.



regarded as being the agent or representative of the company.<sup>199</sup> Therefore the duty of inspecting the appliances to be used by the servants and their place to work,<sup>200</sup> the duty of instructing inexperienced men,<sup>201</sup> and the duty of selecting fellow servants, appliances, etc.,<sup>202</sup> cannot be usually delegated, and the employé intrusted with either of these duties is a vice principal, and not a fellow servant. In applying the doctrine that the character of the act, in the performance of which an injury arises to a coemployé, determines whether the offending servant is a vice principal or not, it will be observed that the latter may, in certain cases, occupy a dual position with his fellow workmen.<sup>203</sup> He may be a vice principal or the representative of the company as to all matters where he is intrusted with the discharge of duties which the company itself is required to perform, and a coservant in the discharge of duties not personal to the master. So, if the act causing the injury is committed while the employé, however high his grade may be in other matters, is merely carrying out the details of the work, he is, in respect to that act, only a fellow servant, for whose negligence the company is not liable to the other servants.<sup>204</sup>

§ 215. **Same—employés in control of current.**—It is held, in some cases, that, where the lineman has, in the performance of his

<sup>199</sup> See § 212.

<sup>200</sup> *Cumberland Tel., etc., Co. v. Bills*, 128 Fed. 272, 62 C. C. A. 620; *West. U. Tel. Co. v. Tracy*, 114 Fed. 282, 52 C. C. A. 168, inspecting the poles; *Twombly v. Consol. Elec. L. Co.*, 98 Me. 353, 57 Atl. 85, 64 L. R. A. 551, inspection of ladders. But see *Gibbons v. Brush Elec. Illum. Co.*, 36 App. Div. 140, 55 N. Y. Supp. 378.

<sup>201</sup> *West. U. Tel. Co. v. Burgess*, 108 Fed. 26, 47 C. C. A. 168, writ of certiorari denied in 181 U. S. 620, 21 Sup. Ct. 924, 45 L. Ed. 1031; *Sias v. Consol. L. Co.*, 79 Vt. 224, 64 Atl. 1104; *Postal Tel. Cable Co. v. Likes*, 225 Ill. 249, 80 N. E. 136; *Tedford v. Los Angeles Elec. Co.*, 134 Cal. 76, 66 Pac. 76, 54 L. R. A. 85.

<sup>202</sup> *Postal Tel. Cable Co. v. Coote* (Tex. Civ. App.) 57 S. W. 912, foreman's negligence in employing incompetent men is that of the company; *Vicars v. Cumberland Tel., etc., Co.*, 52 La. Ann. 2153, 28 South. 367, power to hire and discharge given to one, not a fellow servant with others; *Sarno v. Atlantic Stevedoring Co.*, 66 App. Div. 611, 74 N. Y. Supp. 578, foreman, selecting guy wires and determining when they should be replaced; *Kelly v. Erie Tel., etc., Co.*, 34 Minn. 321, 25 N. W. 706, servant furnishing safe poles for the other servants to work upon.

<sup>203</sup> *West. U. Tel. Co. v. Nolan*, 132 Ill. App. 427.

<sup>204</sup> *Knutter v. New York, etc., Tel. Co.*, 67 N. J. Law, 646, 52 Atl. 565, 58 L. R. A. 808, district manager jerking down a wire which had become lodged in a tree, injuring a lineman; *American, etc., Tel. Co. v. Bower*, 20 Ind. App. 32, 49 N. E. 182, foreman of construction gang climbing a pole and loosening wires which cause other poles to fall injuring a member of the gang; *Tweed v. Hudson, etc., Tel. Co.*, 130 App. Div. 231, 114 N. Y.

duty, to work on wires carrying high and dangerous voltage, the duty of having the current cut off, so as to make the place safe, is a mere detail, and the negligence of a foreman in regard thereto is the negligence of a fellow servant.<sup>205</sup> But, on the other hand, it has been held that the duty of notifying the servants in charge of the power house that linemen are at work upon dead wires, and that the current is not to be turned on until further notice, cannot be delegated.<sup>206</sup> It seems that there should be some distinction drawn between employes controlling the currents and other cases of employes. The reasons which may have led to classing as fellow servants men employed in other line of employment may fail to control situations in this field, although closely analogous. One distinction is in the sudden and unavoidable nature of the peril from a failure to take proper precautions in overlooking dangerous agencies of this kind. A man at one moment is handling a harmless wire which it is the duty of the company to keep so; in the next

Supp. 607, foreman in making splice in a "messenger" wire along which a lineman has to propel himself in order to fasten hooks for the suspension of wires; *Morgridge v. Providence Tel. Co.*, 20 R. I. 386, 39 Atl. 328, 78 Am. St. Rep. 879, superintendent directing workmen to let go their hold on a pole which they are raising; *Gibbons v. Brush Elec. Illum. Co.*, 36 App. Div. 140, 55 N. Y. Supp. 378, foreman of a repair crew engaged in putting up new frames, hoods, and lamps on the poles and inspecting poles and directing linemen to climb them; *Hayes v. Jersey City, etc., R. Co.*, 73 N. J. Law, 639, 64 Atl. 119, a foreman of repair gang and the driver of the wagon from the top of which the plaintiff was at work repairing a wire are both fellow servants; *Grebenstein v. Stone, etc., Corp.*, 205 Mass. 431, 91 N. E. 411, foreman giving certain orders. See, also, § 215.

<sup>205</sup> *Bridges v. Los Angeles, etc., R. Co.*, 156 Cal. 492, 105 Pac. 586, 25 L. R. A. (N. S.) 914; *Guest v. Edison Ill. Co.*, 150 Mich. 438, 114 N. W. 226; *Anglin v. American Const., etc., Co.*, 109 App. Div. 237, 96 N. Y. Supp. 49, affirmed in 186 N. Y. 590, 79 N. E. 1100; *Shank v. Edison Elec. Ill. Co.*, 225 Pa. 393, 74 Atl. 210, 30 L. R. A. (N. S.) 46, n, 17 Ann. Cas. 465, electrician and lineman. See *Borell v. Cumberland Tel., etc., Co.*, 133 La. 630, 63 South. 247, L. R. A. 1916D, 1064; *Perry v. Ohio Valley Elec. R. Co.*, 72 W. Va. 282, 78 S. E. 692, L. R. A. 1916D, 962. See § 208, note 135, as a *duty to shut off current in case of fire*.

<sup>206</sup> *Hough v. Grants Pass, etc., P. Co.*, 41 Or. 531, 69 Pac. 655; *Crist v. Wichita, etc., P. Co.*, 72 Kan. 135, 83 Pac. 199. See, also, *Colorado Electric Co. v. Lubbers*, 11 Colo. 505, 19 Pac. 479, 7 Am. St. Rep. 255; *Jacksonville Elec. Lt. Co. v. Sloan*, 52 Fla. 257, 42 South. 516; *O'Brien v. White & Co.*, 105 Me. 308, 74 Atl. 721; *Keeley v. Boston Elev. Ry. Co.*, 192 Mass. 481, 78 N. E. 490; *Malay v. Mt. Morris, etc., L. Co.*, 41 App. Div. 574, 58 N. Y. Supp. 659; *Massy v. Milwaukee, etc., L. Co.*, 143 Wis. 220, 126 N. W. 544, 40 L. R. A. (N. S.) 814, 139 Am. St. Rep. 1096; *Zentner v. Oshkosh Gas Co.*, 126 Wis. 196, 105 N. W. 911. See, also, *Van Alstine v. Standard, etc., P. Co.*, 116 App. Div. 100, 101 N. Y. Supp. 696, misunderstanding between employes as to when current should be cut off.

moment he may be in contact with a deadly peril, unforeseeable and unescapable, by reason of the act of another whom the company has employed to make and keep safe the place of work. And the reasons to hold that the persons so employed are agents performing a nondelegable duty are very apparent.<sup>207</sup> At any rate, however, where there is a distinct and independent employé to whom is delegated the duty to disconnect and make safe the wires on which others must work, he should ordinarily be considered a vice principal, and not a fellow servant with the lineman and other like workmen.<sup>208</sup>

§ 216. **Under Employers' Liability Act.**—In some of the states constitutional and statutory provisions materially modify, and in some cases abrogate, the common-law rule exempting a master from liability for injuries to a servant caused by the negligence of a fellow servant.<sup>209</sup> In some of the states the statute applies only to railroad companies, while in others it applies to all corporations, including telephone, telegraph, and electric companies.<sup>210</sup>

§ 217. **Joint liability of companies—settlement.**—Under certain circumstances, an employé may hold his own company and another jointly liable for a personal injury, and even though a verdict has been returned against both, a settlement may be made by one, leaving the other company liable for the entire verdict.<sup>211</sup> But a suit against two companies as joint tort-feasors cannot be dismissed as to one and judgment entered against the other.<sup>212</sup> An injured

<sup>207</sup> See § 214. See, also, *Massy v. Milwaukee Elec., etc., L. Co.*, 143 Wis. 220, 126 N. W. 544, 40 L. R. A. (N. S.) 814, 139 Am. St. Rep. 1096; *Humphreys v. Raleigh, etc., Coke Co.*, 73 W. Va. 495, 80 S. E. 803, L. R. A. 1916C, 1270.

<sup>208</sup> *Massy v. Milwaukee Elec. etc., L. Co.*, 143 Wis. 220, 126 N. W. 544, 40 L. R. A. (N. S.) 814, 139 Am. St. Rep. 1096; *Zentner v. Oshkosh Gas Light Co.*, 126 Wis. 196, 105 N. W. 911; *Smith v. Milwaukee Elec., etc., L. Co.*, 127 Wis. 253, 106 N. W. 829. But see *Williams v. North Wisconsin Lumber Co.*, 124 Wis. 328, 102 N. W. 589; *Miller v. Centralia, etc., P. Co.*, 134 Wis. 316, 113 N. W. 954, 13 L. R. A. (N. S.) 742; *Marquette, etc., Mfg. Co. v. Williams*, 230 Ill. 26, 82 N. E. 424; *Keeley v. Boston, etc., R. Co.*, 192 Mass. 481, 78 N. E. 490; *Brush Elec. L., etc., Co. v. Wells*, 110 Ga. 192, 35 S. E. 365; *Malay v. Mt. Morris Elec. L. Co.*, 41 App. Div. 574, 58 N. Y. Supp. 659.

<sup>209</sup> See the statutes of the several states. See *Ashton v. Boston, etc., R. Co.*, 222 Mass. 65, 109 N. E. 820, L. R. A. 1916B, 1281.

<sup>210</sup> *Arkansas, Laws of 1907*, p. 162; *Colorado, Laws 1901*, p. 161, c. 67; *Acts May 27, 1911 (Laws 1911)*, p. 294, c. 113).

<sup>211</sup> *Postal Tel., etc., Co. v. Likes*, 225 Ill. 249, 80 N. E. 136; *Musolf v. Edison Elec. Co.*, 108 Minn. 369, 122 N. W. 499, 24 L. R. A. (N. S.) 451.

<sup>212</sup> *Hart v. Allegheny, etc., Co.*, 201 Pa. 234, 50 Atl. 1010; *Bamberg v. International Ry. Co.*, 121 App. Div. 1, 105 N. Y. Supp. 621.



party may sue any or all of several companies jointly liable, and may obtain judgment and then issue execution against one or all, and nothing short of the satisfaction of the demand or release under seal is a defense to the others.<sup>213</sup> Where two or more companies are jointly and severally liable, an agreement by an employé of a telephone company that he will not sue the latter unless it is held, as a matter of law, that recovery cannot be had against an electric light company, and unless the consideration paid to him should be returned to the telephone company, is a covenant not to sue and not a release barring his remedy against the electric light company.<sup>214</sup> A settlement with one joint tort-feasor and the giving of a release without reservation discharges the others, but not where the release reserves the right to pursue the others.<sup>215</sup> Where two companies have been held jointly liable, and one pays the judgment, it may sue the other for the amount paid on the ground that the injury was due to the negligence of the latter.<sup>216</sup>

§ 218. **Duty and liability to trespassers and licensees.**—As to mere trespassers or licensees, a telephone, telegraph or an electric company is ordinarily under no legal obligation other than to do them no willful harm.<sup>217</sup> So, if a person goes upon the premises of

<sup>213</sup> *Tandrup v. Sampsell*, 234 Ill. 526, 85 N. E. 331, 17 L. R. A. (N. S.) 852. See *Musolf v. Edison Elec. Co.*, 108 Minn. 369, 122 N. W. 499, 24 L. R. A. (N. S.) 451.

<sup>214</sup> *Musolf v. Duluth, etc., Co.*, 108 Minn. 369, 122 N. W. 499, 24 L. R. A. (N. S.) 451, and note.

<sup>215</sup> *Walsh v. New York, etc., R. R.*, 204 N. Y. 58, 97 N. E. 408, 37 L. R. A. (N. S.) 1137; *Barrett v. Third, etc., R. R.*, 45 N. Y. 628; *Metz v. Postal Tel., etc., Co.*, 72 Wash. 188, 130 Pac. 343; *Staab v. Rocky Mountain Tel. Co.*, 23 Idaho, 314, 129 Pac. 1078; *Snyder v. Mutual, etc., Co.*, 135 Iowa, 215, 112 N. W. 776, 14 L. R. A. (N. S.) 321; *Snyder, etc., Co. v. Bowron* (Tex. Civ. App.) 156 S. W. 550; *Hart v. Allegheny, etc., Co.*, 201 Pa. 234, 50 Atl. 1010.

<sup>216</sup> *Fulton, etc., Co. v. Hudson River Tel. Co.*, 200 N. Y. 287, 93 N. E. 1052; *Fulton County, etc., Co. v. Hudson River Tel. Co.*, 130 App. Div. 343, 114 N. Y. Supp. 642; *Southwestern, etc., Tel. Co. v. Krause* (Tex. Civ. App.) 92 S. W. 431; *Tacoma v. Bonnell*, 65 Wash. 505, 118 Pac. 642, 36 L. R. A. (N. S.) 582, Ann. Cas. 1913B, 934. See *Hayes v. Chicago Tel. Co.*, 218 Ill. 414, 75 N. E. 1003, 2 L. R. A. (N. S.) 764.

<sup>217</sup> *McCaughna v. Owosso, etc., Elec. Co.*, 129 Mich. 407, 89 N. W. 73, 95 Am. St. Rep. 441; *Keefe v. Narragansett Elec. Co.*, 21 R. I. 575, 43 Atl. 542; *Sullivan v. Narragansett Elec., etc., Co.* (R. I.) 73 Atl. 306; *Rodgers v. Union L., etc., Co.* (Ky.) 123 S. W. 293; *Hector v. Boston Elec., etc., Co.*, 161 Mass. 558, 37 N. E. 773, 25 L. R. A. 554; *State v. Chesapeake, etc., Tel. Co.*, 123 Md. 120, 91 Atl. 149, 52 L. R. A. (N. S.) 1170; *Newark Elec. Lt., etc., Co. v. Garden*, 78 Fed. 74, 23 C. C. A. 649, 37 L. R. A. 725; *Elec. Co. v. Cronon*, 166 Fed. 651, 92 C. C. A. 345, 20 L. R. A. (N. S.) 816; *Riedel v. West Jersey, etc., R. Co.*, 177 Fed. 374, 101 C. C. A. 428, 21 Ann. Cas. 746, 28 L. R. A. (N. S.)

one of these companies, or of another, out of curiosity,<sup>218</sup> or for his purposes or conveniences,<sup>219</sup> or otherwise,<sup>220</sup> voluntarily without invitation express or implied, and is injured while thereon in coming in contact with heavily charged wires or otherwise, he cannot recover as a result thereof. But if he goes upon said premises in the performance of a duty toward either, or for personal work, where

98; *Pennebaker v. Light, etc., Co.*, 158 Cal. 579, 112 Pac. 459, 139 Am. St. Rep. 202, 31 L. R. A. (N. S.) 1099; *Mayfield, etc., L. Co. v. Webb*, 129 Ky. 395, 111 S. W. 712, 33 Ky. Law Rep. 909, 130 Am. St. Rep. 469, 18 L. R. A. (N. S.) 179; *Braun v. Gen. Elec. Co.*, 200 N. Y. 484, 94 N. E. 206, 140 Am. St. Rep. 645, 21 Ann. Cas. 370, 35 L. R. A. (N. S.) 1089; *Perham v. General Elec. Co.*, 33 Or. 451, 53 Pac. 14, 24, 72 Am. St. Rep. 730, 40 L. R. A. 799; *Greenville v. Pitts*, 102 Tex. 1, 107 S. W. 50, 132 Am. St. Rep. 843, 14 L. R. A. (N. S.) 979; *Burnett v. Ft. Worth, etc., Co.*, 102 Tex. 31, 112 S. W. 1040, 19 L. R. A. (N. S.) 504; *Denison L., etc., Co. v. Patton*, 105 Tex. 621, 154 S. W. 540, 45 L. R. A. (N. S.) 303; *Wetherby v. Twin State Gas Co.*, 83 Vt. 189, 75 Atl. S., 21 Ann. Cas. 1092, 25 L. R. A. (N. S.) 1220. Nor is the rule altered by the fact that the negligence arose from the violation of the ordinance or statute rather than from the negligence of common law. *Burnett v. Ft. Worth, etc., Co.*, *supra*. See *Myer v. Union Light, etc., Co.*, 151 Ky. 332, 151 S. W. 941, 43 L. R. A. (N. S.) 136, child in churchyard.

<sup>218</sup> *Sullivan v. Boston, etc., R. R. Co.*, 156 Mass. 378, 31 N. E. 128, boy going upon roof of another; *Burnett v. Ft. Worth, etc., P. Co.*, 102 Tex. 31, 112 S. W. 1040, 19 L. R. A. (N. S.) 504, practically same facts, and where defectively insulated wire in violation of city ordinance.

<sup>219</sup> *Cumberland Tel., etc., Co. v. Martin*, 116 Ky. 554, 76 S. W. 394, 77 S. W. 718, 105 Am. St. Rep. 229, 63 L. R. A. 469, person going on porch of store, out of storm, and while there was struck by lightning, conducted to him by negligently maintained wire; *Augusta Ry. Co. v. Andrews*, 89 Ga. 653, 16 S. E. 203, party climbing poles; *State v. Chesapeake, etc., Tel. Co.*, 123 Md. 120, 91 Atl. 149, 52 L. R. A. (N. S.) 1170, and note; *Greenville v. Pitts*, 102 Tex. 1, 107 S. W. 50, 132 Am. St. Rep. 843, 14 L. R. A. (N. S.) 979.

<sup>220</sup> Fireman going into building and there comes in contact with wire. *Pennebaker v. San Joaquin L., etc., P. Co.*, 158 Cal. 579, 112 Pac. 459, 139 Am. St. Rep. 202, 31 L. R. A. (N. S.) 1099; *New Omaha Thomson-Houston Elec. L. Co. v. Anderson*, 73 Neb. 84, 102 N. W. 89, ordinance requiring current to be cut off during fire; *Minneapolis General Elec. Co. v. Cronon*, 163 Fed. 651, 92 C. C. A. 345, 20 L. R. A. (N. S.) 816, disinterested person voluntarily entering burning building to extinguish fire. See as to duty of note in § 212. Policeman trespassing upon roof of building to detect gamblers, *City of Greenville v. Pitts*, 102 Tex. 1, 107 S. W. 50, 132 Am. St. Rep. 843, 14 L. R. A. (N. S.) 979; *Hector v. Boston Elec., etc., Co.*, 161 Mass. 558, 37 N. E. 773, 25 L. R. A. 554, acting without scope of license.

But in *Guinn v. Delaware, etc., Tel. Co.*, 72 N. J. Law, 276, 62 Atl. 412, 3 L. R. A. (N. S.) 988, 111 Am. St. Rep. 668, it was held that a telephone company was under a duty to exercise care to a traveler even if he was a trespasser as between himself and the landowner. See, also, *Davoust v. Alameda*, 149 Cal. 69, 84 Pac. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847; *Connell v. Keokuk Elec., etc., Co.*, 131 Iowa, 622, 109 N. W. 177.

permission has been given him there to do, by those in rightful authority, the rule would be otherwise,<sup>221</sup> unless he has been guilty of negligence while on said premises.<sup>222</sup> And, if the company, at the time of the injury, was itself a trespasser, having no authority or permission from the owner to maintain the wires over or upon his premises, the company ought not to avail itself of a rule designed

<sup>221</sup> *Ryan v. St. Louis Transit Co.*, 190 Mo. 621, 89 S. W. 865, 2 L. R. A. (N. S.) 777, workman coming on premises to work for independent contractor; *Davoust v. Alameda*, 149 Cal. 69, 84 Pac. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847, implied invitation to use path across lot; *Guinn v. Delaware, etc., Tel. Co.*, 72 N. J. Law, 276, 62 Atl. 412, 3 L. R. A. (N. S.) 988, 111 Am. St. Rep. 668, person injured while crossing path across field where permission was given him; *Musolf v. Duluth Edison Elec. Co.*, 108 Minn. 369, 122 N. W. 499, 24 L. R. A. (N. S.) 451, employés of one company injured by wires of another both using same poles and cross arms; *New England, etc., Tel. Co. v. Moore*, 179 Fed. 364, 102 C. C. A. 642, 31 L. R. A. (N. S.) 617, employé attempting to remove wire of another company interfering with his employer's line, on same subject, see *Downs v. Andrews*, 145 Mo. App. 173, 130 S. W. 472; *Braun v. Buffalo General Elec. Co.*, 200 N. Y. 484, 94 N. E. 206, 140 Am. St. Rep. 645, 34 L. R. A. (N. S.) 1089, 21 Ann. Cas. 370, workman erecting building over which wire was strung; *Mize v. Rocky Mountain Bell Tel. Co.*, 38 Mont. 521, 100 Pac. 971, 129 Am. St. Rep. 659, 16 Ann. Cas. 1189, railroad company granting license to landowner to construct ditch on right of way and hurt by wire of telegraph company while at work. For similar case, see *City Elec. St. R. Co. v. Conery*, 61 Ark. 381, 33 S. W. 426, 54 Am. St. Rep. 262, 31 L. R. A. 570. See *Palestine v. Siler*, 225 Ill. 630, 80 N. E. 345, 8 L. R. A. (N. S.) 205, person taking hold of wire across street; *Weaver v. Dawson County Mut. Tel. Co.*, 82 Neb. 696, 118 N. W. 650, 22 L. R. A. (N. S.) 1189, person traveling highway not bound to anticipate danger; *Augusta R. Co. v. Andrews*, 92 Ga. 706, 19 S. E. 713. See, also, *Central U. Tel. Co. v. Sokola*, 34 Ind. App. 429, 73 N. E. 143; *Newark Elec., etc., Co. v. Garden*, 78 Fed. 74, 23 C. C. A. 649, 37 L. R. A. 725; *Southwestern, etc., Tel. Co. v. Bruce*, 89 Ark. 581, 117 S. W. 564; *Valparaiso L. Co. v. Tyler*, 177 Ind. 278, 96 N. E. 768; *Philbin v. Marlborough Elec. Co.*, 218 Mass. 394, 105 N. E. 893; *Blackburn v. Southwestern Missouri R. Co.*, 180 Mo. App. 548, 167 S. W. 457.

<sup>222</sup> *Pennebaker v. San Joaquin L., etc., P. Co.*, 158 Cal. 579, 112 Pac. 459, 31 L. R. A. (N. S.) 1099, 139 Am. St. Rep. 202; *Carroll v. Grande Ronde Elec. Co.*, 47 Or. 424, 84 Pac. 389, 6 L. R. A. (N. S.) 290; *Graves v. Washington, etc., P. Co.*, 44 Wash. 675, 87 Pac. 956, 11 L. R. A. (N. S.) 452. But see, where held not guilty of negligence, *Ryan v. St. Louis Transit Co.*, 190 Mo. 621, 89 S. W. 865, 2 L. R. A. (N. S.) 777; *Mangan v. Louisville Elec. L. Co.*, 122 Ky. 476, 91 S. W. 703, 6 L. R. A. (N. S.) 459; *Palestine v. Siler*, 225 Ill. 630, 80 N. E. 345, 8 L. R. A. (N. S.) 205; *Weaver v. Dawson County Mut. Tel. Co.*, 82 Neb. 696, 118 N. W. 650, 22 L. R. A. (N. S.) 1189; *Braun v. Buffalo General Elec. Co.*, 200 N. Y. 484, 94 N. E. 206, 140 Am. St. Rep. 645, 34 L. R. A. (N. S.) 1089, 21 Ann. Cas. 370; *Miner v. Franklin County Tel. Co.*, 83 Vt. 311, 75 Atl. 653, 26 L. R. A. (N. S.) 1195.



for the protection of the owner, which position is taken by some courts.<sup>223</sup>

§ 219. **What companies liable for negligence—vendor, vendee.** The general rule is that, where an electric company contracts to furnish electricity to another who has complete ownership or control over the wires and apparatus, the former will not ordinarily be liable for an injury arising as a result of escape of electricity from said wires or apparatus.<sup>224</sup> And when one company purchases the plant of another and continues the business, the former impliedly contracts with the public that it will use such appliances and care as are known to the business to protect them from injury; and

<sup>223</sup> *Guinn v. Delaware, etc., Tel. Co.*, 72 N. J. Law, 276, 62 Atl. 412, 111 Am. St. Rep. 668, 3 L. R. A. (N. S.) 988; *Daltry v. Media Elec., etc., Co.*, 208 Pa. 403, 57 Atl. 833; *Caglione v. Mt. Morris Elec. Co.*, 56 App. Div. 191, 67 N. Y. Supp. 660; *Southern Bell Tel., etc., Co. v. McTyer*, 137 Ala. 601, 34 South. 1020, 97 Am. St. Rep. 62; *Reagan v. Boston Elec. Co.*, 167 Mass. 406, 45 N. E. 743; *Nelson v. Branford Elec., etc., Co.*, 75 Conn. 548, 54 Atl. 303; *Commonwealth Elec. Co. v. Melville*, 210 Ill. 70, 70 N. E. 1052. But see *Cumberland, etc., Tel. Co. v. Martin*, 116 Ky. 554, 76 S. W. 394, 77 S. W. 718, 105 Am. St. Rep. 229, 63 L. R. A. 469; *Davoust v. Alameda*, 149 Cal. 69, 84 Pac. 760, 9 Ann. Cas. 847, 5 L. R. A. (N. S.) 536; *Romana v. Boston Elev. R. Co.*, 218 Mass. 76, 105 N. E. 598, L. R. A. 1915A, 510.

<sup>224</sup> *Memphis Consol., etc., Elec. Co. v. Speers*, 113 Tenn. 83, 81 S. W. 595, illuminating a sign; *National Fire Ins. Co. v. Denver, etc., Co.*, 16 Colo. App. 86, 63 Pac. 949, not liable for fire; *Fickeisen v. Wheeling Elec. Co.*, 67 W. Va. 335, 67 S. E. 788, 27 L. R. A. (N. S.) 893, one company collecting, selling and delivering electricity to another company. But see *Thomas v. Maysville Gas Co.*, 108 Ky. 224, 56 S. W. 153, 53 L. R. A. 147, duty to see wires of street railway to which it is furnishing electricity are insulated; *San Antonio Gas, etc., Co. v. Ocon*, 105 Tex. 139, 146 S. W. 162, 39 L. R. A. (N. S.) 1046; *Perry v. Ohio Valley R. Co.*, 70 W. Va. 697, 74 S. E. 993; *Lewis v. Bowling Green, etc., Co.*, 135 Ky. 611, 197 S. W. 278, 22 L. R. A. (N. S.) 1169, duty to make inspection of vendee's line. See note 41 for other cases. See, also, *Minneapolis, etc., Elec. Co. v. Cronon*, 166 Fed. 651, 92 C. C. A. 345, 20 L. R. A. (N. S.) 816; *Hoffman v. Leavenworth Lt., etc., Co.*, 91 Kan. 450, 138 Pac. 632, 50 L. R. A. (N. S.) 574; *Peters v. Lynchburg Lt., etc., Co.*, 108 Va. 333, 61 S. E. 745, 22 L. R. A. (N. S.) 1188.

Where an electric company collects electricity and sells and delivers it to another electric company at a point where the wires of the two companies meet, it is not liable for the death of a person coming in contact with a grounded wire of the latter company which was charged with the purchased electricity, but over which the former company had no control. *San Antonio Gas, etc., Co. v. Ocon*, 105 Tex. 139, 146 S. W. 162, 39 L. R. A. (N. S.) 1046; *Fickeisen v. Wheeling Elec. Co.*, *supra*. However, a company which turns on powerful current on private wires strung along the highway is bound to inspect them, from time to time, although they do not belong to it, *Thomas v. Maysville Gas Co.*, *supra*; *Lewis v. Bowling Green Gas Lt. Co.*, *supra*; and where the company sell an electric fixture and agrees to furnish electricity

it is answerable to any one who, without fault on his part, sustains damage for its failure to do so.<sup>225</sup> Under certain circumstances the landlord may be liable to the tenant of the former's leased property for damages arising from the presence of electric wires on the premises.<sup>226</sup>

**§ 220. Injuries to or interference with companies.**—While telegraph, telephone, and electric companies should use due care in the operation of their lines to protect the public from injury, the public, on the other hand, must not commit acts which would interfere with, in any manner, the formers' business. So, where these companies are being lawfully maintained, they may recover damages against any one for injuring their poles, wires, or other appliances, or interfering with the operation of their business.<sup>227</sup> So also they may, in certain instances, maintain an action of injunction against

to be used thereby and to keep such fixture in repair would be liable from an injury resulting therefrom, *Fish v. Electric Co.*, 18 S. D. 122, 99 N. W. 1092, 112 Am. St. Rep. 782; *Thomas v. Maysville Gas Co.*, *supra*.

<sup>225</sup> *Waller v. Leavenworth Light, etc., Co.*, 9 Kan. App. 301, 61 Pac. 327; *Scheiber v. United Tel. Co.*, 153 Ind. 609, 55 N. E. 742; *Gordon v. Ashley*, 77 App. Div. 525, 79 N. Y. Supp. 274, reversing 34 Misc. Rep. 743, 70 N. Y. Supp. 1038, where private person is vendor, and sale by him to company is without consent of municipal authority.

<sup>226</sup> *Howard v. Washington, etc., P. Co.*, 75 Wash. 255, 134 Pac. 927, 52 L. R. A. (N. S.) 578, negligence in not notifying plaintiff of wires; *Ferrell v. Dixie Cotton Mills*, 157 N. C. 528, 73 S. E. 142, 37 L. R. A. (N. S.) 64.

<sup>227</sup> *Dickson v. Kewanee Elec. L., etc., Co.*, 53 Ill. App. 379; *Williams v. Citizens' R. Co.*, 130 Ind. 71, 29 N. E. 408, 30 Am. St. Rep. 201, 15 L. R. A. 64; *Townsend v. Epstein*, 93 Md. 537, 49 Atl. 629, 86 Am. St. Rep. 441, 52 L. R. A. 409; *Day v. Green*, 4 Cush. (Mass.) 433; *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536; *New York, etc., Tel. Co. v. Dexheimer*, 14 N. J. Law J. 295; *Millville Traction Co. v. Goodwin*, 53 N. J. Eq. 448, 32 Atl. 263; *Northwestern Tel. Exch. Co. v. Anderson*, 12 N. D. 585, 98 N. W. 706, 102 Am. St. Rep. 580, 65 L. R. A. 771, 1 Ann. Cas. 110; *Pennsylvania Tel. Co. v. Varnau* (Pa.) 15 Atl. 624; *L. & N. R. Co. v. Gillespie*, 165 Ky. 575, 177 S. W. 451, measure of damages for destroying line.

*House moving.*—The moving of a house along the streets pursuant to statute and under a license from the city is an extraordinary use of the street for an unusual purpose, and as between the mover and the company the former is liable for the damage resulting from the interruption. *Northwestern Tel. Exch. Co. v. Anderson*, 12 N. D. 585, 98 N. W. 706, 102 Am. St. Rep. 580, 65 L. R. A. 771, 1 Ann. Cas. 110. But see *Tel. Co. v. Wilt*, 1 Phila. (Pa.) 270. The telephone company must raise wires on mover's offer to pay reasonable expense and on failure of the company to do so, the mover may raise them. *Tel., etc., Co. v. Thompson* (Tex. Civ. App.) 142 S. W. 1000. See, also, *Kibbie Tel. Co. v. Landphere*, 151 Mich. 309, 115 N. W. 244, 16 L. R. A. (N. S.) 689. See *Collar v. Tel. Co.* (Minn.) 155 N. W. 1075, L. R. A. 1916C, 1249.

an individual,<sup>228</sup> a municipality,<sup>229</sup> or another telegraph, telephone, or electric company<sup>230</sup> where either has without authority interfered with or injured any of the property complained of. Furthermore, it has been held that any one willfully and deliberately interfering with any of the said property of these companies may be indicted for malicious mischief under the common law;<sup>231</sup> but the punishment for the malicious injury to the poles, wires, and other appliances of telegraph and telephone companies has been expressly provided for and defined in statutes in many of the states.<sup>232</sup> It is also further provided in some of these statutes that it shall be a criminal offense for any one to maliciously obstruct or interfere with the transmission of messages; and it is not necessary under these statutes that there be a physical injury to the line.<sup>233</sup>

§ 221. **Same—induction—conduction.**—The operation of telegraph and telephone companies may be interfered with by the escape of electricity from appliances of other electrical companies subsequently organized for quasi-public purposes, such as electric

<sup>228</sup> *Kibbie Tel. Co. v. Landphere*, 151 Mich. 309, 115 N. W. 244, 16 L. R. A. (N. S.) 689, may enjoin a threatened injury to its lines by the moving of a building. See *State v. Nordskog*, 76 Wash. 472, 136 Pac. 694, 50 L. R. A. (N. S.) 1216, and note collating other cases; *Allegheny County L. Co. v. Booth*, 216 Pa. 564, 66 Atl. 72, 9 L. R. A. (N. S.) 404.

<sup>229</sup> *Missouri R. Tel. Co. v. Mitchell*, 22 S. D. 191, 116 N. W. 67; *Rock Island v. Central U. Tel. Co.*, 132 Ill. App. 248; *Southern Bell Tel., etc., Co. v. Mobile (C. C.)* 162 Fed. 523; *Morristown v. East Tennessee Tel. Co.*, 115 Fed. 304, 53 C. C. A. 132.

<sup>230</sup> *Northwestern Tel. Exch. Co. v. Twin City Tel. Co.*, 89 Minn. 495, 95 N. W. 460.

<sup>231</sup> *State v. Watts*, 48 Ark. 56, 2 S. W. 342, 3 Am. St. Rep. 216; *Alt v. State*, 88 Neb. 259, 129 N. W. 432, 35 L. R. A. (N. S.) 1212, evidence of malice. See § 733.

<sup>232</sup> *St. Louis, etc., R. Co. v. Batesville, etc., Tel. Co.*, 80 Ark. 499, 97 S. W. 660; *Davis v. Pacific Tel., etc., Co.*, 127 Cal. 312, 57 Pac. 764, 59 Pac. 698; *State v. McKee*, 126 Mo. App. 524, 104 S. W. 486; *Telegraph Co. v. Wilt*, 1 Phila. (Pa.) 270, 10 Pa. Law J. 375; *Southwestern Tel., etc., Co. v. Priest*, 31 Tex. Civ. App. 345, 72 S. W. 241; *West. U. Tel. Co. v. Bullard*, 65 Vt. 634, 27 Atl. 322; *State v. Brotzer*, 245 Mo. 499, 150 S. W. 1078. See statutes of several states on subject.

*Right of railroad to cut line crossing tracks.*—Where wires are constructed across railroad tracks in accordance to law, the railroad company or its employes have no right to cut them without being subjected to prosecution. *Alt v. State*, 88 Neb. 259, 129 N. W. 432, 35 L. R. A. (N. S.) 1212; *St. Louis, etc., R. Co. v. Batesville, etc., Tel. Co.*, supra; *McGowan v. State*, 146 Ala. 679, 40 South. 142.

<sup>233</sup> See the statutes in the several states, and the cases cited in note 232. See *Martin v. Sheriff*, 5 Ohio S. & C. P. Dec. 100, 32 Wkly. Law Bul. 113, to tap a telegraph wire not alone a crime under the laws of Ohio. To same ef-



railway and electric light and heating companies, when they are all on the same streets and their lines are running parallel. There has been considerable litigation arising on the subject, where one attempts to enjoin the other from using the streets in such a manner as to interfere with the working of the machinery of the complaining company, and in determining the relative rights of the parties the courts are not in complete accord. However, equity will adjust the conflicting interest as far as possible and control both so that each company may exercise its own franchise as fully as is compatible with the necessary exercise of the other's.<sup>234</sup> So in some instances a court of equity will enjoin a company maintaining a high-tension wire from interfering by induction or conduction with a company maintaining a wire of a less tension, provided the latter has a prior or otherwise superior right to the use of the streets;<sup>235</sup> but, if the former company cannot prevent the induc-

fect see *State v. Nordskog*, 76 Wash. 472, 136 Pac. 694, 50 L. R. A. (N. S.) 1216, and note.

*An act to regulate radio communications.*—An act to regulate radio communications was passed by Congress and approved August 13th, 1912 (Act Aug. 13, 1912, c. 287, 37 Stat. 302 [Comp. St. 1913, §§ 10100-10109]) for the secrecy of messages. The nineteenth subsection of section 4 is as follows: "No person or persons engaged in or having knowledge of the operation of any station or stations shall divulge or publish the contents of any messages transmitted or received by such station, except to the person or persons to whom the same may be directed, or their authorized agent, or to another station employed to forward such message to its destination, unless legally required so to do by the court of competent jurisdiction or other competent authority. Any person guilty of divulging or publishing any message, except as herein provided, shall, on conviction thereof, be punishable by a fine of not more than two hundred and fifty dollars or imprisonment for a period of not exceeding three months, or both fine and imprisonment, in the discretion of the court." See § 144 as to constitutionality of act.

<sup>234</sup> *Edison Elec. L., etc., Co. v. Merchants', etc., Elec. L., etc., Co.*, 200 Pa. 209, 49 Atl. 766, 86 Am. St. Rep. 712.

<sup>235</sup> *West. U. Tel. Co. v. Guernsey, etc., Elec. L. Co.*, 46 Mo. App. 120; *Nebaska Tel. Co. v. York Gas, etc., L. Co.*, 27 Neb. 284, 43 N. W. 126, holding that an electric light company will not be enjoined from stringing its wires so as to interfere with a telephone company, where the light company obtained its franchise first; *West. U. Tel. Co. v. Champion Elec. L. Co.*, 9 Ohio Dec. (Reprint) 540, 14 Wkly. Law Bul. 327; *Central Pennsylvania Tel., etc., Co. v. Wilkes-Barre, etc., R. Co.*, 11 Pa. Co. Ct. R. 417; *Rutland Elec. L. Co. v. Marble City Elec. L. Co.*, 65 Vt. 377, 26 Atl. 635, 36 Am. St. Rep. 868, 20 L. R. A. 821, holding that the court will enjoin interference with the operation of an electric light company by a company subsequently formed for the same purpose; *Edison Elec. L., etc., Co. v. Merchants', etc., Elec., etc., Co.*, 200 Pa. 209, 49 Atl. 766, 86 Am. St. Rep. 712; *Paris Elec. L. Co. v. Southwestern Tel., etc., Co.* (Tex. Civ. App.) 27 S. W. 902, an electric light company will be en-

tion or conduction except at great expense, and the latter can do so by the adoption of a safe and comparatively inexpensive device, the injunction will be denied,<sup>236</sup> although the latter may recover the cost of procuring and installing such device.<sup>237</sup> It has been held that if it is part of the contract of a telephone company with the state that the maintenance of its lines shall not prevent the adoption by the public of any safe, convenient, and expeditious mode of transit, such as a street railway company, the telephone company is not deprived of any property right, and cannot therefore recover for injuries either by induction or by conduction;<sup>238</sup> and also that,

joined from placing its wires in such close proximity as to impair the efficiency of a previously established telephone service; *Cumberland Tel., etc., Co. v. United Elec. R. Co. (C. C.)* 42 Fed. 273, 12 L. R. A. 544. See, also, *West. U. Tel. Co. v. Los Angeles Elec. Co. (C. C.)* 76 Fed. 178; *West. U. Tel. Co. v. Champion, etc., L. Co.*, 14 Wkly. Law Bul. (Ohio) 327; *American Tel., etc., Co. v. Morgan, etc., Co.*, 138 Ala. 597, 36 South. 178, 100 Am. St. Rep. 53; *West. U. Tel. Co. v. Syracuse, etc., Co.*, 178 N. Y. 325, 70 N. E. 866; *West Jersey, etc., R. R. v. Atlantic City, etc., Co.*, 65 N. J. Eq. 613, 56 Atl. 890; *Newark, etc., Co. v. Garden*, 78 Fed. 74, 23 C. C. A. 649, 37 L. R. A. 725; *Consol., etc., Co. v. People's, etc., Co.*, 94 Ala. 372, 10 South. 440; *Wettengel v. Allegheny, etc., Co.*, 223 Pa. 79, 72 Atl. 265; *Montgomery, etc., Co. v. Citizens, etc., Co.*, 142 Ala. 462, 38 South. 1026; *Louisville, etc., Co. v. Cumberland, etc., Co.*, 111 Fed. 663, 49 C. C. A. 524, reversing (C. C.) 110 Fed. 593; *Northwestern, etc., Co. v. Twin City, etc., Co.*, 89 Minn. 495, 95 N. W. 460; *Northern, etc., Co. v. Iowa, etc., Co. (Iowa)* 98 N. W. 113; *Cumberland, etc., Co. v. Louisville, etc., Co.*, 114 Ky. 892, 72 S. W. 4; *Cumberland, etc., Co. v. United Elec. Ry.*, 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236; *Birmingham Traction Co. v. Southern, etc., Tel. Co.*, 119 Ala. 144, 24 South. 731; *West. U. Tel. Co. v. Franklin, etc., Co.*, 70 N. H. 37, 47 Atl. 616, federal question whether cutting of poles by car company was in violation of the Post Roads Act. See *American Tel., etc., Co. v. Mill Creek Tp.*, 195 Pa. 643, 46 Atl. 140.

*Parties—Rival companies.*—When one company cannot enjoin a rival company from use of street, see *Baxter Tel. Co. v. Mutual Tel. Ass'n*, 94 Kan. 159, 146 Pac. 324, L. R. A. 1916B, 1083. Injunction cannot be sustained by electric company to prevent landlord from requiring tenant to use rival company's electricity. *People's Land, etc., Co. v. Beyer*, 161 Wis. 349, 154 N. W. 382, L. R. A. 1916B, 813.

<sup>236</sup> *Hudson River Tel. Co. v. Watervliet Tp., etc., Co.*, 135 N. Y. 393, 32 N. E. 148, 31 Am. St. Rep. 838, 17 L. R. A. 674; *Cumberland Tel., etc., Co. v. United Elec. R. Co. (C. C.)* 42 Fed. 273, 12 L. R. A. 544. See, also, *Central Pennsylvania Tel., etc., Co. v. Wilkes-Barre, etc., R. Co.*, 11 Pa. Co. Ct. R. 417. But see *West. U. Tel. Co. v. Guernsey, etc. Elec. L. Co.*, 46 Mo. App. 120.

<sup>237</sup> *Cumberland Tel., etc., Co. v. United Elec. R. Co.*, 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236. See, also, *Central Pennsylvania Tel., etc., Co. v. Wilkes-Barre, etc., R. Co.*, 11 Pa. Co. Ct. R. 417.

<sup>238</sup> *Hudson River Tel. Co. v. Watervliet Tp., etc., Co.*, 135 N. Y. 393, 32 N. E. 148, 31 Am. St. Rep. 838, 17 L. R. A. 674; *Cincinnati Inclined Plane R. Co. v. City, etc., Tel. Assoc.*, 48 Ohio St. 390, 27 N. E. 890, 29 Am. St. Rep. 559, 12

while an electric light company cannot recover for injuries occasioned by induction from a street railway company subsequently constructed, when the establishment of the latter is a legitimate use of the street, yet the former may recover for injury resulting from conduction, where it does not occur upon or within the streets or through the medium of the poles and wires of the electric light company upon the streets.<sup>239</sup>

§ 221a. "Inductive" electricity—meaning of—effect.—"Inductive" electricity is the attraction which the feed wires of these companies have for one another. The feed wires of electric light and railway companies are always heavily charged with electricity when the said companies are operating their plants; and when there is a telephone or telegraph wire stretched near to and parallel with the wires of these companies, there is a tendency of the more heavily charged feed wire of such companies to be attracted toward the wire of the telephone company. The induction may be great or small, and the greater the amount necessarily produces a greater inductive force. The amount of induction depends upon variation in current, the distance of the wires from each other, and the length of parallelism of the wires. The current upon the trolley wire and the feed wire of the railway is quite variable in quantity and in-

L. R. A. 534; Tel. Co. v. R. Co., 53 Ind. App. 230, 100 N. E. 309, Ann. Cas. 1916A, 132., compare Bell v. David City, 94 Neb. 157, 142 N. W. 523; Cumberland, etc., Tel. Co. v. United Elec. Ry. (C. C.) 42 Fed. 273, 12 L. R. A. 544; Spokane Falls Gas L. Co. v. St. Paul Ry. (Mss. Wash. 1899) conduction by electrolysis.

<sup>239</sup> Cumberland Tel., etc., Co. v. United Elec. R. Co., 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236. This case, while arriving at a different result than the analogous case of Hudson River Tel. Co. v. Watervliet Tp., etc., Co., supra, is not necessarily in conflict therewith, as may be observed. But see Cumberland Tel., etc., Co. v. United Elec. R. Co. (C. C.) 42 Fed. 273, 12 L. R. A. 544, injunction denied as injury could be obviated by return wire much cheaper than defendant could obviate the difficulty by remodeling its system.

*Grounding current.*—A reason which has been urged against the allowance of damages for injuries arising from conduction is that, inasmuch as the right to use the earth as a return circuit is common and universal, it is not subject to the rule that a party who is prior in point of time is prior in point of right in using the same. Cincinnati Inclined Plane R. Co. v. City, etc., Tel. Assoc., 48 Ohio St. 390, 27 N. E. 890, 29 Am. St. Rep. 559, 12 L. R. A. 534. Where, however, a telephone company uses the earth for this purpose on its private premises or the premises of its subscriber, it would be unfair to assume that another company, by generating and using an immeasurably superior current of electricity, should be allowed to invade the private premises of another and destroy the successful pursuit of a legitimate business. Cumberland Tel., etc., Co. v. United Elec. R. Co., 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236.



tensity, owing to the drain upon the store of electricity by the moving and stopping of the car. Nor is the electricity, as generated, exactly uniform in its flow from the dynamo. The result is, whenever the telephone wire is parallel with the trolley wire and feed wire, there is induced into the telephone wire a current whose variation corresponds with the variation of the electrical current on the electric railway wires, thereby producing such disturbances as render the use of the telephone plant impracticable.

§ 221b. **Same continued—actions—causes thereof.**—The actions which arise under these interferences or obstructions to the business of telephone companies by electric light and railway companies is by a bill of injunction, or an action for damages. In order to successfully maintain a bill of injunction, there should be alleged therein the fact that the use of the telephone line is being interfered with, or the transmission of messages over the same has been and is being obstructed, or is being disturbed by the intense and varying electric current passing over the feed wire of these companies which is running near to and parallel with the line wire of the telephone company. It must be further shown, in order for the telephone company to recover damages or to sustain a bill of injunction, that the loss caused by the conflict of poles and wires is because of defendant's fault or want of care. The loss of induction, unlike that caused by conduction, occurs upon and within the streets and is a direct and immediate result of the occupation and use of the streets, by a telephone company, simultaneously with these other companies, and would be obviated or remedied by the withdrawal of either company from the streets. It cannot be said that the rights of one to use and occupy the streets are greater than those of the other, nor that one is subservient to the other, for they are both quasi-public corporations, created by the same person and exercising their rights and privileges by permission of the same city authority. They both serve important public functions, and are equal candidates for public favor. Their respective rights to occupy and use the streets are co-ordinate. It is further clear that no conflict can occur between these companies in the use of the streets, if each shall remain in its proper sphere and exercise its power with that careful and prudent regard for the rights of others which the law enjoins.<sup>240</sup> It therefore follows that the electric railway or light companies must be guilty of negligence, or a want of care, before they will become liable. If they, for instance, have their feed

<sup>240</sup> *Cumberland Tel., etc., Co. v. United Electric Railway Co.* (C. C.) 42 Fed. 273, 12 L. R. A. 544.

wire suspended in a proper manner over a track, or on the opposite side of the street to that on which the telephone wire is strung, the company will not be liable. In other words, the telephone company must exercise due care toward these companies, and if it obstructs the streets in anywise as to prevent these companies from carrying on their business uninterruptedly, it cannot maintain this suit.

§ 221c. **Same continued—reason for injunction.**—The court, in one of the most able decisions ever rendered in sustaining an injunction suit against electric railway companies from using its feed wire—the same having been constructed immediately over its track—in such a manner as to interfere with the use of the streets by a telephone company, has the following to say: “The loss caused by conflict of poles and wires is imputable to defendant’s fault or want of care. Having power to have avoided this conflict without injury to its plant, it was the defendant’s duty to do so. The conflict was the result of defendant’s unnecessary act. On the other hand, the loss by induction cannot be imputed to any fault or negligence of defendant. Its plant was, as regards this matter, properly constructed and operated. Defendant could not obviate induction without abandoning the streets where it occurred. Induction is such obstruction of the streets as plaintiff is forbidden to create. The objection that induction is not an obstruction of the streets ‘sticks in the bark.’ True, it did not arrest the construction and operation of defendant’s plant, but that results not for the reason that induction is not an obstruction, but because defendant was sufficiently powerful to disregard and override it. A child upon defendant’s track, in front of its moving car, is not in a strict sense an obstruction; but who will say that the fact does not seriously interfere with defendant’s free and unembarrassed use of the street? The constraint caused by liability for legal penalties, if the child is crushed, operates as a very substantial obstruction. Defendant must stop the car or incur serious liability. It is vain to say that induction is not an obstruction if defendant shall be held for the unavoidable damage caused by it. It is true induction implies no physical contact of the two plants, but is a direct and immediate result of plaintiff’s use and occupation of the streets. The presence of plaintiff’s poles and wires upon the street causes induction and their removal would obviate it. The plaintiff cannot recover for the loss sustained from induction. It results from its unlawful obstruction of defendant’s use of the streets.”<sup>241</sup>

<sup>241</sup> Cumberland Tel., etc., Co. v. United Electric Railway Co. (C. C.) 42 Fed. 273, 12 L. R. A. 544.

§ 221d. **Same continued—distinction between induction and conduction.**—The same court draws a distinction between the liability of these electric railway companies for the interference of the use of the streets by telephone companies by “induction” and “conduction,” and shows how they may be liable for “conduction.” The court says: “Is defendant liable for loss sustained by plaintiff from the effect of conduction? The loss by conduction, unlike that caused by induction does not result from plaintiff’s obstruction of defendant’s use of the streets for an ordinary purpose. This interference would occur and cause precisely the same loss to plaintiff, and in precisely the same manner. If plaintiff had no poles or wires upon the street, loss by conduction does not result in the slightest degree from the presence of the plaintiff’s poles and wires upon the streets, and would not be to any extent remedied by their removal. The contact between the two plants, caused by conduction and the consequent injury, does not occur upon or within the streets or through the medium of plaintiff’s poles and wires located upon the streets, but upon plaintiff’s private property and that of its subscribers, lying outside of the streets and within half a mile on either side. The fact of plaintiff’s occupation and use of the streets, a controlling factor in determining defendant’s inability, for loss by induction, is irrelevant in the consideration of the question of defendant’s liability for loss by conduction. This question must be determined as if the plaintiff had no poles or wires upon the streets. The proviso in the statute of 1885 forbidding plaintiff by the use of the streets to obstruct their ordinary use has no application to the question under consideration. That statute limits plaintiff’s use of the streets, but it does not abridge its right to private property outside the street and wholly detached from their use. That statute confers upon plaintiff the use of the streets and limits that use. It does not confer upon plaintiff any rights of private property outside the streets, and does not undertake to abridge any such rights. The proviso pertains wholly and exclusively to the use of the streets. The defendant’s claim to the dominant use of the streets, if conceded, has no place in the consideration of this question involving the rights of the parties outside the streets.”<sup>242</sup>

§ 221e. **Same continued—priority of time—induction.**—The right of relief by injunction depends in a measure upon the fact as to whether the telephone company has a prior right of occupancy to the space covered by its wires as against the railway and electric

<sup>242</sup> *Cumberland Tel., etc., Co. v. United Electric Railway Co.* (C. C.) 42 Fed. 273, 12 L. R. A. 544.



companies. In a case where a telephone company sued for an injunction to restrain the electric light company from occupying certain streets, and from placing its wires too close to its own, there was some contest as to which had the prior right of occupancy. The bill alleged that incandescent light wires could not be operated parallel to telephone wires at a less distance than three feet, nor arc light wires at a less distance than two feet, without seriously interfering with the telephone, and that if the arc light wires crossed the telephone wires at a less distance than ten feet without being securely boxed, there was danger of accident. The trial court enjoined the light company from using, for arc light purposes, any wires running parallel and on the same side of the street with the telephone wires, and from using for incandescent light purposes any wires running parallel with the telephone wire on the same side of the street within a less distance than eight feet, and in any case for a distance greater than three hundred feet. It was further provided in the decree that in all cases wires must cross each other at an angle of not less than forty-five degrees, and a strong guard wire should be suspended between the wires of the two companies to prevent the upper wires from falling on the lower. The injunction was confined, however, to those streets in which the telephone company had a prior right of occupancy, and was refused as to streets in which the electric light company had been the first occupant. The court also enjoined the telephone company from placing its wires too near those of the light company. The decision of the trial court was sustained on appeal, except as to the injunction against the telephone company; that part of the injunction was set aside on the ground that the answer had asked for no affirmative relief, and that it did not appear that the telephone wires could exert the slightest influence upon those of the light company.<sup>243</sup>

§ 221f. **Same continued—priority of time—conduction.**—There is a different rule held by the courts with respect to the priority of time in the occupancy of streets where a telephone company attempts to enjoin other companies for injuries caused by “conduction” or “leakage.” In a case on this point it appeared from the evidence that the use of the metallic circuit by either company would prevent any interference between the two currents. The telephone company could use such a circuit by the adoption of a safe and comparatively inexpensive device, while the railway company could do so only at a great expense and annoyance. The ques-

<sup>243</sup> Nebraska Tel. Co. v. York Gas Light Co., 27 Neb. 284, 43 N. W. 126; West. U. Tel. Co. v. Champion Electric Light Co., 14 Wkly. Law Bul. 327.

tion was practically as to which company should undergo the expense of such a circuit. The denial of the injunction was placed by Brown, J., upon the following grounds: "First, that the defendants are making lawful use of the franchise conferred upon them by the state in a manner contemplated by the statute, and that such act cannot be considered as a nuisance in itself. Second, that in the exercise of such franchise, no negligence has been shown, and no wanton or unnecessary disregard of the rights of the complainant. Third, that the damages occasioned to the complainant are not the direct consequence of the construction of defendant's roads, but are incidental damages resulting from their operation, and are not recoverable."<sup>244</sup>

§ 221g. Same continued—causes of interference—electrolysis—effect of.—While the business of an electric lighting or heating company is not the same as that of an electric railway company, yet the means of generating and transmitting the electric current for lighting and heating is done in practically the same manner as that by which electric cars are propelled. To have a clear understanding of the manner in which the latter is operated will be sufficient to explain how telephone companies may be interfered with by induction, conduction,<sup>2</sup> or electrolysis. Under the old method, a telephone had a wire running from the exchange to the subscriber's receiver, which was also connected with a ground wire or the earth. The ground wire was connected with the exchange, thereby making a complete circuit. The earth answered the same purpose as this ground wire where none was used. This method of making the circuit is used very little now, and instead of the ground or ground wire for the return circuit, there is in use metallic conductors, such as iron and copper wires, rails, iron and lead pipes, telegraph and telephone cables, constructed alongside the wire leading from the exchange to the subscriber's telephone. There are, so far, two methods by which electric railway cars are operated, with respect to this circuit: First, the electricity, which is produced at the power house, is conducted around the line on wires supported by some means immediately over the center of the track, or on a third insulated rail, located underneath or near the track. It is then conducted from the trolley wire or third rail to the motor on the

<sup>244</sup> *Cumberland Tel., etc., Co. v. United Electric Railway Co.* (C. C.) 42 Fed. 273, 12 L. R. A. 544; *Hoyt v. Jeffers*, 30 Mich. 181; *Hudson River Tel. Co. v. Watervliet Turnpike, etc., Co.*, 135 N. Y. 393, 32 N. E. 148, 31 Am. St. Rep. 838, 17 L. R. A. 674; *Postal, etc., Co. v. Chicago, etc., Ry. Co.*, 49 Ind. App. 697, 97 N. E. 20; *Lake Shore, etc., Ry. v. Chicago, etc., Ry.*, 48 Ind. App. 584, 92 N. E. 989, 95 N. E. 596.

car by means of a trolley or shoe. It then escapes through the wheels to the track, and thence over the track back to the power house, thereby making an entire circuit. This method is called the single-trolley system.<sup>245</sup> The other way is the same as this, with this exception, viz.: Instead of the track and the ground being used for the return circuit, there is another wire placed directly beside the trolley wire, for the purpose of connecting the circuit. This is the double-trolley system.<sup>246</sup> The first of these is considered by experienced electricians to be the most simple, convenient and cheaper of the two, and for these reasons it is the system most generally used.<sup>247</sup> It will be seen that there is a complete circuit made by all of these companies, having the central office or the power house as the beginning of the circuit, and at which point the current is transmitted to the circuit; and it is the current on the circuit which may be interfered with. The telephone, in order to be successfully operated, requires a delicate, sensitive electric current with accurate pulsations, and whenever this current is strengthened, or its pulsations interfered with by the addition of electric force from extrinsic sources, its usefulness is impaired or destroyed. The interfering currents cause a buzzing sound, which almost drowns the voice and makes the enunciators ring, thus materially interfering with the successful working of the apparatus at the central office. The current of the telephone company may be interfered with when on the wires and poles above the ground, by powerful currents conveyed over the wires employed by electric light and railway companies, and is produced by "inductive" electricity;<sup>248</sup> or it may be interfered with on the return circuit underneath the ground by "conduction"<sup>249</sup> or "leakage" where the old system is used. There is another effect of conduction known as "electrolysis."<sup>250</sup> Thus, where the single-trolley system is used, and the

<sup>245</sup> *Cincinnati Inclined Plane Ry. Co. v. City, etc., Tel. Ass'n*, 48 Ohio St. 390, 27 N. E. 890, 29 Am. St. Rep. 559, 12 L. R. A. 534.

<sup>246</sup> *Cincinnati Inclined Plane Ry. Co. v. City, etc., Tel. Ass'n*, 48 Ohio St. 390, 27 N. E. 890, 29 Am. St. Rep. 559, 12 L. R. A. 534.

<sup>247</sup> *Cumberland Tel., etc., Co. v. United Electric Railway Co.*, 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236; *Cumberland Tel., etc., Co. v. United Electric Railway Co. (C. C.)* 42 Fed. 273, 12 L. R. A. 544.

<sup>248</sup> See § 221a.

<sup>249</sup> See § 221d.

<sup>250</sup> *Definition*.—"When the passage of an electric current through a substance is accompanied by definite chemical changes which are independent of the heating effects of the current, the process is known as electrolysis, and the substance is called an electrolyte." 9 Ency. Britannica (11th Ed.) 217. "Electrolysis is a chemical dissolution caused by an electric current. Whenever a



volume of electricity on the return circuit is too great for the size or capacity of the rail, and the resistance is too high to properly return the electricity to the power house, the electric current will escape to other metallic substances which offer less resistance and a better path for its return. In other words, where telephone and telegraph cables, and other underground metallic structures are running parallel with or near the electric railway track, which is used for the return current for the latter company, but which is inadequate to convey the electric current to the power house in the proper manner, the electricity will escape to such telephone and telegraph cables, or other underground metallic substances, and at such points electrolytic actions or disintegration takes place, and causes the cable to be pitted and eaten. Pipes of water companies have suffered more than any other from electrolysis caused by the escape of electricity from the return circuit of electric railway tracks, but telephone, telegraph, and electric companies' wires may also be affected thereby. Heavily charged wires of electric companies may also be the producing cause of electrolysis. So far there has been little litigation on electrolysis,<sup>251</sup> and, as means can be provided to prevent injuries arising therefrom,<sup>252</sup> there will not likely be much litigation thereon. While the courts cannot require the use of certain devices to prevent electrolysis,<sup>253</sup> they can enjoin the escape of electricity which causes electrolysis where the party against whom the complaint is made has been negli-

current of sufficient quantity and intensity is passed through a chemical compound in a fluid condition, it will cause a chemical disruption, and one of the elements will go to the anode, or the place at which the current enters the fluid mass, and the other will go to the cathode, or the place where the current leaves it." *Lowrey v. Cowles Elec., etc., Co.* (C. C.) 68 Fed. 354. "As applied to water pipes, electrolysis is the stripping off of small particles of the iron when a suitable electrolytic solution is present, leaving the carbon of which the pipe is partly composed intact. What the cathode is in this process of decomposition does not clearly appear, but it may be assumed to be the adjoining water pipe, a gas pipe, lead water service pipe, street car rail, or some metallic deposit in the soil; one or more of these being part of the circuit of the current operating on the water main, and flowing toward the negative side of the dynamo in the railway power station." *Peoria Waterworks Co. v. Peoria Ry. Co.* (C. C.) 181 Fed. 990.

<sup>251</sup> *Peoria Waterworks Co. v. Peoria Ry. Co.* (C. C.) 181 Fed. 990; *City of Dayton v. City Ry. Co.*, 26 Ohio Cir. Ct. R. 736; *Townsend v. Norfolk Ry., etc., Co.*, 105 Va. 22, 52 S. E. 970, 4 L. R. A. (N. S.) 87, 115 Am. St. Rep. 842, 8 Ann. Cas. 558.

<sup>252</sup> See *Cravath-Trow, Electric Railways*, pp. 66 and 98.

<sup>253</sup> *City of Dayton v. City Ry. Co.*, 26 Ohio Cir. Ct. R. 736.

gent in this respect;<sup>254</sup> and the latter would also be liable, under the same circumstances, for damages for such injury.<sup>255</sup>

<sup>254</sup> "At the outset it may be said that the court has no power to prescribe by injunction the use of any particular system of circuit or negative return. It is doubtful, indeed, whether the judicial power would extend to the making of a decree restraining the defendant from continuing to serve the public unless it shall cease injuring complainants' water system. The utmost possible relief is to restrain defendant from continuing the injury, assuming for the present that sufficient damage is shown, and punishing it and its officers for contempt in case of disobedience, leaving the means of curing the injury entirely to its discretion. In case of such a result, a decree might be rendered in contempt proceedings brought in this suit on the equitable side, awarding compensation for such injury as might be shown, with incidental punishment. Or a proceeding for a criminal contempt might be brought in case of deliberate disobedience in which a fine or imprisonment might be imposed. *Bessette v. Conkey Co.*, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997. That no system can be imposed by the court is settled by general decisions, passing on the essential distinctions between legislative and judicial power." *Peoria Waterworks Co. v. Peoria Ry. Co.*, (C. C.) 181 Fed. 990.

<sup>255</sup> *Peoria Waterworks Co. v. Peoria Ry. Co.* (C. C.) 181 Fed. 990.

## CHAPTER X

## REGULATION AND CONTROL

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§ 222. Federal control.—Where telegraph and telephone companies extend into several states, they become instruments of interstate commerce, and messages sent over these lines are commerce between the states,<sup>1</sup> subject to the control of Congress, so far as regards matters connected with commerce among the states or

<sup>1</sup> In re Pennsylvania Tel. Co., 48 N. J. Eq. 91, 20 Atl. 846, 27 Am. St. Rep. 462; Central, etc., Tel. Co. v. Falley, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; Daily v. State, 51 Ohio St. 348, 37 N. E. 710, 46 Am. St. Rep. 578, 24 L. R. A. 724; West. U. Tel. Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067; West. U. Tel. Co. v. Pendleton, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187, 1 Interst. Com. R. 306; West. U. Tel. Co. v. Commercial Milling Co., 218 U. S. 406, 54 L. Ed. 1088, 31 Sup. Ct. 59, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815. See § 227. See, also, West. U. Tel. Co. v. Atlantic & Pacific States Tel. Co., 5 Nev. 102; Postal Tel. Co. v. Richmond, 99 Va. 102, 37 S. E. 789, 86 Am. St. Rep. 877; Tel. Co. v. Hall, 118 Fed. 382, 55 C. C. A. 208; Tel., etc., Co. v. Eureka (C. C.) 172 Fed. 755; Tel. Cable Co. v. Mobile (C. C.) 179 Fed. 955.



with foreign countries.<sup>2</sup> Although the fact that a telephone or telegraph company has extended its lines through different states, and is engaged in interstate commerce, will not relieve it from the operation of state statutes upon business conducted wholly within the state, nor justify the refusal of such a company to furnish the best connections and facilities to persons doing business in such state, on the terms prescribed by such statute,<sup>3</sup> nor will a state be prohibited from enacting laws subjecting such companies to penalties for acts of negligence occurring entirely within the limits of that state, although such acts may be committed in the delaying of the transmission of messages to points in other states.<sup>4</sup> The object of vesting the power to regulate commerce in Congress was to secure, with reference to its subjects, uniform regulations, where practicable, against conflicting state legislation. Such conflicting legislation would inevitably follow with reference to communications between citizens of different states, if each state was vested with the power to control them beyond its own limits. The manner and order of the delivery of telegrams, as well as their transmission, would vary according to the judgment of each state. Thus the Indiana statute requires telegrams to be delivered by messengers to persons to whom they are addressed, if they reside within one mile of the telegraph station, or within the city or town in which such station is; and the requirement applies according to the decision of the supreme court in this case when the delivery is to be made in another state. Other states might consider that the delivery by messengers to a person living in a city many miles in extent was an unjust burden, and require the duty within less limits; so, if the law of one state could prescribe the order and manner of delivery in another state, the receiver of the message would often find himself incurring a penalty because of conflicting laws, both of which he could not obey. Conflict and confusion would only follow the attempted exercise of such a power.<sup>5</sup>

<sup>2</sup> *Callum v. District of Columbia*, 15 App. D. C. 529. See *State v. Chicago*, etc., R. Co., 136 Wis. 407, 117 N. W. 686, 19 L. R. A. (N. S.) 326, regulation of working hours of employes; *Lawrence v. Rutland R. Co.*, 80 Vt. 370, 67 Atl. 1091, 15 L. R. A. (N. S.) 350, 13 Ann. Cas. 475, requiring payment of weekly salaries of employes.

<sup>3</sup> *Central, etc., Tel. Co. v. Falley*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114.

<sup>4</sup> *West. U. Tel. Co. v. Howell*, 95 Ga. 194, 22 S. E. 286, 51 Am. St. Rep. 68, 30 L. R. A. 158.

<sup>5</sup> *West. U. Tel. Co. v. Pendleton*, 122 U. S. 347, 30 L. Ed. 1187, 7 Sup. Ct. 1126.

§ 223. **Same continued—concurrent state rights.**—The power to regulate commerce is manifestly a dormant power until brought into activity. It covers a wide field and embraces many subjects, and to the extent that Congress fails to exercise it in any given case, it seems to be conceded that it is a concurrent power and may be exercised by any state.<sup>6</sup> Until this dormant power of the constitution is awakened and made effective by appropriate legislation, the reserved power of the state is plenary, and its exercise in good faith cannot be made the subject of review by the United States Supreme Court.<sup>7</sup> Thus the states may require foreign telegraph and telephone companies to have a known place of business within their jurisdiction, and an agent or agents thereat on whom summons may be served; or they may require a prompt delivery of messages received from another state and impose a penalty for a failure to do so;<sup>8</sup> or they may provide a limited time within which suits must be brought and a notice of same given prior thereto.<sup>9</sup> Because the company is a foreign corporation and carrying on interstate commerce will not deprive the state of any of its police regulations.<sup>10</sup>

§ 224. **Telegraph lines over subsidized railroads.**—In order to have connection between the East and the West, Congress granted rights of ways to the Pacific railroads and aided and assisted them in the construction of their roads.<sup>11</sup> In connection with their railroad business, Congress also granted to them franchises for the construction and operation of telegraph lines along their roads. Congress, nevertheless, has control over these lines, and the railroads cannot evade the federal control of these lines by any agreement with a telegraph company,<sup>12</sup> as they may be compelled to so operate their lines as to give equal facilities to all, without any discrimi-

<sup>6</sup> *Steamship Co. v. Joliffe*, 2 Wall. 450, 17 L. Ed. 805; *American U. Tel. Co. v. West. U. Tel. Co.*, 67 Ala. 26, 42 Am. Rep. 90.

<sup>7</sup> *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. Ed. 96.

<sup>8</sup> *Gray v. Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301n.

<sup>9</sup> *Burgess v. West. U. Tel. Co.*, 92 Tex. 125, 46 S. W. 794, 71 Am. St. Rep. 833.

<sup>10</sup> *West. U. Tel. Co. v. Mississippi R. Co.*, 74 Miss. 80, 21 South. 15; *Postal Tel. Cable Co. v. Chicopee*, 207 Mass. 341, 93 N. E. 927, 32 L. R. A. (N. S.) 997.

<sup>11</sup> *U. S. v. West. U. Tel. Co. (C. C.)* 50 Fed. 28. See, also, *U. S. v. Union Pac. R. Co.*, 160 U. S. 1, 16 Sup. Ct. 190, 40 L. Ed. 319; *U. S. v. Northern Pac. R. Co. (C. C.)* 120 Fed. 546.

<sup>12</sup> *U. S. v. Union Pac. R. Co.*, 160 U. S. 1, 16 Sup. Ct. 190, 40 L. Ed. 319. See, also, *U. S. v. Union Pac. R. Co.*, 163 U. S. 710, 16 Sup. Ct. 1207, 41

nation in favor of any person or corporation, and to receive any exchange business with connecting lines.<sup>13</sup> One of the requirements imposed upon these companies as to the franchise to operate a telegraph line along their roads is that they cannot alienate the franchise; and it has been held that this right of control extends to any telegraph company exercising these franchises under an agreement with the railroad company.<sup>14</sup>

§ 225. **State control.**—Under its inherent power of police regulation over persons and property within its limits, the state may regulate the manner in which telegraph, telephone, and electric companies shall be constructed and maintained within its borders.<sup>15</sup> The police power is one of the fundamental principles upon which the government was founded, and is absolutely essential to its general welfare. Upon this power rests the peace and tranquillity of all society, the enjoyment of health, the upbuilding of good morals, and the security and protection of property.<sup>16</sup> No government can advance in civilization, in wealth, and in influence without an enforcement of these powers. When any corporation acquires a franchise for the purpose of carrying on a corporate business within a state, it is accepted subject to the police power. By giving the franchise, the state did not abrogate its power over the public highways, nor in any way curtail its power to be exercised for the general welfare of the people; nor do the states absolve themselves from their primary duties to maintain the highways of the respective states in a safe and proper condition for public travel and other necessary purposes.<sup>17</sup> Neither can this power be alienated, surrendered, nor abridged by the legislature by any grant, contract, or

L. Ed. 316; U. S. v. West. U. Tel. Co., 160 U. S. 53, 16 Sup. Ct. 210, 40 L. Ed. 337.

<sup>13</sup> U. S. v. Northern Pac. R. R. Co. (C. C.) 120 Fed. 546.

<sup>14</sup> U. S. v. West. U. Tel. Co. (C. C.) 50 Fed. 28; U. S. v. Union Pac. R. Co., 160 U. S. 1, 16 Sup. Ct. 190, 40 L. Ed. 319; U. S. v. Northern Pac. R. Co. (C. C.) 120 Fed. 546.

<sup>15</sup> State v. West. U. Tel. Co., 172 Ind. 20, 87 N. E. 641; Hockett v. State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; State v. West. U. Tel. Co., 75 Kan. 609, 90 Pac. 299; Michigan Tel. Co. v. Charlotte (C. C.) 93 Fed. 11. See chapter V; State ex rel. v. Superior Court, 67 Wash. 37, 120 Pac. 861. L. R. A. 1915C, 287, Ann. Cas. 1913D, 78, citing text; People v. Squire, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893; New York v. Squire, 145 U. S. 175, 12 Sup. Ct. 880, 36 L. Ed. 666.

<sup>16</sup> State v. Superior Court, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C, 287, Ann. Cas. 1913D, 78, quoting Jones on T. & T. Co. See Cooley on Const. Lim. 572.

<sup>17</sup> American Rapid Tel. Co. v. Hess, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454, note; Sheldon v. West. U. Tel. Co., 121 N. Y.



delegation whatsoever; because it constitutes the exercise of a governmental function without which it would become powerless to do those things which it was especially designed to accomplish.<sup>18</sup> It therefore follows that under its inherent power of police regulation the state may regulate the manner in which domestic telegraph, telephone, and electric companies shall be constructed and carried on within its borders;<sup>19</sup> and it may also regulate and control, to a certain extent, foreign corporations doing business within the state.<sup>20</sup> While the telegraph and telephone companies may, and generally do, fall under the laws pertaining to interstate commerce, and therefore regulated by Congress, yet the states may prescribe certain conditions for them to perform before they will be protected and recognized under the state laws. For instance, a foreign telegraph company, which has failed to locate an office and place an agent thereat, on whom a summons may be served, in a state whose constitution provides that such must be done, will not be protected in an injunction suit instituted by such a company.<sup>21</sup> They cannot be prevented from coming into a state—and they may, upon the principles of comity, do business therein, unless it is in conflict with the laws thereof or unjustly interferes with the rights of some of its citizens—yet they will not be protected by the state laws.<sup>22</sup>

§ 226. **State may control the construction.**—The state in granting to a telegraph, telephone, or electric company a license to construct its line upon the streets or public highways does not relinquish its control over the streets and highways; nor does it divest itself of the right to exercise the police power in any way. But even if the state had granted some interest in the streets, it could nevertheless regulate the size and location of the poles, the height of the wires, and their location;<sup>23</sup> and should they become an obstruction and a nuisance, the state could remove them or require them to be placed underground.<sup>24</sup> The company may be required

697, 24 N. E. 1099. See § 87; *State ex rel. v. Superior Court*, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C, 287, Ann. Cas. 1913D, 78, quoting text.

<sup>18</sup> *People v. Squire*, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893; *Presbyterian Church v. New York City*, 5 Cow. (N. Y.) 540; *State v. Superior Court*, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C, 287, Ann. Cas. 1913D, 78, quoting *Jones on T. & T. Co.*

<sup>19</sup> See chapter V.

<sup>20</sup> *American U. Tel. Co. v. West. U. Tel. Co.*, 67 Ala. 26, 42 Am. Rep. 90.

<sup>21</sup> *American U. Tel. Co. v. West. U. Tel. Co.*, 67 Ala. 26, 42 Am. Rep. 90.

<sup>22</sup> *American U. Tel. Co. v. West. U. Tel. Co.*, 67 Ala. 26, 42 Am. Rep. 90.

<sup>23</sup> See § 89 et seq.

<sup>24</sup> See § 93 et seq.

to furnish a map showing the street or highway desired to be used and designate thereon the general course of the underground conduit to be used, with a description of its size and depth.<sup>25</sup> The primary and fundamental object of all public highways is to furnish a passageway for travelers in vehicles, or on foot, through the country.<sup>26</sup> They were originally designed for the use of the travelers alone, but in the course of time and in the interest of the general prosperity and comfort of the public, they have been put, especially in large cities, to numerous other uses, and yet such uses have always been held to be subordinate to the original design and use.<sup>27</sup> It is, therefore, the duty of the governmental power to secure a safe highway for the protection of life; and any control over the construction and maintenance of these companies which will enhance the interest of good morals and health, and protection to life, can and ought to be exercised under the police power. "The state may exercise any other general control in the construction of these companies as the public interest may require. The subjects upon which the state may act are almost infinite, yet in its regulations with respect to all of them, there is this necessary limitation: The state cannot thereby encroach upon the free exercise of the power vested in Congress by the constitution.<sup>28</sup> Within that limitation it may undoubtedly make all necessary provisions with respect to the construction of poles and wires of telegraph companies in its jurisdiction which the comfort and convenience of the community may require."<sup>29</sup>

§ 227. **Same continued—taxing power.**—The state, under the police power, may tax a foreign telegraph company doing business within its borders. This brings us to a subject of much interest and one to be further discussed—that is whether such companies fall within the laws of interstate commerce, and thereby to be con-

<sup>25</sup> See § 89.

<sup>26</sup> Bouvier's Institute, § 442.

<sup>27</sup> *New York v. Squire*, 145 U. S. 175, 12 Sup. Ct. 880, 36 L. Ed. 666, affirming 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893; *Allentown v. West. U. Tel. Co.*, 148 Pa. 117, 23 Atl. 1070, 33 Am. St. Rep. 820; *West. U. Tel. Co. v. Philadelphia (Pa.)* 12 Atl. 144; *Forsythe v. Baltimore, etc., Tel. Co.*, 12 Mo. App. 494.

<sup>28</sup> See chapter IV.

<sup>29</sup> *West. U. Tel. Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187. See chapter V. See, also, *Cooley v. Board of Port Wardens*, 12 How. 299, 13 L. Ed. 996; *West. U. Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *American U. Tel. Co. v. West. U. Tel. Co.*, 67 Ala. 31, 42 Am. Rep. 90; *Pacific, etc., Tel. Co. v. Eshleman*, 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, and note, Ann. Cas. 1915C, 822.

trolled by Congress; or whether the state can have such control.<sup>30</sup> Congress is vested, to a limited extent, for special purposes, with the exercise of the police power. One of these special purposes in which it may exercise this right is the power of regulating and controlling interstate commerce, and this power is within the exclusive control of Congress. The state has the like exclusive power, subject to no limitation save that of the constitution of the United States, to control all of the commerce carried on within its borders. Intelligence transmitted by means of electricity is commerce, and when it is being transmitted from one state to foreign states, to any of the territories, or within the District of Columbia, it is exclusively under the control of Congress.<sup>31</sup> All telegraph lines running from one state to any other, and all connecting lines, even though they may be wholly within the state, are subject to the control of Congress.<sup>32</sup> But if any business is carried on over these lines within the boundary of any state, and the same is not business of a governmental nature, it is subject to the control of the state and may be taxed as any other property therein.<sup>33</sup> "Considered purely as a foreign corporate body, deriving its powers from a charter granted by the state of New York, the state of Alabama has the power to prescribe police regulations for its government within its boundaries, and to tax its property situated there for purposes of revenue, having due regard that no unjust discrimination be made."<sup>34</sup> The state has the same power to tax domestic telephone companies for the purpose of obtaining revenue as it has to tax any other property in the state.<sup>35</sup> The police power to raise revenue by taxation may be vested in municipalities.<sup>36</sup> They have the power under an ordinance to tax domestic telephone companies doing business within the city limits.<sup>37</sup>

§ 228. **Same continued—penalty for delay in delivering messages.**—The state may, under its police power, impose a penalty on

<sup>30</sup> See chapter XXVI.

<sup>31</sup> See § 222.

<sup>32</sup> See § 55 et seq.

<sup>33</sup> *Osborne v. State*, 33 Fla. 162, 14 South. 588, 39 Am. St. Rep. 99, 25 L. R. A. 120; *People v. Wemple*, 131 N. Y. 64, 29 N. E. 1002, 27 Am. St. Rep. 547n. See *Com. v. Smith*, 92 Ky. 38, 17 S. W. 187, 36 Am. St. Rep. 578; *City of Bloomington v. Bourland*, 137 Ill. 534, 27 N. E. 692, 31 Am. St. Rep. 382; *State v. French*, 109 N. C. 722, 14 S. E. 383, 26 Am. St. Rep. 590. See *West. U. Tel. Co. v. Sharp* (Ark.) 180 S. W. 504.

<sup>34</sup> *Moore v. Eufaula*, 97 Ala. 670, 11 South. 921.

<sup>35</sup> See chapter XXVI.

<sup>36</sup> See chapter XXVI.

<sup>37</sup> *Southern Bell, etc., Tel. Co. v. D'Alemberte*, 39 Fla. 25, 21 South. 570. See, also, chapter XXVI.



a telegraph company for a failure to deliver a message promptly when properly tendered. These statutes are penal and must be strictly construed in the same manner as all other penal statutes. Thus the penalty imposed cannot ordinarily be enforced where the failure of duty on the part of the company occurs beyond the jurisdiction of the state.<sup>38</sup> The court, speaking on this subject, said: "The attempted regulation by Indiana of the mode in which messages sent by telegraphic companies doing business within her limits shall be delivered in other states cannot be upheld. It is an impediment to the freedom of that form of interstate commerce which is as much beyond the power of Indiana to interpose as the imposition of a tax by the state of Texas upon every message transmitted by a telegraph company within her limits to other states was beyond her power. Whatever authority the state may possess over the transmission and delivery of messages by telegraph companies within her limits, it does not extend to the delivery of messages in other states." These penalties may be enforced for a failure to deliver within a reasonable time a message which has been sent from without a state,<sup>39</sup> or sent through other states to points within.<sup>40</sup>

**§ 229. Same continued—the Pendleton Case—what embraced.**—The decision of the United States Supreme Court in the Pendleton Case was confined to the particular point at issue and is not to be given too extensive an application. Thus, where there is a refusal or total failure to transmit, the sender may enforce the statutory penalty, although the point of destination was in another state.<sup>41</sup> So also, where the wrong complained of is a refusal to deliver, or a delay in delivery, the addressee, if the statute allows an action by him, may enforce the penalty though the message is sent from a foreign state.<sup>42</sup> All that was decided in the Pendleton Case was that a state cannot enforce the performance of a duty beyond its borders, and the fact that the message is sent from one state into another does not deprive either state of the right to enforce the

<sup>38</sup> *Alexander v. West. U. Tel. Co.*, 67 Miss. 386, 7 South. 280; *West. U. Tel. Co. v. Pendleton*, 122 U. S. 347, 30 L. Ed. 1187, 7 Sup. Ct. 1126; *Little Rock, etc., R. Co. v. Davis*, 41 Ark. 79. See *West. U. Tel. Co. v. Commercial Milling Co.*, 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, and note, 21 Ann. Cas. 815.

<sup>39</sup> *West. U. Tel. Co. v. Pendleton*, 122 U. S. 347, 30 L. Ed. 1187, 7 Sup. Ct. 1126, reversed 95 Ind. 12, 48 Am. Rep. 698.

<sup>40</sup> *Leavell v. West. U. Tel. Co.*, 116 N. C. 211, 21 S. E. 391, 47 Am. St. Rep. 798, 27 L. R. A. 843.

<sup>41</sup> See chapter XVIII.

<sup>42</sup> See chapter XVIII.

performance, within its borders, of the duties of the company engaging to transmit it.<sup>43</sup> This view would follow from the accepted principles that a state may enforce the performance of the obligations of a public company though it is engaged in interstate commerce, and that a state law is not invalid merely because it incidentally affects interstate commerce.<sup>44</sup>

§ 230. **Same continued—must fall within meaning of statute.**—These statutes are penal and subject to the rules of construction which obtain in respect to same, and which require that “no case shall be held to fall within it which does not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment.”<sup>45</sup> Thus, where a statute imposed a penalty for failure to “receive and transmit a message promptly, and with impartiality and good faith, the company could not be held liable under this statute on the sole ground, as alleged, to transmit and deliver it.”<sup>46</sup> “There is no doubt but that the company undertakes to deliver, under reasonable rules and regulations, messages transmitted over its wires, and it must respond in damages to those who are injured by its neglect of duty. But the question is, Has the legislature imposed a penalty for the refusal to perform that duty as it has for the refusal to perform the duty of transmitting a message? The terms of the act are confined to a refusal to transmit over the wires,”<sup>47</sup> and the act is confined strictly to these words and not to any which might be inferred. The sendee of a message is not, under these statutes entitled to recover the penalty therein named for a failure by the company to deliver such message with due diligence, unless the charges thereon were prepaid or tendered by the sender, or unless there was a failure to deliver, or delay in delivering, on or after payment or tender by the sendee or his agent.<sup>48</sup>

§ 231. **Same continued—offices established—must keep open.**—When a telegraph company once establishes an office, it must not discontinue the same without the consent of the state,<sup>49</sup> and the fact

<sup>43</sup> See chapter XVIII.

<sup>44</sup> *West. U. Tel. Co. v. Pendleton*, 122 U. S. 347, 30 L. Ed. 1187, 7 Sup. Ct. 1126; *Peck v. Chicago, etc., R. Co.*, 94 U. S. 164, 24 L. Ed. 97; *Louisville, etc., R. Co. v. Railroad Com. (C. C.)* 19 Fed. 679. See *West. U. Tel. Co. v. Commercial Milling Co.*, 218 U. S. 406, 54 L. Ed. 1088, 31 Sup. Ct. 59, 36 L. R. A. (N. S.) 220, note, 21 Ann. Cas. 815.

<sup>45</sup> *Burnett v. West. U. Tel. Co.*, 39 Mo. App. 599.

<sup>46</sup> *Brooks v. West. U. Tel. Co.*, 56 Ark. 224, 19 S. W. 572.

<sup>47</sup> *Brooks v. West. U. Tel. Co.*, 56 Ark. 224, 19 S. W. 572.

<sup>48</sup> *Langley v. West. U. Tel. Co.*, 88 Ga. 777, 15 S. E. 291.

<sup>49</sup> *Atchison, T. & S. F. R. Co. v. State*, 23 Okl. 210, 100 Pac. 11, 21 L. R. A. (N. S.) 908, a telephone is a facility and convenience which a rail-

that the income from such office is not sufficient to defray the expense in keeping it up will not be grounds for the company to close same.<sup>50</sup> A case involving this point was that of a foreign company, it being claimed that it had never asked or received from the state in which it was being prosecuted any grant, franchise, privilege or immunity, but that it secured its rights to erect its lines along the post roads in the state by virtue of authority derived from an act of Congress; yet the court held that it was subject to such reasonable police regulations as the state saw proper to impose for securing conveniences to the people; and the fact that it does receive its powers from Congress, does not release it from any and all local public regulations.<sup>51</sup>

§ 232. **Same continued—other regulations.**—The state may provide such other regulations for these companies as the necessities of the state may require. It may provide the rates to be charged for all messages sent to all points within the state;<sup>52</sup> that they shall not discriminate among its patrons;<sup>53</sup> that they shall furnish equal facilities to all;<sup>54</sup> and that all foreign companies shall comply with all the requirements exacted of domestic concerns, and also with all the conditions required of other foreign corporations; for instance, they must file their charter with the secretary of state and have an agent within the state upon whom process may be served. The constitution of Alabama provided that no corporation should do business within the state "without having at least one known place of business and an authorized agent or agents therein." In this state, one telegraph company attempted to enjoin another from interfering with the construction and operation of its line.

road company may be required to install, under Oklahoma Const. art. 9, § 18. But see, *Duncan v. Toledo, etc., R. Co.*, P. U. R. 1916B, 751, where same cannot be done in Indiana by commission.

<sup>50</sup> *Chicago, R. I. & P. R. Co. v. State*, 24 Okl. 370, 103 Pac. 617, 24 L. R. A. (N. S.) 393, holding that a railroad company cannot be reasonably and justly required by the state corporation commission to install and maintain a telegraph operator at a station, unless it is reasonably necessary for the safety and expedition of the train service, both freight and passenger, or either, and the convenience of the public in the conduct of the freight and passenger service, or either. See also *St. Louis, etc., R. Co. v. Newell*, 25 Okl. 502, 106 Pac. 818; *State v. Postal Tel. Cable Co.*, 96 Kan. 298, 150 Pac. 544.

<sup>51</sup> *West. U. Tel. Co. v. Railroad Co.*, 74 Miss. 80, 21 South. 16; *Railroad Com'rs v. West. U. Tel. Co.*, 113 N. C. 213, 18 S. E. 389, 22 L. R. A. 570. See, also, *Mayo v. West. U. Tel. Co.*, 112 N. C. 343, 16 S. E. 1006.

<sup>52</sup> See § 234. See cases cited in note 82.

<sup>53</sup> See chapter II. See, also, *Central U. Tel. Co. v. State*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114.

<sup>54</sup> See chapter II. See *Butner v. West. U. Tel. Co.*, 2 Okl. 234, 37 Pac. 1087.



The former company had not complied with this condition and the injunction was therefore denied, although it was denied on the ground that no right to such relief was shown to exist. The court further held that the constitutional provision quoted did not conflict with the federal constitution, saying: "The mandate of section 4, art. 14, of the constitution of Alabama, which requires foreign corporations to have a known place of business and an authorized agent, is just as much a police regulation for the protection of the property interest of the citizens as a law forbidding vagrancy among its inhabitants. It does not impede or obstruct unreasonably any right conferred on foreign telegraph corporate companies by the act of Congress and is therefore free from constitutional objections."<sup>55</sup> The state may also restrict the company's power to limit its liability, by declaring invalid stipulations in the contract of sending in so far as such stipulations operate to relieve the company from liability for negligence.<sup>56</sup>

**§ 233. Same continued—limitation—impairment of contract.—**The state is limited in its control over these companies, in that it cannot exercise a power which is exclusively within the rights of Congress;<sup>57</sup> nor can it make provisions which would impair the obligations of a contract and the same to be in favor of a vested right.<sup>58</sup> Thus a municipal ordinance granting to a particular company authority to construct and maintain telegraph lines along the streets without limitation as to time, and for a stipulated consideration, when accepted and acted on by the company by a compliance with all conditions, and by the construction of an expensive plant, acquires the feature of a contract, which the city cannot afterwards

<sup>55</sup> *American U. Tel. Co. v. West. U. Tel. Co.*, 67 Ala. 26, 42 Am. Rep. 90. See, also, *Singer Mfg. Co. v. Hardee*, 4 N. M. (Johns.) 175, 16 Pac. 605; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137; *Philadelphia Fire Assoc. v. N. Y.*, 119 U. S. 110, 7 Sup. Ct. 108, 30 L. Ed. 342.

<sup>56</sup> *Kemp v. West. U. Tel. Co.*, 28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363; *West. U. Tel. Co. v. Commercial Milling Co.*, 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, note, 21 Ann. Cas. 815.

<sup>57</sup> *State v. Chicago, etc., R. Co.*, 136 Wis. 407, 117 N. W. 686, 19 L. R. A. (N. S.) 326, a regulation by Congress of the number of hours per day for which telegraph operators and train dispatchers on interstate railroads may be employed inhibits state legislation upon the same subject, especially such as limits such employment to fewer hours per day than allowed by Congress, and puts the regulation in force sooner than the time provided by the congressional act.

<sup>58</sup> *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629. See §§ 44 and 84.

annul or alter in its essential terms without the company's consent.<sup>59</sup>

§ 234. **Regulate charges.**—Telegraph, telephone, and electric light companies are engaged in a "business affected with a public interest" within the meaning of the rule laid down in a leading case,<sup>60</sup> and the state in the exercise of the police power may, therefore, regulate the rates and charges for such companies, and provide a maximum rate which these charges shall not exceed.<sup>61</sup> One of the fundamental principles of law is that, when individuals invest their money in an enterprise in which the public has an interest, the enterprise must be regulated by the government in such a manner as to prevent its general welfare from being interfered with. Telegraph, telephone, and electric light companies—whether they have become incorporated or whether they are being conducted by private citizens as a private enterprise<sup>62</sup>—are carrying on a business

<sup>59</sup> *New Orleans v. Great Southern Tel. Co.*, 40 La. Ann. 41, 3 South. 533, 8 Am. St. Rep. 502; *Hudson Tel. Co. v. Jersey City*, 49 N. J. Law, 303, 8 Atl. 123, 60 Am. Rep. 619; *Northwestern Tel. Exch. Co. v. Anderson*, 12 N. D. 585, 98 N. W. 706, 102 Am. St. Rep. 580, 65 L. R. A. 771, 1 Ann. Cas. 110; *City of Plattsmouth v. Nebraska Tel. Co.*, 80 Neb. 460, 114 N. W. 588, 14 L. R. A. (N. S.) 654, 127 Am. St. Rep. 779. See, also, §§ 44, 84.

<sup>60</sup> *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, affirming 69 Ill. 80; *Cooley's Const. Lim.* (4th Ed.) p. (594) 743; *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 5 L. R. A. 559n, 15 Am. St. Rep. 460.

<sup>61</sup> *Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238, 22 Sup. Ct. 881, 46 L. Ed. 1144; *Hockett v. State*, 105 Ind. 259, 5 N. E. 178, 55 Am. Rep. 207; *Central U. Tel. Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721; *Johnson v. State*, 113 Ind. 143, 15 N. E. 215; *Central U. Tel. Co. v. State*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; *Railroad Com'rs v. West. U. Tel. Co.*, 113 N. C. 213, 18 S. E. 389, 22 L. R. A. 570; *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278, note; *Nebraska Tel. Co. v. State*, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113; *Mayo v. West. U. Tel. Co.*, 112 N. C. 343, 16 S. E. 1006; *Central U. Tel. Co. v. State*, 123 Ind. 113, 24 N. E. 215; *Home Tel., etc., Co. v. Los Angeles*, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176; *Cumberland Tel. Co. v. Louisville (C. C.)* 187 Fed. 637; *Pioneer Tel., etc., Co. v. Westenhaver*, 29 Okl. 429, 118 Pac. 354, 38 L. R. A. (N. S.) 1209; *State v. Superior Ct.*, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C. 287, Ann. Cas. 1913D, 78; *Williams v. Tel. Co. (D. C.)* 203 Fed. 140; *Ex parte Goodrich*, 160 Cal. 410, 117 Pac. 451, Ann. Cas. 1913A, 56, electric light company; *Horner v. Oxford Water, etc., Elec. Co.*, 153 N. C. 535, 69 S. E. 607, 138 Am. St. Rep. 681. See § 254 et seq.

<sup>62</sup> *Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201. But in *Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238, 22 Sup. Ct. 881, 46 L. Ed. 1144, it was held that a local telephone plant installed in a building so that parties in different rooms could communicate with each other, but having no connection or means of communicating with the general public, and intended solely as a local convenience for the occupants of the building

in which the public has an interest, and to such an extent of public interest they must be controlled by the public.<sup>63</sup> It is an undisputed fact, and one which it is unnecessary to discuss, that the states may regulate the charges on all common carriers which are carrying on a business to all points within their jurisdiction.<sup>64</sup> Under some statutory enactments, telegraph and telephone companies have become common carriers of intelligence and are, therefore, to be governed and controlled by the laws applicable to other common carriers; however, it is not necessary in order to give the state control over the charges of these companies, for statutes to be passed, declaring them common carriers.

**§ 235. Same continued—constitutionality of statutes.**—It has been attempted to be shown that these statutes which regulate the charges of these and other similar institutions are unconstitutional, in that they attempt to divest persons of property without due process of law, which is prohibited under the fourteenth amendment of the constitution of the United States.<sup>65</sup> The case of *Munn v. Illinois*<sup>66</sup> is a direct authority upon this question. This case was carried to the United States Supreme Court on a writ of error, to review a judgment of the supreme court of the State of Illinois, which affirmed the constitutionality of a statute of that state fixing a maximum charge for the elevation and storage of grain in warehouses in that state. The act was challenged as a violation of the constitutional guaranty in the constitution of Illinois protecting life, liberty and property, and which was expressed in substantially the same language as that found in the constitutions of almost all other states. The supreme court of the United States affirmed the judg-

was not, although installed by a public telephone company, a part of its public business, and the rates to be charged for such services were not subject to legislative regulation.

<sup>63</sup> *Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; *State v. Superior Court*, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C, 287, Ann. Cas. 1913D, 78; *Horne v. Oxford Water, etc., Co.*, 153 N. C. 535, 69 S. E. 607, 138 Am. St. Rep. 681; *Bluefield Waterworks, etc., Co. v. Bluefield*, 69 W. Va. 1, 70 S. E. 772, 33 L. R. A. (N. S.) 759; *Home Tel. Co. v. Carthage*, 235 Mo. 644, 139 S. W. 547, 48 L. R. A. (N. S.) 1055, Ann. Cas. 1912D, 301.

<sup>64</sup> *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682, 15 Am. St. Rep. 460, 5 L. R. A. 559, note; *State v. Superior Court*, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C, 287, Ann. Cas. 1913D, 78.

<sup>65</sup> *Home Tel. Co. v. Carthage*, 235 Mo. 644, 139 S. W. 547, 48 L. R. A. (N. S.) 1055, Ann. Cas. 1912D, 301; *West. U. Tel. Co. v. Myatt* (C. C.) 98 Fed. 335; *State ex rel. v. Superior Court*, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D, 78, L. R. A. 1915C, 287.

<sup>66</sup> 94 U. S. 113, 24 L. Ed. 77.



ment of the state court, on the ground that the legislation in question was a lawful exercise of legislative power, and did not infringe upon this clause of the federal constitution. As was said by an eminent jurist on this subject: "There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property or the use of it; but if, for a particular purpose, the public have a right to resort to his premises, and make use of them, and he have a monopoly in them for the purpose, if he will take the benefit of that monopoly he must, as an equivalent, perform the duty attached to it on reasonable terms."<sup>67</sup> "Where an employment becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power."<sup>68</sup>

**§ 236. Same continued—right to fix charges—reason—enforcement.**—From the earliest period of the common law it has been held that common carriers were under obligations to transfer property for a reasonable compensation. They were not at liberty to charge whatever sum they pleased; but where the price of carriage was fixed by the contract or convention of the parties, the contract was not enforceable beyond the point of a reasonable compensation. It is said that the control which the legislature is permitted to exercise over the business of common carriers is a survival of that class of legislation which, in former times, extended to the details of personal conduct and assumed to regulate the private affairs and business of men in the minutest particulars.<sup>69</sup> The principle of the common law that telegraph and telephone companies must serve the public for a reasonable compensation becomes a part of the law of the states, when they were declared common carriers by statutes. As it is within the power of the legislature to enforce upon these companies the duty to make only reasonable charges, it is but reasonable that it may fix and define the maximum charges for their services, and punish the wrongdoer for exceeding them.<sup>70</sup> Whenever there is a general right on the part of the public, and a gen-

<sup>67</sup> *Alnutt v. Ingles*, 12 East, 527.

<sup>68</sup> *Sinking Fund Case*, 99 U. S. 747, 25 L. Ed. 504.

<sup>69</sup> *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682, 15 Am. St. Rep. 460, 5 L. R. A. 559, note.

<sup>70</sup> *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682, 15 Am. St. Rep. 460, 5 L. R. A. 559, note. See cases cited in note 61. See, also, *Colorado Tel. Co. v. Fields*, 15 N. M. 431, 110 Pac. 571, 30 L. R. A. (N. S.) 1088.

eral duty cast upon any other with respect to such right, we think it is competent for the legislature, by a specific enactment, to prescribe a precise and practical rule for declaring, establishing, and securing such right and enforcing respect for such.<sup>71</sup>

§ 237. **Same continued—cannot evade statutes—charged in two items—patents.**—Where a statute exists which regulates such charges, the telephone company cannot indirectly evade its operation. Thus it cannot exceed the maximum rate by pretending to divide the charges into two items, one being designated as the regular rental and the other as a monthly charge for the use of the instruments by nonsubscribers. This evasion was attempted to be made under an Indiana statute which provided that any person owning or operating a telephone line who charges and collects for the use of a telephone only a sum in excess of three dollars per month shall be punished by fine. It was held that a person who charges and collects the sum of three dollars per month as rental for the subscriber's use, and the sum of one dollar per month as rental for the use of nonsubscribers, is guilty of the offense prohibited. "For, divide the four dollars as he might, and designate the items as he might, the fact remains and is apparent, that defendant did thereby charge, collect, or receive, for the use of one

<sup>71</sup> *Com. v. Alger*, 7 Cush. (Mass.) 53. A telephone company will be enjoined from charging rates in excess of those prescribed by the ordinance granting its franchise to do business within the municipality. *Cumberland Tel., etc., Co. v. Hickman*, 129 Ky. 220, 111 S. W. 311, 33 Ky. Law Rep. 730. A citizen of a city is entitled to insist on the enforcement of a contract between the city and a telephone company limiting the rate to be charged subscribers for services. *Rochester Tel. Co. v. Ross*, 125 App. Div. 76, 109 N. Y. Supp. 381, affirming in 195 N. Y. 429, 88 N. E. 793. But it was held in *Buffalo Merchants' Delivery Co. v. Frontier Tel. Co.* (Sup.) 112 N. Y. Supp. 862, that where a private citizen, for whose benefit a contract is made between a city and telephone company fixing maximum rates for telephone service, voluntarily and with knowledge of the facts contracts with the company for service at a different rate than that prescribed by the municipal franchise, he cannot repudiate his contract and demand a different service at a different rate by virtue of the franchise, on the ground that the company is bound by the franchise to render the service demanded. *Emporia v. Tel. Co.*, 87 Kan. 465, 124 Pac. 895, telephone will be enjoined. See *State v. Superior Court*, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D, 78, L. R. A. 1915C, 287, city cannot change rates made by commissioner and collect same from a telephone company. *Home Tel. Co. v. Carthage*, 235 Mo. 644, 139 S. W. 547, Ann. Cas. 1912D, 301, 48 L. R. A. (N. S.) 1055. Courts will not interfere with rates fixed. See § 236 et seq.

telephone only, a sum in excess of three dollars per month.”<sup>72</sup> Nor can it exceed the rate prescribed by attempting to charge a certain sum for each conversation, instead of charging a regular rental as where what is known as the exchange and rental system is abandoned and another system is substituted therefor, under which all persons must resort to stations fixed by the companies where telephones are kept to be used upon payment of a certain toll.<sup>73</sup> Nor can it be evaded by making separate charges for the use of various parts of the instruments; as where the telephone company attempted to collect for the rental of one magnetic telephone and battery transmitter and for labor and service charges for switching, construction and maintenance charges for lines, batteries, central office apparatus, magnetic bell and other appurtenances, and the same exceeding the maximum sum prescribed by statute. It was held that all these separate instruments fell under and were comprehended by the term “telephone,” and could be charged for only in the aggregate.<sup>74</sup> But it has been held that, where the law fixes the maximum rate for a telephone on a separate wire, the statute is not violated by additional charges for equipments, such as auxiliary bells.<sup>75</sup> The fact that telephone lines are operated under patents granted by the general government in no way affects the right of the states to regulate the charges on these companies. As was said by the court: “We are of the opinion that the right conferred upon the patentee and his assigns to use and vend the corporal thing brought into existence by the application of the patented discovery must be exercised in subordination of the police regulation which the state established by statute.”<sup>76</sup>

**§ 238. Statute rates must be reasonable.**—The maximum rate prescribed by these statutes must not be unreasonable.<sup>77</sup> So, if it appears that the maximum rate allowed is less than the actual cost

<sup>72</sup> *Johnson v. State*, 113 Ind. 143, 15 N. E. 215.

*Partnership rate.*—Physicians using connecting offices and conducting a copartnership as to “minor surgery,” although having a private individual practice in other lines, are copartners within the schedule of rates authorizing a telephone company to charge copartnerships for the use of one telephone three dollars and fifty cents per month. *Manning v. Interstate Tel., etc., Co.*, 147 N. C. 298, 60 S. E. 1134.

<sup>73</sup> *Central U. Tel. Co. v. State*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114.

<sup>74</sup> *Hockett v. State*, 105 Ind. 259, 5 N. E. 178, 55 Am. Rep. 209. See § 260.

<sup>75</sup> *Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238, 22 Sup. Ct. 881, 46 L. Ed. 1144.

<sup>76</sup> *Hockett v. State*, 105 Ind. 259, 5 N. E. 178, 55 Am. Rep. 209.

<sup>77</sup> *West. U. Tel. Co. v. Myatt (C. C.)* 98 Fed. 335. See, also, *Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238, 22 Sup. Ct. 881, 46 L. Ed. 1144; *Tel. Co. v. State*, 31 Okl. 415, 121 Pac. 1069; *Home Tel. Co. v. Carthage*,



of service, the regulation is unconstitutional as denying to these companies the equal protection of the law.<sup>78</sup> A law which is not reasonable in its purposes is no law; so, if the legislative power grants to a corporation the franchise to carry on a legitimate corporate business, and then prescribes for them certain duties to perform and a compliance with them would necessitate its carrying on the business at a constant loss, the requirements would be unreasonable at the outset and of course not binding. The charges must be such as that the company may be enabled to pay all expenses for carrying on the telephone business, with a reasonable margin above this to pay the company a sufficient income on the money invested.<sup>79</sup> Of course, this statement has reference to a paying concern, and not to such as is carrying on an unprofitable or losing business; the charges must, however, be the same on both, as there can be no discrimination in charges.<sup>80</sup> It is rather difficult to estimate what would be a reasonable rate to be charged, but a great number of statutes have been enacted—and the same have been held to be constitutional in this respect—which fix the maximum rate at three dollars per month for each subscriber.<sup>81</sup>

§ 239. **As to interstate messages—cannot fix maximum charges.** The state is without power to regulate the charges on interstate messages. Such messages fall under the head of interstate commerce,

235 Mo. 644, 139 S. W. 547, 48 L. R. A. (N. S.) 1055, Ann. Cas. 1912D, 301, evidence of circulars issued by an investment company not admissible.

<sup>78</sup> West. U. Tel. Co. v. Myatt (C. C.) 98 Fed. 335; Chesapeake, etc., Tel. Co. v. Manning, 186 U. S. 238, 22 Sup. Ct. 881, 46 L. Ed. 1144.

<sup>79</sup> State v. Superior Court, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D, 78; L. R. A. 1915C, 287; Home Tel. Co. v. Carthage, 235 Mo. 644, 139 S. W. 547, 48 L. R. A. (N. S.) 1055, Ann. Cas. 1912D, 301.

Where a rate, reasonable in the beginning, has, because of changed conditions, become unreasonable and confiscatory, it will not be specifically enforced, even though it was originally accepted by the company as a matter of contract, in exchange for its franchise or other privileges. Maryland Tel., etc., Co. v. Charles Simons Sons Co., 103 Md. 136, 63 Atl. 314, 115 Am. St. Rep. 346.

<sup>80</sup> But a municipality authorized to regulate rates prescribing different rates for different companies doing business within its limits does not necessarily constitute an illegal discrimination or denial of the equal protection of the laws, since a just ground for such classification may exist by reason of the difference in the territory occupied, facilities furnished, and services rendered by the different companies. Home Tel., etc., Co. v. Los Angeles, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176.

<sup>81</sup> See Home Tel. Co. v. Carthage, 235 Mo. 644, 139 S. W. 547, 48 L. R. A. (N. S.) 1055n, Ann. Cas. 1912D, 301n; Tel., etc., Co. v. Memphis (C. C.) 183 Fed. 875, defining reasonable and unreasonable rates; Tel., etc., Co. v. Louisville (C. C.) 187 Fed. 637, factors in determining reasonableness of rates im-

and the charges therefore are subject alone to regulations prescribed by Congress.<sup>82</sup> A statute<sup>83</sup> in Indiana provided that every telegraph company in the state should receive dispatches from persons or from other lines, and on payment of the usual charges "transmit the same with impartiality and good faith, in the order of time in which they were received, under penalty" of one hundred dollars. The statute also provided for the preference of certain messages, and for the delivery of all messages by a messenger of the receiving office. When the validity of the statute was tested in the state

posed by ordinance; *Tel., etc., Co. v. Westenhaver*, 29 Okl. 429, 118 Pac. 354, 38 L. R. A. (N. S.) 1209.

*In determining the unreasonableness of rates*, it must be taken into consideration that a decrease in rates does not, as in the case of some other businesses, increase the volume of business without a corresponding increase in the expense of conducting it. *R. R. Com. v. Cumberland Tel., etc., Co.*, 212 U. S. 414, 29 Sup. Ct. 357, 53 L. Ed. 577.

*Ordinance requiring electric companies to furnish lamps free—validity.*—A corporation engaged in supplying electricity for light and power to the general public cannot be required by a municipal ordinance to furnish electric lamps free of charge to its customers, where such ordinance is not an exercise of the power of the city to fix the rates for supplying current, but was passed after and in no way depended on or referred to a prior ordinance fixing rates. *Ex parte Goodrich*, 160 Cal. 410, 117 Pac. 451, Ann. Cas. 1913A, 56. See *Postal Tel. Cable Co. v. Chicopee*, 207 Mass. 341, 93 N. E. 927, 32 L. R. A. (N. S.) 997, poles for fire alarms.

*Reasonableness of presumed.*—It will be presumed that the rate established is reasonable and valid, and the burden is upon the telegraph or telephone company to show the contrary. *Railroad Com. v. Cumberland Tel., etc., Co.*, 212 U. S. 414, 29 Sup. Ct. 357, 53 L. Ed. 577.

*Proceedings to determine reasonableness of rates.*—See *Home Tel. Co. v. Carthage*, supra, and *Tel., etc., Co. v. Westenhauer*, supra, both cases considering what property or assets of the company may be used as the basis upon which to determine or of fixing the rates. For instance, the number of subscribers, the lines and plants and other similar property and the depreciation of which may be considered. See, also, § 254. See, also, *Peck v. Indianapolis, etc., Heat Co.*, P. U. R. 1916B, 445, what constitutes working capital; *Re Omaha, etc., L. Co.*, P. U. R. 1916B, 564, right to allowance for increase cost due to weather conditions.

<sup>82</sup> The state may regulate telegraph rates between points in the state, although the connecting line passes out of the state, it all being owned by one corporation. *Leavell v. West. U. Tel. Co.*, 116 N. C. 211, 21 S. E. 391, 47 Am. St. Rep. 798, 27 L. R. A. 843; *State v. West. U. Tel. Co.*, 113 N. C. 213, 18 S. E. 389, 22 L. R. A. 570. And it has been held that a telegraph company may be amenable to common-law principles relative to discrimination in rates of public service corporations, even as to its interstate business, in the absence of federal action. *West. U. Tel. Co. v. Call Pub. Co.*, 58 Neb. 192, 78 N. W. 519. See *Tel. Co. v. State*, 31 Okl. 415, 121 Pac. 1069, regulation affecting messages from without the state.

<sup>83</sup> Rev. St. 1881, §§ 4176-4178.

court, upon the issue as to whether the sender of a dispatch from a place in Indiana to a place in Iowa could recover the penalty because the company's agent in the former state failed to deliver the dispatch by a messenger as required, it was held by an undivided bench that the statute was valid and constitutional, and that the plaintiff might recover the penalty.<sup>84</sup> But the decision of the state court was reversed on a writ of error in the United States Supreme Court, which held that such statute could be enforced only as to messages sent between points both of which were within the state.<sup>85</sup>

**§ 240. Must furnish services notwithstanding charges.**—Where statutes have been passed fixing the maximum rates on telephone companies and the same are reasonable charges, and a penalty is prescribed for the violation of its provision, these facts do not abridge the right of an aggrieved party to compel the telephone company to furnish him with the service to which he is entitled. The remedy for the aggrieved party is generally by a writ of mandamus.<sup>86</sup>

**§ 241. Municipal control.**—After having discussed at some length the control which the federal and state governments have over the construction and maintenance of telegraph, telephone and electric light companies, and the manner and extent to which they may exercise this power, we now take up the subject with respect to the powers of municipalities exercising this authority over these companies doing business within their limits. The power to regulate and control the management of streets rests primarily in the state as one of its inherent police powers.<sup>87</sup> It may prescribe the manner in which all the streets shall be laid out and the uses to which they may be put. In fact, it may make all such regulations with respect to the control over these as will tend to the protection of health, the security of property and safety of life. It has been contended by many learned in the law that this power could only be exercised by the state;<sup>88</sup> but it is now held by the greater preponderance of authority that the power may be delegated to the

<sup>84</sup> West. U. Tel. Co. v. Pendleton, 95 Ind. 12, 48 Am. Rep. 692; West. U. Tel. Co. v. Meredith, 95 Ind. 93.

<sup>85</sup> West. U. Tel. Co. v. Pendleton, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187.

<sup>86</sup> Central U. Tel. Co. v. Bradbury, 106 Ind. 1, 5 N. E. 121; State v. Tel. Co., 36 Ohio St. 296, 38 Am. Rep. 583; Bell Tel. Co. v. Com. (Pa.) 3 Atl. 825.

<sup>87</sup> § 86 et seq.

<sup>88</sup> Ingersoll, 230.



municipality.<sup>89</sup> There can be no doubt that it is competent for the general assembly to delegate to municipalities the power to enact ordinances which, when authorized, have the force and effect of laws passed by the legislature of the state, within the corporate limits;<sup>90</sup> and within the sphere of their delegated powers, municipal corporations have as absolute control as the general assembly would have, if it had not delegated such powers.<sup>91</sup>

§ 242. **Powers limited—generally specified.**—Of course, the class of powers which it is competent for the legislature to delegate to municipal corporations is limited to such as have reference to matters which form appropriate subjects for municipal regulation. The power granted must be one which relates to legitimate and proper municipal purposes. It must be local in its general character as well as in its operation.<sup>92</sup> The powers delegated to municipal corporations to control their streets are generally prescribed in the municipal charter or in the general statutes, and the limit of authority may be delegated in a general way; or the powers delegated may be specifically given; and where this is the case, the municipality cannot exceed these powers.<sup>93</sup> Thus the state may delegate to municipalities a general power to manage and regulate the construction and maintenance of telegraph, telephone, and electrical lines within their limits, and this power is generally held to be included in the delegation of a general power of police control over streets.<sup>94</sup> Often the streets are lined with an intricate web of wires, actually or potentially charged with electric currents, which are dangerous unless approached with caution. These wires are not for telephone purposes alone, but also for the transmission of electricity, and as a source of motive power and illumination. To permit these wires to be indefinitely increased upon the streets, without some power to regulate the manner of their construction, would be a source of annoyance and inconvenience to the municipality. So, when the general power of police regulation is delegated

<sup>89</sup> *Id.* See *State v. Superior Court*, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C, 287, Ann. Cas. 1913D, 78.

<sup>90</sup> 1 Dill. on Mun. Corp. § 245.

<sup>91</sup> *Taylor v. Carondelet*, 22 Mo. 110; *Heland v. Lowell*, 3 Allen (Mass.) 408, 81 Am. Dec. 670.

<sup>92</sup> *Howe v. Plainfield*, 37 N. J. Law, 146.

<sup>93</sup> *Ingersoll*, 377; 1 Dill. on Mun. Corp. (3d Ed.) § 89; *St. Louis v. McLaughlin*, 49 Mo. 559; *St. Louis v. Herthel*, 88 Mo. 128; *Home Tel. Co. v. Carthage*, 235 Mo. 644, 139 S. W. 547, 48 L. R. A. (N. S.) 1055, Ann. Cas. 1912D, 301.

<sup>94</sup> *Allentown v. West. U. Tel. Co.*, 148 Pa. St. 117, 23 Atl. 1070, 33 Am. St. Rep. 820; *West. U. Tel. Co. v. Philadelphia (Pa.)* 12 Atl. 144.

to a city, the power to regulate the construction and maintenance of these lines will be included therein.<sup>95</sup> The municipality may, under the police power delegated to it, prescribe the exact location of poles. In granting a franchise to one of these companies to construct a line upon the streets, it may require the company to furnish a map showing the exact location for the poles.<sup>96</sup> It may require that the poles shall be of such size and character as not to endanger persons using the streets, and that they shall not be unsightly.<sup>97</sup> It may require that the wires shall be a certain height above the surface of the streets, and to cross other wires at a certain angle. And in certain cases, where the conditions are such as warrant their removal entirely, the city may compel the company to dispense with their use and to place them underground.<sup>98</sup> All restrictions imposed by a city must be reasonable.<sup>99</sup>

**§ 243. Power to revoke franchise—alter rates.**—The municipal authority very clearly has the right to couple with the permission to use the streets, such conditions as the occupancy of the streets by the company's posts and wires suggest;<sup>100</sup> but this authority cannot at its mere will annul the act<sup>101</sup> which has legalized the occupation of the streets, and so leave the company's property impressed with the character of a nuisance which could be at any time abated.<sup>102</sup> For instance, if the power to regulate and control the construction and maintenance of these companies has been dele-

<sup>95</sup> See § 86 et seq. See, also, § 61.

<sup>96</sup> *Auerbach v. Cuyahoga Tel. Co.*, 9 Ohio Dec. 389, 7 Ohio N. P. 633. See, also, § 86 et al.

<sup>97</sup> *Forsythe v. Baltimore, etc., Tel. Co.*, 12 Mo. App. 494; *Hardwick v. Vermont, etc., Tel. Co.*, 70 Vt. 180, 49 Atl. 169. See § 89.

<sup>98</sup> § 92 et seq.

<sup>99</sup> *Summit Tp. v. New York, etc., Tel. Co.*, 57 N. J. Eq. 123, 41 Atl. 146; *Northwestern Tel. Exch. Co. v. Minneapolis*, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175; *Matter of Seaboard Tel., etc., Co.*, 68 App. Div. 283, 74 N. Y. Supp. 15; *American U. Tel. Co. v. Harrison*, 31 N. J. Eq. 627. See, also, § 98.

*Grant of one company to another.*—An electric light company having a franchise to use the streets of a city may not grant the right to a telephone company to occupy a street with its poles and wires, for the privilege of using the streets of a city can only be acquired in the manner prescribed by constitution. *East Tennessee Tel. Co. v. Paris Elec. Co.*, 156 Ky. 762, 162 S. W. 530, Ann. Cas. 1915C, 543.

<sup>100</sup> 1 Dill. on Mun. Corp. §§ 555, 558, 575.

<sup>101</sup> *Northwestern Tel. Exch. Co. v. Anderson*, 12 N. D. 585, 98 N. W. 706, 102 Am. St. Rep. 580, 65 L. R. A. 771, 1 Ann. Cas. 110. See § 44.

<sup>102</sup> *Hudson Tel. Co. v. Jersey City*, 49 N. J. Law, 303, 8 Atl. 123, 60 Am. Rep. 619; *State v. Brainerd*, 126 Minn. 90, 147 N. W. 712.

gated to a municipality and permission has been given to the former, under such authority, to construct their lines along the streets after complying with all the conditions required, the same cannot be revoked without good cause, when the franchise or license has been accepted, great expense has been incurred and all conditions have been complied with.<sup>103</sup> But, under the power of police authority, these municipalities may make such changes in the grant to these companies when the same is for the interest of the public; provided vested rights are not impaired. Thus a city may require the wires to be placed underground where the condition or circumstances require that the same be done.<sup>104</sup> When permission has been granted to these companies to construct a line of wires along the streets, they will not be treated as trespassers, and their works declared a nuisance, if they are so constructed as not to interfere with the use of the streets by the public.<sup>105</sup> But if they should become a nuisance for any reason, the city authority has a right to abate their works by virtue of its general power to protect the public interest in the streets.<sup>106</sup> Where municipal charters are subject to general laws the legislature may direct a telephone company to raise its service rates from those fixed in the franchise granted it by the municipality, if it is necessary to secure effective service, and no unconstitutional impairment of a contract results thereby.<sup>107</sup>

**§ 244. Cannot impose tax or license—not police power.**—It has been held that a telegraph company whose business is the transmission of messages from one state to another, and which is in-

<sup>103</sup> *Hudson Tel. Co. v. Jersey City*, 49 N. J. Law, 303, 8 Atl. 123, 60 Am. Rep. 619; *Northwestern Tel. Exch. Co. v. Anderson*, 12 N. D. 585, 98 N. W. 706, 102 Am. St. Rep. 580, 65 L. R. A. 771, 1 Ann. Cas. 110. See § 44. See, also, *L. & N. R. Co. v. Russellville Home Tel. Co.*, 163 Ky. 415, 173 S. W. 1105, L. R. A. 1915E, 138; *East Tennessee Tel. Co. v. Paris Elec. Co.*, 156 Ky. 762, 162 S. W. 530, Ann. Cas. 1915C, 543.

<sup>104</sup> See § 93 et seq.

<sup>105</sup> *Southern Bell Tel. Co. v. Francis*, 109 Ala. 224, 19 South. 1, 55 Am. St. Rep. 930, 31 L. R. A. 193.

<sup>106</sup> *New York, etc., Tel. Co. v. East Orange*, 42 N. J. Eq. 490, 8 Atl. 289; *Mut. U. Tel. Co. v. Chicago (C. C.)* 16 Fed. 309.

<sup>107</sup> *State v. Superior Court*, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D, 78, L. R. A. 1915C, 287; *Dawson v. Dawson Tel. Co.*, 137 Ga. 62, 72 S. E. 508. See, also, *Manitowoc v. Manitowoc, etc., T. Co.*, 145 Wis. 13, 129 N. W. 925, 140 Am. St. Rep. 1056; *Turtle Creek v. Pennsylvania Water Co.*, 243 Pa. 415, 90 Atl. 199; *Bellevue v. Ohio Valley Water Co.*, 245 Pa. 114, 91 Atl. 236; *White Haven v. White Haven Water Co.*, 209 Pa. 166, 58 Atl. 159.

May be authorized to reduce rates to meet competition. *Re Flat Creek Tel. Co.*, P. U. R. 1916B, 80.



vested with the powers and privileges conferred by Congress, cannot be forced by the state, as a condition of doing business in its jurisdiction, to pay a license tax, the same being free from the control of state regulations, except such as are strictly of a police character.<sup>108</sup> It therefore follows that a city which derives all its powers from the state has no authority, under the power to regulate the control of the streets, to impose a license on these companies. Licenses for this purpose do not fall under the head of police power and subjected, therefore, to the state control.<sup>109</sup> But a municipal corporation has a right, and it is its duty in the exercise of the police power, to supervise and control the erection and maintenance of telegraph and telephone poles and wires within its limits, and if the license is imposed for the purpose of inspecting this work, it will fall under the police power and therefore subject to such license;<sup>110</sup> or, if the imposition is in the nature of a rental, it may be enforced.<sup>111</sup> Thus where an ordinance compelling a telegraph com-

<sup>108</sup> *Leloup v. Mobile*, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311, reversed 76 Ala. 401, where the company had accepted the act of Congress; *Postal Tel. Cable Co. v. Richmond*, 99 Va. 102, 37 S. E. 789, 86 Am. St. Rep. 877, where the tax was held bad, although it was recited to be in lieu of a property ad valorem tax; *Tel. Co. v. Wakefield*, 69 Neb. 272, 95 N. W. 659; *Tel. Co. v. Troy*, 7 Ala. App. 315, 61 South. 488. See *Tel. Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; *Ludwig v. Tel. Co.*, 216 U. S. 146, 30 Sup. Ct. 280, 54 L. Ed. 423; *State v. Tel. Co.*, 43 Mont. 445, 117 Pac. 93.

<sup>109</sup> *New Orleans v. Great Southern Tel. etc., Co.*, 40 La. Ann. 41, 3 South. 533, 8 Am. St. Rep. 502.

<sup>110</sup> *Ft. Smith v. Hunt*, 72 Ark. 556, 82 S. W. 163, 105 Am. St. Rep. 51, 66 L. R. A. 238; *Southern Bell, etc., Tel. Co. v. D'Alemberte*, 39 Fla. 25, 21 South. 570; *West. U. Tel. Co. v. Wakefield*, 69 Neb. 272, 95 N. W. 659; *Borough of New Hope v. Postal Tel., etc., Co.*, 202 Pa. 532, 52 Atl. 127; *Borough of Taylor v. Postal Tel., etc., Co.*, 202 Pa. 583, 52 Atl. 128; *Delaware, etc., Tel. Co.'s Petition*, 224 Pa. 55, 73 Atl. 175, 132 Am. St. Rep. 750; *Postal Tel. Co. v. City of Richmond*, 99 Va. 102, 37 S. E. 789, 86 Am. St. Rep. 877; *Philadelphia v. West. U. Tel. Co. (C. C.)* 81 Fed. 948; *Philadelphia v. West. U. Tel. Co.*, 89 Fed. 454, 32 C. C. A. 246; *Philadelphia v. Atlantic, etc., Tel. Co.*, 102 Fed. 254, 42 C. C. A. 325; *Sunset Tel., etc., Co. v. Medford (C. C.)* 115 Fed. 202; *Leloup v. Mobile*, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311; *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828. See *Wisconsin Tel. Co. v. Milwaukee*, 126 Wis. 1, 104 N. W. 1009, 1 L. R. A. (N. S.) 581, 110 Am. St. Rep. 886; *Ex parte Cramer*, 62 Tex. Cr. App. 11, 136 S. W. 61, 36 L. R. A. (N. S.) 78, Ann. Cas. 1913C, 588, cost may be placed on party inspecting.

<sup>111</sup> *Nebraska Tel. Co. v. Lincoln*, 82 Neb. 59, 117 N. W. 284, 28 L. R. A. (N. S.) 221; *Allentown v. West. U. Tel. Co.*, 148 Pa. 117, 23 Atl. 1070, 33 Am. St. Rep. 820; *Philadelphia v. Postal Tel. Cable Co.*, 66 Hun. 633, 67 Hun. 21, 21 N. Y. Supp. 556; *Chester v. West. U. Tel. Co.*, 154 Pa. 464, 25 Atl. 1134; *West. U. Tel. Co. v. Philadelphia (Pa.)* 12 Atl. 144; *New Hope v. West. U. Tel. Co.*, 16 Pa. Super Ct. 306; *St. Louis v. West. U. Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485,

pany to pay five dollars per annum for every pole within the city "for the privilege of using the streets, alleys and public places" is a charge in the nature of a rental, and it makes no difference that these companies are doing interstate business; but the charges imposed must be reasonable, which is a subject open to judicial investigation.<sup>112</sup> It has been held that five dollars for each pole per annum was not an unreasonable charge.<sup>113</sup> The legislature may, in express terms, delegate the power to a city to impose a tax or license on these companies, where the same is not done by the state,<sup>114</sup> yet this delegated power will not give the city the power to make such an imposition on the business of interstate commerce: and while these companies may be doing an interstate commerce business, yet business which is carried on exclusively within the state may be subject to such taxes.<sup>115</sup> The same rule which applies to the reasonableness of charges as rental of the space occupied by

37 L. Ed. 380, reversing (C. C.) 39 Fed. 59; *Cable Co. v. Newport*, 76 S. W. 159, 25 Ky. Law Rep. 635; *Taylor v. Cable Co.*, 202 Pa. 583, 52 Atl. 128; *Tel. Co. v. Baltimore*, 79 Md. 502, 29 Atl. 819, 24 L. R. A. 161; *Ogden City v. Crossman*, 17 Utah, 66, 53 Pac. 985; *West. U. Tel. Co. v. New Hope*, 187 U. S. 419, 23 Sup. Ct. 204, 47 L. Ed. 240. See *Carterville v. Gibson*, 259 Mo. 499, 168 S. W. 673, L. R. A. 1915A, 106; *New York Tel. Co. v. Siegel*, 202 N. Y. 502, 96 N. E. 109, 36 L. R. A. (N. S.) 560.

*Poles for fire alarms.*—City may require of company, as a condition to use of streets, the use of poles, free of charge, for wires for fire alarms. *Postal Tel.-Cable Co. v. Chicopee*, 207 Mass. 341, 93 N. E. 927, 32 L. R. A. (N. S.) 997.

<sup>112</sup> *St. Louis v. West. U. Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380, reversing (C. C.) 39 Fed. 59; *Nebraska Tel. Co. v. Lincoln*, 82 Neb. 59, 117 N. W. 284, 28 L. R. A. (N. S.) 221.

<sup>113</sup> *St. Louis v. West. U. Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380, reversing 39 Fed. 59.

<sup>114</sup> *Ogden City v. Crossman*, 17 Utah, 66, 53 Pac. 985, occupation tax imposed on each telegraph instrument used in the city; *Wisconsin Tel. Co. v. Milwaukee*, 126 Wis. 1, 104 N. W. 1009, 110 Am. St. Rep. 886, 1 L. R. A. (N. S.) 581; *Pensacola v. Southern Bell Tel. Co.*, 49 Fla. 161, 37 South. 820, may impose a reasonable charge in the nature of a rental, and may also impose a reasonable charge in the enforcement of local government supervision, the latter being a police power; *Atlantic, etc., Tel. Co. v. Philadelphia*, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. Ed. 995, imposition of license fee for supervisory inspection.

<sup>115</sup> *Moore v. Eufaula*, 97 Ala. 670, 11 South. 921; *Atlantic, etc., Tel. Co. v. Philadelphia*, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. Ed. 995, holding that if a corporation, although engaged in the business of interstate commerce, so carries on its business as to justify, at the hands of any municipality, a police supervision of the property and instrumentalities used therein, the municipality is not bound to furnish such supervision for nothing, and may, in addition to ordinary property taxation, subject the corporation to a charge for the expense of the supervision.

the poles of these companies applies to the taxes which the municipality has the power to impose under the delegated authority. In other words, the taxes imposed on these companies as a purpose of revenue must not be excessive.<sup>116</sup> What is a reasonable charge is a question of fact, and what would be reasonable in one instance might not be in another. For instance, if the poles were in a crowded and busy part of the city, the amount to be charged should not be the same as that which should be imposed in a small country town where the property is not so expensive.<sup>117</sup>

§ 245. **Cannot regulate rate—without express authority.**—A municipal corporation cannot regulate the charges of telephone and electric companies for services unless the right has been expressly delegated to it, as this right is not embraced in the general police power of the city. There is no question that this power may be delegated to the municipality, yet it must be done in express terms.<sup>118</sup> As the city government is only a part of the whole gov-

<sup>116</sup> *St. Louis v. West. U. Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380.

<sup>117</sup> *St. Louis v. West. U. Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; *Chester v. West. U. Tel. Co.*, 154 Pa. 464, 25 Atl. 1134.

<sup>118</sup> *Florida*.—See *Jacksonville v. Southern Bell Tel. Co.*, 57 Fla. 374, 49 South. 509.

*Kentucky*.—See *Moberly v. Richmond Tel. Co.*, 126 Ky. 369, 103 S. W. 714.

*Maryland*.—Compare *Charles Simons Sons Co. v. Maryland Tel., etc., Co.*, 99 Md. 141, 57 Atl. 193, 63 L. R. A. 727, and *Maryland Tel., etc., Co. v. Chas. Simons Sons Co.*, 103 Md. 136, 63 Atl. 314, 115 Am. St. Rep. 346.

*Missouri*.—*St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278; *Home Tel. Co. v. Carthage*, 235 Mo. 644, 139 S. W. 547, Ann. Cas. 1912D, 301, 48 L. R. A. (N. S.) 1055. See, also, *State v. Missouri, etc., Tel. Co.*, 189 Mo. 83, 88 S. W. 41.

*New York*.—See *Buffalo Merchants' Delivery Co. v. Frontier Tel. Co. (Sup.)* 112 N. Y. Supp. 862. Compare *Wright v. Glen Tel. Co.*, 112 App. Div. 745, 99 N. Y. Supp. 85.

*Ohio*.—*Farmer v. Columbiana County Tel. Co.*, 72 Ohio St. 526, 74 N. E. 1078; *State v. Central U. Tel. Co.*, 7 Ohio Cir. Dec. 536; *Macklin v. Home Tel. Co.*, 24 Ohio Cir. Ct. R. 446.

*Texas*.—*Southwestern Tel. Co. v. Dallas (Civ. App.)* 131 S. W. 80.

*Washington*.—*State v. Superior Court*, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C, 287, Ann. Cas. 1913D, 78.

*West Virginia*.—*Bluefield Water, etc., Co. v. Bluefield*, 69 W. Va. 1, 70 S. E. 772, 33 L. R. A. (N. S.) 759.

*Wisconsin*.—*State v. Sheboygan*, 111 Wis. 23, 86 N. W. 657; *State v. Milwaukee Independent Tel. Co.*, 133 Wis. 588, 114 N. W. 108, 315.

*United States*.—*Home Tel., etc., Co. v. Los Angeles*, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176; *Cumberland Tel., etc., Co. v. Memphis (C. C.)* 183 Fed. 875.

In *Home Tel., etc., Co. v. Los Angeles*, *supra*, the court said: "The power to fix, subject to constitutional limits, the charges of such a business as the fur-



ernment which constitutes the commonwealth, and is, therefore, subservient to the management of the whole, it cannot enforce any

nishing to the public of telephone service is among the powers of government, is legislative in its character, continuing in its nature, and capable of being vested in a municipal corporation."

In *State v. Missouri, etc., Tel. Co., supra*, the statute conferred on the municipality "exclusive control over its public highways, streets, avenues, alleys and public places." etc., and another section authorized the city to provide "for regulating and controlling the exercise by any person or corporation of any public franchise or privilege in any of the streets or public places of such city, whether such franchises or privileges have been granted by said city, or by or under the state of Missouri, or any other authority." Under the above section it was held that the city did not have power to regulate telephone rates. The court said: "It is not questioned that the state has power to keep telephone corporations in this state within reasonable bounds in respect of charges for their service, nor can it be questioned that the state may delegate that power to be exercised by a municipal corporation within its limits, but the question is, Has the state delegated that authority to this city? \* \* \* The regulation of prices to be charged by a corporation intrusted with a franchise of a public utility character is within the sovereign power of the state that grants the franchise or that suffers it to be exercised within its borders and that power may be with wisdom and propriety conferred on a municipal corporation, but it is not a power appertaining to the government of the city and does not follow as an incident to a grant of power to frame a charter for a city government." The court further said that, under the power conferred in this case, "the city may regulate the planting of poles, wires, etc., or require the wires to be put under ground, or do anything within reason to render the use of the street by the private corporation as little of injury to the public as may be. But the section does not confer on the city the power to regulate the prices to be charged by the telephone company for its service to the inhabitants of the city."

In *Macklin v. Home Tel. Co., supra*, it was held that, in the absence of statutory authorization, a municipality had no power to regulate telephone rates, the court saying: "There appears to be nothing in the constitution or the laws made in pursuance thereof that confers upon the council of the city power to fix the price of telephone service in the city of Findlay. We think the city, under the law of the state, has no more right or power to set a price on telephone service than it has to regulate and fix the price of dry goods, groceries or other commodities in the same city. Perhaps the legislature of Ohio might confer such power on a municipality, but it has not done so, and the city is destitute of power in that respect."

*Electric companies.*—In the absence of a delegation thereof by the legislature, express or necessarily implied, a municipal corporation has no power to regulate or control rates for public service, such as the furnishing of electricity, or the terms and conditions of contracts thereof, otherwise than by contract with the corporation or person rendering such service. *Bluefield Waterworks, etc., Co. v. Bluefield*, 69 W. Va. 1, 70 S. W. 772, 33 L. R. A. (N. S.) 759. Where it is delegated, the city has the power to fix upon maximum rates for electricity to be consumed, which rates the company has no right to disregard, where they are reasonable in their terms and are

rule of law which would be inconsistent with the whole, but can exercise only such powers as may be delegated to it, in clear and in expressed terms. The question as to whether the municipal corporation has the right to regulate the charges for telephone services doing business within its limits was declared in a case which went up from the city of St. Louis. The charter of this city gave the mayor and the assembly power "to license, tax, and regulate telegraph companies or corporations," and it might "pass all such ordinances, not inconsistent with the provisions of this charter or the laws of the state, as may be expedient, in maintaining the peace, good government, health, and welfare of the city, its trade, commerce and manufactures." The court held in that case that the fact that the city had the right to regulate the use of the streets with respect to the construction of the telephone lines thereon did not give it the right to regulate the charges for telephone services, nor did it have the power, under its charter, to regulate the rate under its general police power but that the state had the power to fix and prescribe a maximum rate, and that the state may delegate such power to municipal corporations.<sup>119</sup> The rates which the city may fix must be reasonable and fair, and not confiscatory, which should be regulated according somewhat to the conditions of the particular city exercising such delegated power.<sup>120</sup>

without discrimination as between citizens receiving the same kind and degree of service; and, in the absence of more specific legislative regulation, such rates may, under some circumstances, be made the subject of judicial scrutiny and control. *Horner v. Oxford, etc., Elec. Co.*, 153 N. C. 535, 69 S. E. 607, 138 Am. St. Rep. 681. See *Ex parte Goodrich*, 160 Cal. 410, 117 Pac. 451, Ann. Cas. 1913A, 56, rate fixed by ordinance.

<sup>119</sup> *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278. See *State v. Sheboygan*, 111 Wis. 23, 86 N. W. 657.

<sup>120</sup> In *Cumberland Tel., etc., Co. v. Memphis (C. C.)* 183 Fed. 875, it was said: "Assuming that the city of Memphis, notwithstanding any contract it may have with the complainant, has the right and power to fix the rates which the latter may charge its customers in Memphis, this general power must nevertheless be exercised in such manner as not to violate the constitutional rights of the complainant. The rates which the city may fix must be reasonable and fair, and not confiscatory. I do not understand this proposition to be controverted. \* \* \* The conditions in no two cities may be alike, and it seems reasonable to say that questions as to telephone rates may in large measure be local questions to be determined upon factors, among which the most important may be: (1) The cost of the plant; (2) the cost of operation and maintenance; (3) the amount of taxes and other dues exacted by the local government; and (4) the rapidity of deterioration due to climatic or other causes." See, also, *State ex rel. v. Superior Court*, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D, 78, L. R. A. 1915C, 287.

§ 246. **State may delegate power to commission.**—The state may also delegate its power of regulation and control over telegraph, telephone, and electric companies to a board or body, such as a railroad commission.<sup>121</sup> Under this power such commission may have supervision over the construction and maintenance of the lines in the state,<sup>122</sup> and the right to regulate the rates and charges for service;<sup>123</sup> and when such charges are made, if constitutional, they are binding on the companies, and also on municipalities.<sup>124</sup>

§ 247. **Control of wireless telegraph.**—Congress has assumed jurisdiction over all wireless telegraphs engaged in interstate or foreign commerce, whether the system is operated by an individual, company or corporation, and has thereby provided all of the conditions under which said system shall be carried on, and the remedies for the violation of said conditions.<sup>125</sup> This does not, however, prevent the state from regulating wireless telegraph carrying

<sup>121</sup> West. U. Tel. Co. v. Myatt (C. C.) 98 Fed. 335; Emporia v. Tel. Co., 90 Kan. 118, 133 Pac. 858; Tel. Co. v. State, 38 Okl. 412, 133 Pac. 476; Tel., etc., Co. v. Beach, 8 Ga. App. 720, 70 S. E. 137, construing order of commission; Tel. Co. v. State, 31 Okl. 415, 121 Pac. 1069; State v. Superior Court, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D, 78, L. R. A. 1915C, 287; Pacific Tel., etc., Co. v. Eshleman, 166 Cal. 640, 137 Pac. 1119, Ann. Cas. 1915C, 822, 50 L. R. A. (N. S.) 652, jurisdiction of commissioners; People v. Willcox, 207 N. Y. 86, 100 N. E. 705, 45 L. R. A. (N. S.) 629, burden on company to show it has consent of commission.

<sup>122</sup> Under the Oklahoma laws, the commission has the authority to supervise, regulate, and control a telephone company owned solely by an individual in all matters relating to the performance of its public duties and charges. Hine v. Wadlington, 26 Okl. 389, 109 Pac. 301. See St. Louis, etc., R. R. Co. v. Newell, 25 Okl. 502, 106 Pac. 818.

<sup>123</sup> Railroad Com'rs v. West. U. Tel. Co., 113 N. C. 213, 18 S. E. 389, 22 L. R. A. 570; Mayo v. West. U. Tel. Co., 112 N. C. 343, 16 S. E. 1006; West. U. Tel. Co. v. State R. Com., 120 La. 758, 45 South. 598; State v. Superior Court, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D, 78, L. R. A. 1915C, 287; Dry Goods Co. v. Pub. Service Corp., 142 Ga. 841, 83 S. E. 946.

<sup>124</sup> The Washington Public Utilities Act confers jurisdiction on the public service commissioners to raise rates for telephone service in a city above the rates fixed by ordinance granting the franchise to operate a telephone system, where such increased rates are necessary to give the telephone company a fair return on its capital, and enable it to maintain the system in a proper condition so as to render efficient service. State v. Superior Court, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D, 78, L. R. A. 1915C, 287. Compare Dawson v. Dawson Tel. Co., 137 Ga. 62, 72 S. E. 508; Manitowoc v. Manitowoc, etc., Tr. Co., 145 Wis. 13, 129 N. W. 925, 140 Am. St. Rep. 1056. See Home Tel. Co. v. Carthage, 235 Mo. 644, 139 S. W. 547, Ann. Cas. 1912D, 301, 48 L. R. A. (N. S.) 1055.

<sup>125</sup> An act to regulate radio communication, No. 264, S. 6412, approved August 13, 1912, c. 287, 37 Stat. 302 (U. S. Comp. St. 1913, §§ 10100-10109).



on an exclusive intrastate business.<sup>126</sup> The regulation of wireless telegraph on steamers of the United States or of any foreign country navigating the ocean or the Great Lakes is under the control of Congress. Under the act,<sup>127</sup> assuming such control, it is prescribed what steamers shall be provided with apparatus for radio communication, the efficiency thereof, and the number and qualifications of the operators in charge of same, and provides a remedy for the violation of these requirements. The International Radiotelegraphic Convention, signed at London on July 5, 1912,<sup>128</sup> by nearly all the nations of the world, also adopted certain resolutions for the regulation of all radio stations, both coastal stations and stations on shipboard, which are established or worked by the several nations and open to public service between the coast and vessels at sea. The London Convention and Regulations do not, however, modify or repeal the acts of Congress hereinbefore mentioned.<sup>129</sup>

<sup>126</sup> *In time of war.*—The principles which should regulate the control of radio-telegraph in time of war are not yet fully established. Certain regulations were adopted by The Hague Conference in 1907. By these belligerents are forbidden to:

“(a) Erect on the territory of a neutral power a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea.

“(b) Use any installation of this kind established by them before the war on the territory of a neutral power for purely military purposes, and which has not been opened for the service of public messages.”

“From practice, as shown in various states, from the opinions of the courts and of writers, from the votes of conferences, and from international agreements, it is evident that the state within whose jurisdiction a wireless telegraph apparatus is or passes is and will be authorized to exercise a degree of control over its use. The responsibility resting upon such state will be large. In order to avoid possible complications in time of war, it will be expedient in time of war for state, whether neutral or belligerent, to exercise control over wireless telegraphy as circumstances seem to require.” *Int. Law Situations*, U. S. Naval War College, 1907, p. 175.

<sup>127</sup> Act approved July 23, 1912, c. 250, 37 Stat. 199, amending section 1 of act approved June 24, 1910, c. 379, 36 Stat. 629 (U. S. Comp. St. 1913, § 8262).

<sup>128</sup> Ratified by the Senate of the United States on January 22, 1913.

<sup>129</sup> Official statement of Commissioner of Navigation.

## CHAPTER XI

## DUTIES TO FURNISH EQUAL FACILITIES TO ALL

- § 248. Must serve all impartially.
- 249. Must have sufficient facilities.
- 250. Must transmit in order in which received.
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- 268. Remedies.
- 269. Measure of damages.
- 269a. May recover overcharge.
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- 269c. Excuses for not rendering services.

§ 248. **Must serve all impartially.**—Telegraph and telephone companies are not common carriers under the common law, but have been declared to be such by statutes in many of the states, and are thereby made subject to all the laws applicable to common carriers. They may or may not become incorporated, but if they have the power to exercise some of the rights of the government, such as the right of eminent domain, they are then impressed with a public interest and are under a legal obligation to serve with impartiality all who apply to them after complying with their reasonable regulations.<sup>1</sup> When the government grants to any corpora-

<sup>1</sup> State v. American, etc., Commercial News Co., 43 N. J. Law, 381; West. U. Tel. Co. v. Call Pub. Co., 44 Neb. 326, 62 N. W. 506, 27 L. R. A. 622, 48 Am. St. Rep. 729; Id., 58 Neb. 192, 78 N. W. 519; Stewart v. Postal Tel. Cable Co., 131 Ga. 31, 61 S. E. 1045, 18 L. R. A. (N. S.) 692, 127 Am. St. Rep. 205; West. U. Tel. Co. v. State ex rel., 165 Ind. 492, 76 N. E. 100, 3 L. R. A. (N. S.) 153, 6 Ann. Cas. 880.

tion or person some of its rights, it takes in lieu thereof an interest in the granted business; and, when one is the owner of the property which is devoted to a public use and in which the public has acquired an interest, he, in effect, grants an interest in such use and must, to the extent of that interest, submit to be controlled by the government for the common good as long as such is maintained.<sup>2</sup> One of the important requirements which the government demands of every institution impressed with a public interest—and one which is thrown around every citizen as a great and protective shield—is the duty to act impartially toward all.<sup>3</sup> So telegraph, telephone and electric companies enjoying public privileges, or devoting their property to a quasi public business, are under obligations to extend their facilities to all persons, on equal terms, who are willing to comply with their reasonable regulations, and who make or offer to make such compensation as is exacted of others in like circumstances.<sup>4</sup>

<sup>2</sup> *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 56 N. E. 822, 75 Am. St. Rep. 184, 48 L. R. A. 568.

<sup>3</sup> *Reed v. West. U. Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492. See cases in following note. See *State v. Atlantic Coast, etc., R. Co.*, 52 Fla. 646, 41 South. 705, 12 L. R. A. (N. S.) 506, holding railroad cannot discriminate against telegraph companies.

<sup>4</sup> *Alabama*.—*West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; *West. U. Tel. Co. v. Hill*, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058; *Vinson v. Southern Bell. Tel., etc., Co.*, 188 Ala. 292, 66 South. 100, L. R. A. 1915C, 450, burden on company.

*Arkansas*.—*Tel., etc., Co. v. Danaher*, 102 Ark. 547, 144 S. W. 925.

*Florida*.—*Gainesville v. Gainesville, etc., Elec. P. Co.*, 65 Fla. 404, 62 South. 919, 46 L. R. A. (N. S.) 1119.

*Georgia*.—*Stewart, etc., Co. v. Postal Tel. Cable Co.*, 131 Ga. 31, 61 S. E. 1045, 18 L. R. A. (N. S.) 692, 127 Am. St. Rep. 205; *Tel., etc., Co. v. Beach*, 8 Ga. App. 720, 70 S. E. 137.

*Illinois*.—*Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 56 N. E. 822, 75 Am. St. Rep. 184, 48 L. R. A. 568.

*Indiana*.—*Central U. Tel. Co. v. Fehring*, 146 Ind. 189, 45 N. E. 64; *Central U. Tel. Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721; *Central U. Tel. Co. v. Falley*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114.

*Kentucky*.—*West. U. Tel. Co. v. Van Cleave*, 107 Ky. 464, 54 S. W. 827, 92 Am. St. Rep. 366.

*Maryland*.—*Chesapeake, etc., Tel. Co. v. Baltimore, etc., Tel. Co.*, 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167.

*Minnesota*.—*State v. Power Co.*, 119 Minn. 225, 137 N. W. 1104, 41 L. R. A. (N. S.) 1181, Ann. Cas. 1914B, 19.

*Missouri*.—*Reed v. West. U. Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 58 Am.



§ 249. **Must have sufficient facilities.**—In order that a telegraph, telephone, or electric company may be able to carry out the duties which it owes to the government, it must in the first place equip its business so that all unfavorable emergencies may be dispensed with in the shortest possible time and in the most efficient and careful manner.<sup>5</sup> It is the duty of a telegraph or telephone company to have sufficient facilities to transact all business offered to it for all points where it has offices;<sup>6</sup> and if the press of business offered

St. Rep. 609, 34 L. R. A. 492; *State v. Kinloch Tel. Co.*, 93 Mo. App. 349, 67 S. W. 684.

*Nebraska*.—*Buffalo County Tel. Co. v. Turner*, 82 Neb. 841, 118 N. W. 1064, 19 L. R. A. (N. S.) 693, 130 Am. St. Rep. 699; *State v. Nebraska Tel. Co.*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404; *West. U. Tel. Co. v. Call Pub. Co.*, 44 Neb. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 27 L. R. A. 622; *Id.*, 58 Neb. 192, 78 N. W. 519.

*New Jersey*.—*Trenton, etc., Turnpike Co. v. American, etc., News Co.*, 43 N. J. Law, 381.

*New York*.—*U. S. Tel. Co. v. West. U. Tel. Co.*, 56 Barb. (N. Y.) 46; *Friedman v. Gold, etc., Tel. Co.*, 32 Hun (N. Y.) 4; *Atlantic, etc., Tel. Co. v. West. U. Tel. Co.*, 4 Daly (N. Y.) 527. See, also, *People v. Hudson River Tel. Co.*, 19 Abb. N. C. (N. Y.) 466.

*North Carolina*.—*Leavell v. West. U. Tel. Co.*, 116 N. C. 211, 21 S. E. 391, 47 Am. St. Rep. 798, 27 L. R. A. 843; *Carmichael v. Tel., etc., Co.*, 162 N. C. 333, 78 S. E. 507, Ann. Cas. 1915A, 983; *Woodley v. Tel., etc., Co.*, 163 N. C. 284, 79 S. E. 598, Ann. Cas. 1914D, 116.

*Ohio*.—*State v. Bell Tel. Co.*, 36 Ohio St. 296, 38 Am. Rep. 583.

*Pennsylvania*.—*Bell Tel. Co. v. Com.*, 2 Sadler, 299, 3 Atl. 825.

*South Carolina*.—*Gwynn v. Citizens' Tel. Co.*, 69 S. C. 434, 48 S. E. 460, 104 Am. St. Rep. 819, 67 L. R. A. 111; *State v. Citizens' Tel. Co.*, 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139.

*South Dakota*.—*Kirby v. West. U. Tel. Co.*, 4 S. D. 105, 55 N. W. 759, 46 Am. St. Rep. 765, 30 L. R. A. 612, 624.

*Tennessee*.—*Vaught v. East Tennessee Tel. Co.*, 123 Tenn. 318, 130 S. W. 1050, 31 L. R. A. (N. S.) 315, Ann. Cas. 1912C, 132.

*Vermont*.—*Commercial U. Tel. Co. v. New England Tel., etc., Co.*, 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161.

*United States*.—*West. U. Tel. Co. v. Call Pub. Co.*, 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765; *Cumberland Tel., etc., Co. v. Kelly*, 160 Fed. 316, 87 C. C. A. 268, 15 Ann. Cas. 1210; *Delaware, etc., Tel., etc., Co. v. Delaware*, 50 Fed. 677, 2 C. C. A. 1, affirmed (C. C.) 47 Fed. 633; *Missouri v. Bell Tel. Co. (C. C.)* 23 Fed. 539; *Tel. Co. v. Tel., etc., Co. (C. C.)* 177 Fed. 726.

<sup>5</sup> *Leavell v. West. U. Tel. Co.*, 116 N. C. 211, 21 S. E. 391, 47 Am. St. Rep. 798, 27 L. R. A. 843; *Gwynn v. Citizens' Tel. Co.*, 69 S. C. 434, 48 S. E. 460, 104 Am. St. Rep. 819, 67 L. R. A. 111. But see *Cumberland Tel., etc., Co. v. Kelly*, 160 Fed. 316, 87 C. C. A. 268, 15 Ann. Cas. 1210, circumstances of the particular case should be considered.

<sup>6</sup> *Leavell v. West. U. Tel. Co.*, 116 N. C. 211, 21 S. E. 391, 47 Am. St. Rep. 798, 27 L. R. A. 843; *Gwynn v. Citizens' Tel. Co.*, 69 S. C. 434, 48 S. E. 460,

is so great that one wire or one operator at a point is not sufficient, it is the duty of the company to add another wire or an additional employé.<sup>7</sup> It must not only have sufficient facilities to carry out its business, but it also must be provided with competent servants<sup>8</sup> and suitable instruments for this purpose; and on a failure to do so, whereby injuries or losses are incurred, it must respond in damages.<sup>9</sup> In the case of telephone companies, each person has the right to demand and receive a telephone and telephonic connections, facilities and services, and the best in use by such companies.<sup>10</sup> Not only is it necessary that these companies should furnish the best facilities which they may have in use, but they must furnish the very best equipped and most up-to-date instruments to be used by any similar companies.<sup>11</sup> These companies voluntarily engage in a public duty; they solicit the public to transact business with them on reasonable terms, and when they have placed themselves before the public to perform such business as may be tendered, they must exercise due care to carry out all such duties; and in order to do this, they must prepare and furnish the best instruments and extend impartial favors toward the public.

**§ 250. Must transmit in order in which received.**—One of the duties imposed upon telegraph companies is that they must, with few exceptions, transmit all messages tendered them, after a rea-

104 Am. St. Rep. 819, 67 L. R. A. 111; Cumberland Tel., etc., Co. v. Kelly, 160 Fed. 316, 87 C. C. A. 268, 15 Ann. Cas. 1210; Maryland Tel., etc., Co. v. Simon Sons Co., 103 Md. 136, 63 Atl. 314, 115 Am. St. Rep. 346.

<sup>7</sup> Leavell v. West. U. Tel. Co., 116 N. C. 211, 21 S. E. 391, 47 Am. St. Rep. 798, 27 L. R. A. 843; West. U. Tel. Co. v. Henderson, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; West. U. Tel. Co. v. Broesche, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843. See extended note in West. U. Tel. Co. v. Blanchard, 45 Am. Rep. 487.

<sup>8</sup> *Licensed*.—Electricians may be required if it is imposed on all alike, State v. Gantz, 124 La. 535, 50 South. 524, 24 L. R. A. (N. S.) 1072; or an occupation tax imposed, Ex parte Cramer, 62 Tex. Cr. R. 11, 136 S. W. 61, 36 L. R. A. (N. S.) 78, Ann. Cas. 1913C, 588.

<sup>9</sup> Reed v. West. U. Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492.

<sup>10</sup> Central U. Tel. Co. v. State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; Central U. Tel. Co. v. Falley, 118 Ind. 598, 20 N. E. 145; Johnson v. State, 113 Ind. 143, 15 N. E. 215; Central U. Tel. Co. v. Bradbury, 106 Ind. 1, 5 N. E. 721; Hockett v. State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; Gardner v. Providence Tel. Co., 23 R. I. 262, 49 Atl. 1004; Id., 23 R. I. 312, 50 Atl. 1014, 55 L. R. A. 113; Commercial U. Tel. Co. v. New England Tel., etc., Co., 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161.

<sup>11</sup> Central U. Tel. Co. v. State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114.

sonable compliance with their rules and regulations, in the order in which they are received.<sup>12</sup> These companies are under a legal obligation to the public to carry out this part of their duties toward the public for obtaining so great a right as that of assuming public functions and enjoying public immunities; and the same must be observed unless the statutes of the state or public policy demands that certain other messages shall have precedence over these. In many states there have been statutes passed which require that messages be transmitted in the order in which they are received,<sup>13</sup> but it seems that the companies are under this obligation even though there are no statutes to this effect. If they were permitted to exercise their own judgment with respect to the time and manner in which the messages should be delivered, partiality would in many instances be shown, which, as we heretofore said, could not be done. It necessarily follows, therefore, that messages should be transmitted in the order in which they are received, even in the absence of a statute to that effect. There are some messages which, through legislative enactments, are entitled to a preference over those which would otherwise have precedence; where such is the case, those messages—such as pertain to the government, those for and from officers of justice, and those for publication of general and public interest—have the right of way. It is considered, where the public—or any of its servants—is the sender of messages, that they are always of some consequence, and that not only one but many people are directly or indirectly interested in the results, and a failure to promptly and immediately send same in preference to those otherwise having priority would inflict a loss not only upon one of its citizens, but on many; for this reason some of the legislatures have seen fit to give them preference. It has also been held that these companies are under obligations to give preference to all private messages where they have been informed, either by the sender or by the face of the message, that their immediate transmission and delivery was of the utmost importance. It seems that such messages as these should have precedence over those given

<sup>12</sup> *Mackay v. West. U. Tel. Co.*, 16 Nev. 222; *Davis v. West. U. Tel. Co.* (Ohio) 1 Cin. R. 100; *Daughtery v. Amer. Union Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435; *Dorgan v. West. U. Tel. Co.*, 7 Fed. Cas. 918, No. 4004. See *West. Union Tel. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *West. U. Tel. Co. v. Reynolds*, 77 Va. 173, 195, 46 Am. Rep. 715; *Renter v. Electric Tel. Co.*, 6 E. etc. B 341, 2 Jr. M. S. 1245, 26 L. G. Q. B. 46, 4 Wkly. Rep. 564, 88 E. C. L. 341.

<sup>13</sup> See *West. U. Tel. Co. v. Penn. R. Co.*, 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517.



preference by statute, should the former clearly appear to be of more consequence than the latter. It is presumed that those given preference by statute are of much importance, but the presumption may be overcome if it clearly appears from an inspection of the private message that it is of greater importance than the former. The telegraph company is often ignorant of the real meaning of a telegram; and, while it may be assured of its meaning, it cannot always know its full importance, as the importance of a message often depends on other circumstances surrounding the particular message. The company cannot, therefore, always know what importance should be given to messages, and if this fact should be left to its own consideration, it might often be mistaken in its judgment; and on this account preferences might be given to some which would not be thereto entitled. It is not a good policy anyway to give these companies this power; for they might take advantage of the power and give preference, many times, to messages which should be transmitted in the regular order in which they are received. It is, therefore, much the better policy to demand of them to transmit the messages in the order in which they are received.

§ 251. **Cannot discriminate.**—The business of a telegraph or telephone company is public in its nature and a public interest is impressed thereon to such an extent that no unjust discrimination can be made against persons or corporations, either in the business of receiving and transmitting messages,<sup>14</sup> or in the charges therefor where the conditions are the same,<sup>15</sup> or by refusing to serve or furnish facilities to them when demanded, and in the character and quality generally given and provided to others. Like other quasi-public corporations, telegraph and telephone companies may make and enforce reasonable rules and regulations for the conduct of their business; and those who refuse to comply with such rules and regulations cannot demand the services and facilities of these companies,<sup>16</sup> or a continuance of same where there is a substantial

<sup>14</sup> *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 56 N. E. 822, 75 Am. St. Rep. 184, 48 L. R. A. 568; *West. U. Tel. Co. v. Call Pub. Co.*, 44 Neb. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 27 L. R. A. 622; *Id.*, 58 Neb. 192, 78 N. W. 519; *Stewart, etc., Co. v. Postal Tel. Cable Co.*, 131 Ga. 31, 61 S. E. 1045, 18 L. R. A. (N. S.) 692, 127 Am. St. Rep. 205.

<sup>15</sup> See § 252 et seq.

<sup>16</sup> *Pugh v. City, etc., Tel. Ass'n*, 8 Ohio Dec. (Reprint) 644, 9 Wkly. Law Bul. 104; *West. U. Tel. Co. v. McGuire*, 104 Ind. 130, 2 N. E. 201, 54 Am. Rep. 296; *Gardner v. Providence Tel. Co.*, 23 R. I. 262, 49 Atl. 1004; *Kirby v. West. U. Tel. Co.*, 7 S. D. 623, 65 N. W. 37, 46 Am. St. Rep. 765, 30 L. R. A. 621, 624; *Hewlett v. West. U. Tel. Co. (C. C.)*, 28 Fed. 181; *Tel., etc., Co. v.*

violation thereof.<sup>17</sup> These rules and regulations must be reasonable, and, if reasonable, the fact that they have not been enforced in particular cases does not mean that they may not be enforced in other cases.<sup>18</sup> These companies have the right to make reasonable charges for their services;<sup>19</sup> but they must be imposed equally on all, where the circumstances are the same. This is a common-law principle, and could be enforced in the absence of a statute to that effect. Under their rules and regulations, they may require charges for services to be paid in advance,<sup>20</sup> or on a certain day of the

Murphy, 100 Ark. 546, 140 S. W. 720; Tel., etc., Co. v. Danaher, 102 Ark. 547, 144 S. W. 925.

<sup>17</sup> Irvin v. Rushville Co-operative Tel. Co., 161 Ind. 524, 69 N. E. 258; Pugh v. City etc., Tel. Ass'n, 8 Ohio Dec. (Reprint) 644, 9 Wkly. Law Bul. 104; Gardner v. Providence Tel. Co., 23 R. I. 262, 49 Atl. 1004; Huffman v. Tel. Co., 143 Iowa, 590, 121 N. W. 1033, 23 L. R. A. (N. S.) 1010.

<sup>18</sup> People v. West. U. Tel. Co., 166 Ill. 15, 46 N. E. 731, 36 L. R. A. 637; Irvin v. Rushville Co-operative Tel. Co., 161 Ind. 524, 69 N. E. 258. But see Plummer v. Hattelsted (Iowa) 117 N. W. 680; Atlantic, etc., Tel. Co. v. West. U. Tel. Co., 4 Daly (N. Y.) 527.

<sup>19</sup> Minneapolis Gen. Elec. Co. v. Minneapolis (C. C.) 194 Fed. 215; Thompson v. San Francisco, etc., Elec. Co., 20 Cal. App. 142, 128 Pac. 347; Marion Elec., etc., Co. v. Rochester, 149 Ky. 810, 149 S. W. 977.

<sup>20</sup> Woodley v. Carolina Tel., etc., Co., 163 N. C. 284, 79 S. E. 598, Ann. Cas. 1914D, 116; National Tel. Co. v. Griffin, 2 Ir. R. 115; Yancey v. Batesville Tel. Co., 81 Ark. 486, 99 S. W. 679, 11 Ann. Cas. 135; Malochee v. Great Southern Tel., etc., Co., 49 La. Ann. 1690, 22 South. 922; Buffalo County Tel. Co. v. Turner, 82 Neb. 841, 118 N. W. 1064, 130 Am. St. Rep. 699, 19 L. R. A. (N. S.) 693; Vaught v. East Tennessee Tel. Co., 123 Tenn. 318, 130 S. W. 1050, Ann. Cas. 1912C, 132, 31 L. R. A. (N. S.) 315; State v. Independent Tel. Co., 59 Wash. 156, 109 Pac. 366, 31 L. R. A. (N. S.) 329; Rushville Co-operative Tel. Co. v. Irvin, 27 Ind. App. 62, 59 N. E. 327; West. U. Tel. Co. v. McGuire, 104 Ind. 130, 2 N. E. 201, 54 Am. Rep. 296; Neb. Tel. Co. v. State, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113.

See Ashley v. Rocky Mtn. Bell Tel. Co., 25 Mont. 286, 64 Pac. 765.

In Yancey v. Batesville Tel. Co., *supra*, however, a telephone subscriber was compelled to go to the central office and pay in advance for long-distance messages, when others could send same from their homes and places of business and pay for the same at the end of each month. It was held that it was an unreasonable and unnecessary discrimination.

*Reasonableness of rule.*—A rule of rural telephone company that telephone companies must be paid six months in advance is reasonable, and a subscriber refusing to comply therewith is not entitled to service. Buffalo County Tel. Co. v. Turner, 82 Neb. 841, 118 N. W. 1064, 130 Am. St. Rep. 699, 19 L. R. A. (N. S.) 693; Minneapolis General Electric Co. v. Minneapolis (C. C.) 194 Fed. 215.

On the same principle, a telegraph, telephone, and electric company may require, as a condition of furnishing services, a deposit of a reasonable amount as security for the payment of future charges. See Hewlett v. West. U. Tel.

month.<sup>21</sup> They cannot be required to extend credit to any one, although credit has been extended to others.<sup>22</sup> They may enforce the payment of charges for services to a subscriber to whom the company is indebted.<sup>23</sup>

§ 252. **Same continued—discrimination—must be just.**—It is not every discrimination which is unjust,<sup>24</sup> since there may be conditions surrounding the particular case which would entitle telegraph and telephone companies to make discriminations among their patrons. These companies certainly have the right to demand a reasonable compensation for their services, and where the conditions pertaining to the transmission and delivery of messages are similar in every respect, they should not be permitted to discriminate in their rates; but in many cases the conditions are not similar, and where this is the case, it is not unjust discrimination.<sup>25</sup> It is not contrary to the common law nor is it contrary to the stat-

Co. (C. C.) 28 Fed. 181; *West. U. Tel. Co. v. McGuire*, 104 Ind. 130, 2 N. E. 201, 54 Am. Rep. 296.

<sup>21</sup> *Irvin v. Rushville Co-operative Tel. Co.*, 161 Ind. 524, 69 N. E. 258, may discontinue without notice where subscriber knows of rule.

<sup>22</sup> *Irvin v. Rushville Co-operative Tel. Co.*, 161 Ind. 524, 69 N. E. 258; *Vaught v. East Tennessee Tel. Co.*, 123 Tenn. 318, 130 S. W. 1050, 31 L. R. A. (N. S.) 315, Ann. Cas. 1912C, 132. But see *Yancey v. Batesville Tel. Co.*, 81 Ark. 486, 99 S. W. 679, 11 Ann. Cas. 135.

<sup>23</sup> *Irvin v. Rushville Co-operative Tel. Co.*, 161 Ind. 524, 69 N. E. 258, holding that, where a telephone company has made a rule unknown to its subscribers requiring rentals to be paid by a certain day of the month, it may discontinue the service for nonpayment, although it is indebted to the subscriber.

A *counterclaim* by subscriber for faulty services, a large part of which is exorbitant and illegal, does not justify him in demanding that he be given a service without a prepayment of such rent as other subscribers pay. *Buffalo County Tel. Co. v. Turner*, 82 Neb. 841, 118 N. W. 1064, 130 Am. St. Rep. 699, 19 L. R. A. (N. S.) 693.

*Failure to obtain franchise.*—The failure of a company to obtain a franchise, as required, for the use of highways, is no defense to an action for rental. *Union Tel. Co. v. Ingersoll*, 178 Mich. 187, 144 N. W. 560, 52 L. R. A. (N. S.) 713.

<sup>24</sup> *Snell v. Clinton Elec. L., etc., Co.*, 196 Ill. 626, 63 N. E. 1082, 89 Am. St. Rep. 341, 58 L. R. A. 284, reversed 95 Ill. App. 552; *Cincinnati, etc., R. Co. v. Bowling Green*, 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422; *Weld v. Com'rs*, 197 Mass. 556, 84 N. E. 101; *State v. Elec., etc., Co.*, 43 Mont. 118, 115 Pac. 44; *Horne v. Water, etc., Co.*, 153 N. C. 535, 69 S. E. 607, 138 Am. St. Rep. 681; *Kilbourn City v. Power Co.*, 149 Wis. 168, 135 N. W. 499; *State v. Power Co.*, 119 Minn. 225, 137 N. W. 1104, 41 L. R. A. (N. S.) 1181, Ann. Cas. 1914B, 19; *Packing Co. v. Illuminating Co.*, 115 App. Div. 51, 100 N. Y. Supp. 605.

<sup>25</sup> *West. U. Tel. Co. v. Call Pub. Co.*, 44 Neb. 326, 62 N. W. 506, 48 Am.



ute to make a difference in the charges. It has been held that the true rule on this subject is that the rates must not only be reasonable in themselves, but must be relatively reasonable; that is, they must first be reasonable, and then they must not, without a just and reasonable ground for discrimination, render to one patron services at a less rate than it renders to another, where such discrimination operates to the disadvantage of that other.<sup>26</sup> They must not discriminate in rates between patrons so as to give one an undue preference over another. It is not an undue preference, however, to make to one patron a less rate than to the other, when there exist differences in conditions as to the expense or difficulty of the services rendered which fairly justifies such a difference in rates.<sup>27</sup> This question was very elaborately discussed in a case in which a newspaper company instituted an action for damages against a telegraph company which was transmitting news for the Associated Press at Chicago, for unjustly discriminating against the plaintiff and in favor of another paper company doing business in the same place. The Associated Press was furnishing news to both of these papers, but it was shown that the plaintiff was an evening paper—the other being a morning paper—and received its news during the day, when the telegraph company was necessarily very busily engaged in other general telegraphic business, and at a time when its wires could easily have been put to other uses. The other paper did not receive its news until night, and at a time when the defendant was not being rushed with work and incurring the expense to which it was subjected during the day. The court held in this case that, notwithstanding the fact that the news was transmitted over the same wire of defendant company, from the same place to the same place, and that the same amount of skill and care was necessary in both cases, yet the expense incurred in the transmission of messages to the plaintiff was so much greater than that incurred in the transmission to the other paper that the defendant had the right to discriminate in the rates between the two, and that it was not an unjust discrimination.<sup>28</sup>

§ 253. **Same continued—reasonable discriminations.**—Where the conditions respecting the transmission of messages for two patrons are different, in that the expense and trouble incurred in the transmission of one is greater than in the other, the company may discriminate in the charges. Discriminations made in good

St. Rep. 729, 27 L. R. A. 622; Cumberland Tel., etc., Co. v. Kelly, 160 Fed. 316, 87 C. C. A. 268, 15 Ann. Cas. 1210.

<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> Id.

faith, because of such differences in the expense of transmission—and proportional with reference thereto—are undoubtedly just, but it devolves upon these companies, relying upon such facts as a defense to a suit for unjust discrimination, to prove them to the satisfaction of the court.<sup>29</sup> Thus, where the same messages are transmitted by the same company, from the same place to two patrons of the same place, but the messages are received at different times during the day and at times when the expenses and trouble in the transmission are different, the company may discriminate in its rates.<sup>30</sup> A telegraph or telephone company may also, unless restrained by statute, discriminate in favor of longer distances.<sup>31</sup> But these companies cannot discriminate against those who refuse to patronize them exclusively.<sup>32</sup> And it is not a legitimate ground

<sup>29</sup> Compare *People v. Wabash, etc., R. Co.*, 104 Ill. 476; *Portsmouth, etc., R. Co. v. Forsaith*, 59 N. H. 122, 47 Am. Rep. 181; *St. Louis, etc., R. Co. v. Hill*, 14 Ill. App. 579.

<sup>30</sup> *West. U. Tel. Co. v. Call Pub. Co.*, 44 Neb. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 27 L. R. A. 622, holding that the burden is upon the party complaining to show injustice of the amount thereof; *Cumberland Tel., etc., Co. v. Kelly*, 160 Fed. 316, 87 C. C. A. 268, 15 Ann. Cas. 1210.

<sup>31</sup> Compare *St. Louis, etc., R. Co. v. Hill*, 14 Ill. App. 579; *Hersh v. Northern C. R. Co.*, 74 Pa. 188; *Leavell v. West. U. Tel. Co.*, 116 N. C. 211, 21 S. E. 391, 47 Am. St. Rep. 798, 27 L. R. A. 843, the difference in conditions must not be due to the wrongful or improper conduct of the company, as by sending messages of one customer by a direct route and those of another by a longer and more expensive route.

<sup>32</sup> *Menacho v. Ward (C. C.)* 27 Fed. 529; *Gwynn v. Citizens' Tel. Co.*, 69 S. C. 434, 48 S. E. 460, 104 Am. St. Rep. 819, 67 L. R. A. 111, where a contract was made between a company and a customer wherein the former was to put in a telephone for the use of the latter on condition that he would not use any other system, held to be void as in restraint of trade, and against public policy, as tending to create a monopoly. See, also, *State v. Citizens' Tel. Co.*, 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139, mandamus the proper proceeding to compel a company to furnish service; *Central Union Tel. Co. v. Falley*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; *State v. Nebraska Tel. Co.*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404. Mandamus, however, does not lie to compel the performance of an unlawful act. See note to *Dane v. Derby*, 89 Am. Dec. 731. And it cannot be compelled to furnish facilities to a bawdyhouse. *Godwin v. Tel. Co.*, 136 N. C. 258, 48 S. E. 636, 103 Am. St. Rep. 941, 67 L. R. A. 251, 1 Ann. Cas. 203. See *Union Trust & Sav. Bk. v. Kinloch Long-Distance Tel. Co.*, 258 Ill. 202, 101 N. E. 535, 45 L. R. A. (N. S.) 465, Ann. Cas. 1914B, 258; *Central N. Y., etc., Tel. Co. v. Averill*, 199 N. Y. 128, 92 N. E. 206, 139 Am. St. Rep. 878, 32 L. R. A. (N. S.) 494, a contract giving a company the exclusive right to furnish connections in a hotel for a term of years, although only in partial restraint of trade, is against public policy and void, since it injuriously affects the public interest. See § 49.

for giving a preference to one patron that he engages to employ other lines of the company for the transmission of news distinct from and unconnected with the message in question.<sup>33</sup> A telegraph or telephone company cannot discriminate in favor of itself or any of its employes as against other patrons.<sup>34</sup> A contract by which a telegraph or telephone company agrees to transmit for one person at cheaper rates than it was transmitting for other patrons and the public generally in like circumstances,<sup>35</sup> under the same conditions<sup>36</sup> and for like distances, is void as creating an illegal preference and making an unjust discrimination. And a contract by which a telegraph company gives to a railroad company a preference over its lines to the exclusion of others is an illegal discrimination and does not justify it in exacting an extra tariff for sending a message over the line of another company to a point at which it also has a line.<sup>37</sup> These companies cannot discriminate in favor of a patron having a large amount of business with them, as it tends to create monopoly, to destroy competition, and is contrary to public policy;<sup>38</sup> neither can they give discriminatory rates to a particular person for the purpose of obtaining his business.<sup>39</sup>

**§ 254. Reasonableness of rates—how determined.**—While the general rule is that the rates of telegraph and telephone companies

<sup>33</sup> *Baxendale v. Great Western R. Co.*, 1 Nev., etc., Macn. 191; *Bellsdyke Coal Co. v. North British R. Co.*, 2 Id. 105.

<sup>34</sup> *Cumberland Valley R. Co.'s App.*, 62 Pa. 118.

<sup>35</sup> *Indianapolis, etc., R. Co. v. Ervin*, 118 Ill. 250, 8 N. E. 862, 59 Am. Rep. 369; *Messenger v. Pa. R. Co.*, 36 N. J. Law, 407, 13 Am. Rep. 457; *Id.*, 37 N. J. Law, 531, 18 Am. Rep. 754; *Scofield v. R. Co.*, 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846; *Ivanhoe Furn. Co. v. Va., etc., Tel. Co.*, 109 Va. 130, 63 S. E. 426; *Cumberland Tel., etc., Co. v. Kelly*, 160 Fed. 316, 87 C. C. A. 268, 15 Ann. Cas. 1210.

<sup>36</sup> *West. U. Tel. Co. v. Call Pub. Co.*, 44 Neb. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 27 L. R. A. 622; *Cumberland Tel., etc., Co. v. Kelly*, 160 Fed. 316, 87 C. C. A. 268, 15 Ann. Cas. 1210.

<sup>37</sup> *Leavell v. West. U. Tel. Co.*, 116 N. C. 211, 21 S. E. 391, 47 Am. St. Rep. 798, 27 L. R. A. 843; *Gwynn v. Citizens' Tel. Co.*, 69 S. C. 434, 48 S. E. 460, 104 Am. St. Rep. 819, 67 L. R. A. 111; *State v. Citizens' Tel. Co.*, 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139.

A telephone company cannot remove an instrument from the office of a subscriber, engaged in the general messenger business, who is not in default as to his rentals, because he uses the instrument to notify persons who are wanted at a rival telephone exchange. *Owensboro-Harrison Tel. Co. v. Wisdom*, 62 S. W. 529, 23 Ky. Law Rep. 97.

<sup>38</sup> *Postal Cable Tel. Co. v. Cumberland Tel., etc., Co. (C. C.)* 177 Fed. 726, a telephone company is not justified in charging a telegraph company more for telephone service than it charges other business concerns.

<sup>39</sup> *West. U. Tel. Co. v. Call Pub. Co.*, 44 Neb. 326, 62 N. W. 506, 48 Am.



must not only be reasonable in themselves, but must be relatively reasonable, yet it is rather difficult in many cases, where it is claimed that there is an unjust discrimination between two patrons, to determine the reasonableness of one rate and the unreasonableness of the other, or, more strictly speaking, the relatively reasonable rates of the two, where a just discrimination can be made.<sup>40</sup> It has been held by some courts that no cause of action can be predicated upon the mere fact that another patron obtained services for a less rate, unless it be shown that the rate charged complainant is in itself unreasonable and excessive.<sup>41</sup> There must be some rate which is considered reasonable within itself or some standard of measurement to be used as a guide for the jury in determining the reasonableness of a rate, and whether or not this is relatively reasonable with another rate imposed, where the conditions respecting the transmission of the two are different. The jury must have some guide of this kind, in order to arrive at a proper conclusion; as was said: "How can it be said that a jury acts upon evidence and reaches a verdict solely upon consideration thereof when, having established a difference in rates and a difference in conditions, without anything to show how one difference affects the other, or to what extent it is permitted to measure one against the other, and to say that to the extent of one dollar or to the extent of one thousand dollars, the difference in rates was disproportionate to the difference in conditions? It may be said that it would be difficult to produce evidence to show to what extent such differences in conditions reasonably affect rates. This may be true, but the answer is that, whatever may be the difficulties of the proof, a verdict must be based upon the proof, and a verdict must be founded upon evidence, and not upon the conjecture of the jury or its general judgment as to what is fair without evidence whereon to found such judgment."<sup>42</sup>

St. Rep. 729, 27 L. R. A. 622. Compare *Hays v. Pa. Co.* (C. C.) 12 Fed. 309; *Scofield v. Lake Shore, etc., R. Co.*, 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846; *London, etc., R. Co. v. Evershed*, L. R. 3 App. Cas. 1029.

<sup>40</sup> Compare *Baxendale v. Eastern C. R. Co.*, 4 Com. B. 63; *Great Western R. Co. v. Sutton*, 4 H. L. Cas. 239; *Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623, 26 Am. Rep. 731; *Fitchburg R. Co. v. Gage*, 12 Gray (Mass.) 393; *Sargent v. Boston, etc., R. Co.*, 115 Mass. 416; *Ragan v. Aiken*, 9 Lea (Tenn.) 609, 42 Am. Rep. 684; *Menacho v. Ward* (C. C.) 27 Fed. 529. See § 234 et seq.

<sup>41</sup> Compare *Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623, 26 Am. Rep. 731.

<sup>42</sup> *West. U. Tel. Co. v. Call Pub. Co.*, 44 Neb. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 27 L. R. A. 622.

§ 255. **Statutes—declaratory of common law.**—There are statutes in many of the states imposing upon telegraph and telephone companies the duty to furnish equal facilities impartially to all who apply to them, offering to comply with all of their reasonable regulations, but it has been held that these statutes were only declaratory of the common law on the subject.<sup>43</sup> These obligations are imposed by the demands of commerce and trade, and it would be idle to say they existed only by force of these statutes.<sup>44</sup> Thus, when a statute imposes a penalty<sup>45</sup> on any company which refuses to receive a message for transmission over its wires from an individual or another company, the company, in the absence of such statute, could be forced by a writ of mandamus to perform such duty. It is an obligation which a company cannot avoid by reason of the fact that there are no penal statutes to that effect.<sup>46</sup>

§ 256. **Duties peculiarly applicable to the telephone.**—There are some duties peculiarly applicable to the telephone which cannot very well be discussed under the joint title of telegraph and telephone, because of the difference in the manner in which each is operated.<sup>47</sup> There is no difference, however, between telegraph and telephone companies in respect to those duties which have been discussed elsewhere.<sup>48</sup> But the uses to which a telephone may be adapted, as a result of its convenience in its operation, have made it more popular and more generally used than the telegraph, and so to these uses and the manner in which they shall be performed particular reference should and will here be made. A telephone company must furnish every person, on request, as modern and thoroughly equipped telephone apparatus, with all the appurtenances thereof, as is furnished to any other of its patrons,<sup>49</sup> of the same

<sup>43</sup> *Vaught v. East. Tenn. Tel. Co.*, 123 Tenn. 318, 130 S. W. 1050, 31 L. R. A. (N. S.) 315, Ann. Cas. 1912C. 132; *Postal Cable Tel. Co. v. Cumberland, etc., Tel. Co.* (C. C.) 177 Fed. 726; *Mooreland Rural Tel. Co. v. Mouch*, 48 Ind. App. 521, 96 N. E. 193; *Bradford v. Citizens' Tel. Co.*, 161 Mich. 385, 126 N. W. 444, 137 Am. St. Rep. 513.

<sup>44</sup> *State v. Neb. Tel. Co.*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404.

<sup>45</sup> In *Brown v. Cumberland Tel., etc., Co.* (C. C.) 181 Fed. 246, an action under a penal statute imposing a penalty for discrimination barred by the statute of limitations if not brought within one year after cause of action accrued.

<sup>46</sup> *Central Union Tel. Co. v. Falley*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114.

<sup>47</sup> *Sou. Tel. Co. v. King*, 103 Ark. 160, 146 S. W. 489, Ann. Cas. 1914B, 780, 39 L. R. A. (N. S.) 402, citing author.

<sup>48</sup> See § 248 et seq.

<sup>49</sup> *Cent. Union Tel. Co. v. State*, 118 Ind. 194, 19 N. E. 604, 10 Am. St.

class and similarly situated,<sup>50</sup> provided such applicant offers to pay the maximum price authorized by statute to be charged therefor, and agrees to comply with the company's other rules and regulations. However, where two patrons pay the same rate, one cannot demand more than is furnished the other,<sup>51</sup> if they are of the same class.<sup>52</sup> A telephone company may, in good faith, determine the territory within which it will carry on business,<sup>53</sup> and the character thereof.<sup>54</sup> So it is not required to extend its facilities to persons living outside of the corporate limits of a municipality within which it may be doing business,<sup>55</sup> and this, too, although it may be so furnishing to some,<sup>56</sup> especially where they are not similarly situated.<sup>57</sup> Discriminations cannot be made either in regard to the public station system of a telephone or its so-called private system of instruments.<sup>58</sup> And a telephone company is not justified in refusing to install an instrument in an office, residence, or place of business by reason of the fact that it provides public stations for

Rep. 114; Cent. Union Tel. Co. v. Falley, 118 Ind. 598, 20 N. E. 145; Johnson v. State, 113 Ind. 143, 15 N. E. 215; Hockett v. State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; Cent. Union Tel. Co. v. Bradbury, 106 Ind. 1, 5 N. E. 721; Gardner v. Providence Tel. Co., 23 R. I. 262, 49 Atl. 1004; Id., 23 R. I. 312, 50 Atl. 1014, 55 L. R. A. 113; Commercial Union Tel. Co. v. New England Tel., etc., Co., 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161; Colorado Tel. Co. v. Fields, 15 N. M. 431, 110 Pac. 571, 30 L. R. A. (N. S.) 1088, telephone company cannot require a patron to pay for installing or transferring instrument. See Hamilton v. McKenna, 95 Kan. 207, 147 Pac. 1126, L. R. A. 1915E, 455, mutual telephone system.

<sup>50</sup> Ivanhoe Furnace Co. v. Va., etc., Tel. Co., 109 Va. 130, 63 S. E. 426, individual subscriber not of the same class as another telephone company; Cumberland Tel., etc., Co. v. Kelly, 160 Fed. 316, 87 C. C. A. 268, 15 Ann. Cas. 1210, an applicant on a party line, different class from one on direct line.

<sup>51</sup> Red Line Mutual Tel. Co. v. Pharris, 82 Neb. 371, 117 N. W. 995, one subscriber cannot demand a switchboard and two wires connecting different lines where others are so furnished.

<sup>52</sup> Ivanhoe Furnace Co. v. Va., etc., Tel. Co., 109 Va. 130, 63 S. E. 426.

<sup>53</sup> Delaware, etc., Tel. Co. v. Delaware, 50 Fed. 677, 2 C. C. A. 1, affirming (C. C.) 47 Fed. 633; Cumberland Tel., etc., Co. v. Kelly, 160 Fed. 316, 87 C. C. A. 268, 15 Ann. Cas. 1210. But see Re Mountain, etc., Tel. Co., P. U. R. 1916B, 169.

<sup>54</sup> Delaware, etc., Tel. Co. v. Delaware, 50 Fed. 677, 2 C. C. A. 1, affirming (C. C.) 47 Fed. 633.

<sup>55</sup> Crouch v. Arnett, 71 Kan. 49, 79 Pac. 1086. But see Re Mountain, etc., Tel. Co., P. U. R. 1916B, 169.

<sup>56</sup> Younts v. Southwestern Tel., etc., Co. (C. C.) 192 Fed. 200.

<sup>57</sup> Crouch v. Arnett, 71 Kan. 49, 79 Pac. 1086.

<sup>58</sup> State v. Kinloch Tel. Co., 93 Mo. App. 349, 67 S. W. 684.



the use of all who will pay toll.<sup>59</sup> It is the duty of a telephone company to furnish its subscribers with all the necessary instruments and conveniences to be had and furnished to others similarly situated. Thus, if some subscribers are furnished with a directory or telephone book containing their names and telephone numbers, it must be furnished to all, and must contain the names and telephone numbers of all who require their names and numbers inserted, or whose names and numbers are accustomed to be inserted.<sup>60</sup> It is also the duty of telephone companies to treat all of their subscribers and patrons with the greatest courtesy and respect, and to attend to all business which they may request respecting the services toward them as subscribers. A subscriber may demand that his "calls" at the exchange be properly attended to in the regular order in which they are made; that all "calls" made for him be promptly and properly looked after; and that he be given prompt and effi-

<sup>59</sup> *State v. Kinloch Tel. Co.*, 93 Mo. App. 349, 67 S. W. 684; *Cent. Union Tel. Co. v. State*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; *State v. Neb. Tel. Co.*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404.

<sup>60</sup> *State v. Sunset Tel., etc., Co.*, 30 Wash. 676, 71 Pac. 198.

In *State v. Neb. Tel. Co.*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 409, it appeared that the relator, an attorney at law, applied to the local company for a telephone with the usual connections. The instrument was furnished, together with all the appliances, excepting a directory, the absence of which materially impaired the beneficial use of the telephone. After continued application, a directory was furnished, but on pay day the subscriber refused to pay except for the time during which he had been furnished with the directory; the company insisted on full payment. Neither would yield; so the company removed the instrument. Subsequently the relator applied for service, offering to comply with their reasonable regulations. He was refused. He then applied for mandamus to compel the company to render the service. It was held that the mandamus should issue. The court, after reviewing the status of the telephone company and the public character of the obligations they assumed, concluded: That the company had "assumed the responsibility of a common carrier of news. Its wires and poles line our public streets and thoroughfares. It has, and must be held to have, taken its place by the side of the telegraph as such common carriers." That the duty to the relator was one growing out of its office as a carrier and not out of contract, and that its relations with the relator as to the misunderstanding between them concerning the directory cannot affect the case. See, also, *Delaware v. Delaware, etc., Tel., etc., Co.* (C. C.) 47 Fed. 633, affirming 50 Fed. 677, 2 C. C. A. 1; *Central Union Tel. Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721; *Budd v. N. Y.*, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247; *People v. Manhattan Gaslight Co.*, 45 Barb. (N. Y.) 136.

The telephone company cannot evade this obligation by alleging that it does not rent telephones, but furnishes such service by means of public stations only. *Cent. Union Tel. Co. v. State*, 123 Ind. 113, 24 N. E. 215; *Cent. Union Tel. Co. v. State*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114.

cient connections with other subscribers.<sup>61</sup> The authorities are not in harmony as to the amount of damages which may be recovered from a telephone company where it has failed to make prompt, proper and efficient connections—or where it fails to make any connection at all—with other lines at the central exchange. If such failure of duty is the result of mere negligence on the part of the company, only nominal damages, if any, should be recoverable. But if, on the other hand, this has been the result of gross negligence, or that which is tantamount to wanton or willful negligence, the injured subscriber should recover such fair compensation for the loss and for annoyance, inconvenience and humiliation as would be fairly attributable to the wrong thus done,<sup>62</sup> or, as some of the authorities hold, for such special damages as would be the most probable result thereof, and of which the company would have had notice at the time of the commission of the said wrong.<sup>63</sup>

<sup>61</sup> *Glawson v. Southern Bell Tel., etc., Co.*, 9 Ga. App. 450, 71 S. E. 747; *Southern Tel. Co. v. King*, 103 Ark. 160, 146 S. W. 489, 39 L. R. A. (N. S.) 402, Ann. Cas. 1914B, 780, punitive damages recoverable; *Vinson v. Southern Bell Tel. etc., Co.*, 188 Ala. 292, 66 South. 100, L. R. A. 1915C, 450; *Southern Bell Tel., etc., Co. v. Glawson*, 13 Ga. App. 520, 79 S. E. 488; *Cumberland Tel., etc., Co. v. Sutton*, 156 Ky. 191, 160 S. W. 949; *Carmichael v. Southern Bell Tel., etc., Co.*, 162 N. C. 333, 78 S. E. 507, Ann. Cas. 1915A, 983. See other cases in note 63.

<sup>62</sup> See § 269. See, also, *Southern Tel. Co. v. King*, 103 Ark. 160, 146 S. W. 489, 39 L. R. A. (N. S.) 402, Ann. Cas. 1914B, 780, punitive damages not recoverable in absence of intentional, willful, or conscientious indifference to consequences; *Vinson v. Southern Bell Tel., etc., Co.*, 188 Ala. 292, 66 South. 100, L. R. A. 1915C, 450; *Southern Bell Tel., etc., Co. v. Glawson*, 13 Ga. App. 520, 79 S. E. 488; *Cumberland Tel., etc., Co. v. Sutton*, 156 Ky. 191, 160 S. W. 949. See *Southern Bell Tel., etc., Co. v. Reynolds*, 139 Ga. 385, 77 S. E. 388; *Seifert v. West. U. Tel. Co.*, 129 Ga. 181, 58 S. E. 699, 121 Am. St. Rep. 210, 11 L. R. A. (N. S.) 1149.

<sup>63</sup> *Southern Tel. Co. v. King*, 103 Ark. 160, 146 S. W. 489, Ann. Cas. 1914B, 780, 39 L. R. A. (N. S.) 402, nominal damages; *Lebanon, etc., Tel. Co. v. Latham Lumber Co.*, 131 Ky. 718, 115 S. W. 824, 21 L. R. A. (N. S.) 115, 18 Ann. Cas. 1066, loss by fire not proximate cause of delay in making connections for sending fire alarm; *Southern Bell Tel., etc., Co. v. Reynolds*, 139 Ga. 385, 77 S. E. 388, failing to respond to call, subscriber delayed in securing physician resulting in injury cannot recover, practically overruling *Glawson v. Southern Bell, etc., Co.*, 9 Ga. App. 450, 71 S. E. 747. Cases holding damages may be recovered for failing to respond to call: *Cumberland Tel., etc., Co. v. Sutton*, 156 Ky. 191, 160 S. W. 949, compensatory damages recovered; *Southwestern Tel., etc., Co. v. Pearson* (Tex. Civ. App.) 137 S. W. 733, damages for mental anguish; to same effect, *Southwestern Tel., etc., Co. v. Gehring* (Tex. Civ. App.) 137 S. W. 754; *Southwestern Tel., etc., Co. v. Jarrell* (Tex. Civ. App.) 138 S. W. 1165, mental damages. With the exception of the Kentucky case, in all the foregoing cases the company had notice of the urgency of the connection.

§ 257. **Charges for use of telephone.**—Much has been said, under the joint title of telephone and telegraph, concerning the uniform charges for the use of these instrumentalities as a means of communication,<sup>64</sup> and only such as are peculiarly applicable to the telephone will be discussed under this subject. A telephone company is charged with the duty of furnishing its services to each patron at the same charges it makes to every other patron for the same or substantially the same or similar services.<sup>65</sup> Such charges are usually regulated by statutes;<sup>66</sup> and where such is the case, it is not the taking of private property for public use; neither is it in any wise interfering with the constitutional rights of citizens in private property;<sup>67</sup> nor does it interfere with interstate commerce.<sup>68</sup> And where these statutes prescribe a penalty for a violation of this duty, it is only cumulative; and the company can be forced to comply with its requirements by mandamus.<sup>69</sup> There are

Southwestern Tel., etc., Co. v. Allen (Tex. Civ. App.) 146 S. W. 1066, substantial damages; to same effect Carmichael v. Southern Bell Tel., etc., Co., 157 N. C. 21, 72 S. E. 619, Ann. Cas. 1913B, 1117, 39 L. R. A. (N. S.) 651; Central Union Tel. Co. v. Fehring, 146 Ind. 189, 45 N. E. 64, penalty recovered; but Irvin v. Rushville Co-Operative Tel. Co., 161 Ind. 524, 69 N. E. 258, not allowed penalty for denying service where rental unpaid; Cumberland Tel., etc., Co. v. Jackson, 95 Miss. 79, 48 South. 614; Cumberland Tel., etc., Co. v. Paine, 94 Miss. 883, 48 South. 229, punitive damages not recoverable; Haber Hat Co. v. Southern Bell Tel., etc., Co., 118 Ga. 874, 45 S. E. 696; Yancey v. Batesville, etc., Tel. Co., 81 Ark. 486, 99 S. W. 679, 11 Ann. Cas. 135, requiring subscriber to go to central office, violative of penal statutes. But see Cumberland Tel., etc., Co. v. Baker, 85 Miss. 486, 37 South. 1012; Southwestern Tel., etc., Co. v. Taylor, 26 Tex. Civ. App. 79, 63 S. W. 1076; Volquardsen v. Iowa Tel. Co., 148 Iowa, 77, 126 N. W. 928, 28 L. R. A. (N. S.) 554; Southwestern Tel., etc., Co. v. Solomon, 54 Tex. Civ. App. 306, 117 S. W. 214; Vinson v. Southern Bell Tel., etc., Co., 188 Ala. 292, 66 South. 100, L. R. A. 1915C, 450, burden on company to show no negligence, question for jury.

<sup>64</sup> See § 251, et seq.

<sup>65</sup> Neb. Tel. Co. v. State, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113; Owensboro-Harrison Tel. Co. v. Wisdom, 23 Ky. Law Rep. 97, 62 S. W. 529.

<sup>66</sup> See chapter X.

<sup>67</sup> Hockett v. State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201.

<sup>68</sup> Central Union Tel. Co. v. Falley, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114.

<sup>69</sup> Central Union Tel. Co. v. Falley, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114.

In Vaught v. East Tennessee Tel. Co., 123 Tenn. 318, 130 S. W. 1050, 31 L. R. A. (N. S.) 315, Ann. Cas. 1912C, 132, it was held that a telephone company was not chargeable with a penalty under the Acts of Tennessee 1885, c. 66, par. 11, for discrimination against a prospective patron by requiring him to pay three months' rental in advance, because the general rule under which the requirement was made was not uniformly enforced. See Home Tel. Co. v. Peo-



instances where a telephone company may lawfully discriminate in its charges, in other ways than that elsewhere discussed.<sup>70</sup> It may make a greater charge to a subscriber who has a single line than to one who is on a party line.<sup>71</sup> And a greater charge may be imposed on business lines than on residence phones; but the fact that a party uses his residence phone in his business is not sufficient to warrant applying the rate for business phones to him, in the absence of a showing that his use thereof is substantially different from that of other residence phones.<sup>72</sup> While it is not the general custom, there is no reason why a greater charge may not be imposed on a rural subscriber than on one in the municipality, or require different arrangements as to the payment thereof,<sup>73</sup> as it is necessarily more expensive and troublesome to keep this line in repair than one within the corporate limits and nearer the exchange. It has been held to be an illegal discrimination for a telephone company to charge a new subscriber a higher rate than it does old subscribers for the same service.<sup>74</sup> The charges for long-distance phones must be the same to all whether the patron be a subscriber or not;<sup>75</sup> and the company could not require such business to be conducted over lines on a circuitous route, and charge according to the length of such route, if such could be conducted on a more direct line.<sup>76</sup> Nor can any charge be enforced for such business unless the patron or subscriber has agreed either expressly or impliedly so to be. Thus, when a long distance call is made on a business telephone, the operator should require the name of the person calling, and, if it is different from that of the subscriber, the latter must be conferred with and his consent had to a charge against him before such charge is valid;<sup>77</sup> however, the company could not require such

ple's Tel., etc., Co., 125 Tenn. 270, 141 S. W. 845, 43 L. R. A. (N. S.) 550, penal statute not unconstitutional as imposing an excessive fine.

<sup>70</sup> See § 253. See, also, *New York Tel. Co. v. Siegel*, 202 N. Y. 502, 96 N. E. 109, 36 L. R. A. (N. S.) 560.

<sup>71</sup> *Home Tel. Co. v. Carthage*, 235 Mo. 644, 139 S. W. 547, Ann. Cas. 1912D, 301, 48 L. R. A. (N. S.) 1055.

<sup>72</sup> *Mooreland Rural Tel. Co. v. Mouch*, 48 Ind. App. 521, 96 N. E. 193.

<sup>73</sup> See *Buffalo County Tel. Co. v. Turner*, 82 Neb. 841, 118 N. W. 1064, 130 Am. St. Rep. 699, 19 L. R. A. (N. S.) 693.

<sup>74</sup> *Bradford v. Citizens' Tel. Co.*, 161 Mich. 385, 126 N. W. 444, 137 Am. St. Rep. 513.

<sup>75</sup> See § 251 et seq. *Re Northeast Kansas Tel. Co.*, P. U. R. 1916B, 925, cannot be required to furnish free long-distance service.

<sup>76</sup> *Leavell v. West. U. Tel. Co.*, 116 N. C. 211, 21 S. E. 391, 47 Am. St. Rep. 798, 27 L. R. A. 843; *West. U. Tel. Co. v. Call Pub. Co.*, 44 Neb. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 27 L. R. A. 622.

<sup>77</sup> *Southern Ry. Co. v. Cumberland Tel., etc., Co.*, 127 Tenn. 566, 156 S. W.

subscriber to first go to the central office and pay such charges in advance, when the same was not required of other subscribers, but who were allowed to settle for same at the end of the month,<sup>78</sup> and yet there may be conditions which would change this rule. It has been held that a telephone company may make a rebate in rates to the municipality along whose streets its wires are stretched, and which has large powers of control and regulation over the property, as a contribution to the expense and cost of government, without entitling all customers to the special rate given it;<sup>79</sup> and it may make a special rate to charitable institutions performing services of special benefit to the community as a whole, and to clergymen, without entitling all customers to the same rate.<sup>80</sup> Telephone companies cannot discriminate between rural subscribers under similar circumstances; but if a subscriber in one county desires to talk to a subscriber in another county, they may charge extra for such message, and yet this charge must be the same as that imposed on a nonsubscriber for the same kind of message. Furthermore, the charges must be the same between subscribers and nonsubscribers in the same county, where the conversation is between a subscriber and a nonsubscriber. In other words, where conversations are carried on between two citizens of a county, where one is a nonsubscriber, the charges must be the same as that imposed on all other nonsubscribers. There may be this apparent exception, however, when the addressee is a subscriber, the company would not be allowed to make an extra charge for the purpose of getting him to the phone as it would in case he were a nonsubscriber, and that, too, whether he was or was not a nonresident of the county. A telephone company cannot charge a lower rate to patrons who do a larger share of business with them,<sup>81</sup> or who have a number of different phones in the same place of business or elsewhere, but this does not apply where all the phones are on the same line, or merely constitute an extension set, and it does not prevent the company from dividing its subscribers into classes according to the amount

853, Ann. Cas. 1914B, 1187, 45 L. R. A. (N. S.) 990, employé of plaintiff; *Jones v. Cumberland Tel., etc., Co.*, 140 Ky. 165, 130 S. W. 994. See *McSorley v. Faulkner*, 38 N. Y. St. Rep. 802, 14 N. Y. Supp. 789. But a rule of the company requiring a subscriber to pay for all long-distance messages originating from his telephone, whether O. K'd by him or not, is reasonable. *Southwestern Tel., etc., Co. v. Sharp*, 118 Ark. 541, 177 S. W. 25, L. R. A. 1915E, 323.

<sup>78</sup> See note 20.

<sup>79</sup> *N. Y. Tel. Co. v. Siegel-Cooper Co.*, 202 N. Y. 502, 96 N. E. 109, 36 L. R. A. (N. S.) 560.

<sup>80</sup> *Id.*

<sup>81</sup> See § 253.

of business done, and establishing a different rate for each class. The classes must be fixed by some reasonable and just rule, and every person in a given class is entitled to the same service at the same rates as every other subscriber in the same class. Thus the company may make a different charge to subscribers residing more than a given distance from the central office; or it may furnish a certain kind of instruments at one rate and a better kind at another rate, provided the latter did not exceed by its rates the maximum fixed by law. A telephone company may furnish party line service within a municipality, and the latter has no inherent power to forbid such.<sup>82</sup> But where its franchise provided that it should not install any party lines, the company is not warrantied in installing such lines because it charged cheaper toll rates for the same, and the service was approximately equal to that of direct lines.<sup>83</sup>

§ 258. **Whom to serve—persons conducting legal business.**—It is the duty of telephone companies to furnish equal facilities and conveniences, impartially to all, irrespective of age, race or habits, and serve all these alike on offering to comply with their reasonable regulations. While it seems that they cannot be forced to furnish their instruments to persons for the purpose of using them for an illegal business, yet there is no reason why they may not be compelled to furnish their facilities to parties who carry on an illegal business, otherwise than by the operation or use of the company. In other words, telegraph and telephone companies cannot be compelled by mandamus to furnish their facilities to a "bucket shop" for the purpose of obtaining the market quotations,<sup>84</sup> or to persons otherwise using them as a means of consummating wagering contracts; yet it is their duty to furnish these people, at their place of business not used for such purposes, with all the facilities and con-

<sup>82</sup> *Home Tel. Co. v. Carthage*, 235 Mo. 644, 139 S. W. 547, 48 L. R. A. (N. S.) 1055, Ann. Cas. 1912D, 301.

<sup>83</sup> *Louisville v. Louisville Home Tel. Co.*, 149 Ky. 234, 148 S. W. 13, Ann. Cas. 1914A, 1240. This is a condition to the granting of the franchise and may be enforced by the city. This case also held the rule to be the same although the operator might, by special equipment, signal one subscriber without the others.

<sup>84</sup> *Bryant v. West. Union Tel. Co.* (C. C.) 17 Fed. 825; *Metropolitan Grain & Stock Exch. v. Chicago Board of Trade* (C. C.) 15 Fed. 847; *West. Union Tel. Co. v. State*, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. (N. S.) 153, 6 Ann. Cas. 880; *Smith v. West. Union Tel. Co.*, 84 Ky. 664, 2 S. W. 483; *Sterrett v. Philadelphia, etc., Tel. Co.*, 18 Wkly. Notes Cas. (Pa.) 77, no injunction will be granted against the removal of telegraph wires from a bucket shop; *West. U. Tel. Co. v. Hammond Elevator Co.*, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. (N. S.) 153, 6 Ann. Cas. 880.



veniences furnished other persons, and on the same terms, where the same is being used for all conveniences otherwise than such as may pertain to their gambling transactions. Furthermore, should they see fit to furnish their telephones and connections to such persons for the express purpose of carrying out their illegal or gambling contracts, yet they could not be forced to furnish their facilities for such purposes to other like persons; because, as they could not be compelled to furnish their facilities to any person for the purpose of carrying on a business which is not under the protection of the laws, they could not be compelled to furnish to others conducting a similar business, likewise unprotected. Among such who should claim to be discriminated against in this respect there would be no ground in law or equity on which to base and contend for the right; there is no principle within the far-reaching vision of jurisprudence so powerful as to compel any one to carry on an illegal business, or to assist in lending a helping hand to another for the purpose of doing the same. So, as the law will not compel these companies to furnish their facilities to one person for an illegal purpose, it surely will not compel them to furnish one for this kind of a business when the company voluntarily extends its services to another for like purposes.

§ 259. **When may refuse to furnish services—abusive language.** Under certain conditions and circumstances, telephone companies may refuse to furnish their telephonic instruments and services to certain persons. As mentioned in the preceding section, they may refuse to furnish them to persons who intend to use them for illegal purposes.<sup>85</sup> And while these companies must deal fairly with their

<sup>85</sup> Mandamus does not lie to compel a telephone company to place a telephone in a bawdyhouse. *Godwin v. Tel. Co.*, 136 N. C. 258, 48 S. E. 636, 103 Am. St. Rep. 941, 67 L. R. A. 251, 1 Ann. Cas. 203. The court in this case said: "It is argued that a common carrier would not be authorized to refuse to convey the plaintiff because she keeps a bawdyhouse. Nor is the defendant refusing her a telephone on that ground, but because she wishes to place the telephone in a bawdyhouse. A common carrier could not be compelled to haul a car used for such purpose. If the plaintiff wishes to have the phone placed in some other house used by her, or even in a house where she resided, but not kept as a bawdyhouse, she would not be debarred because she kept another house for such unlawful and disreputable purpose. It is not her character, but the character of the business at the house where it is sought to have the telephone placed, which required the court to refuse the mandamus. In like manner, if a common carrier knew that passage was sought by persons who are traveling for the execution of an indictable offense, or a telegraph company that a message was tendered for a like purpose, both would be justified in refusing; and certainly when the plaintiff admits that she is carrying on a criminal business in the house where she seeks to have the telephone placed

patrons and extend to them all the courtesy and respect which is due one person toward another in like circumstances, yet, on the other hand, they should likewise receive the same treatment by all who desire to do business with them. So, if any one applying to them for service should use abusive language over the wires, or such as would tend to create a public disturbance either with any employé of the company or other person with whom they may be conversing, they may refuse to furnish him service while using such language.<sup>86</sup> And should one of their subscribers use, continuously, such language or abuse over his telephone, after persistent requests by the company not to do so, they may, as a last resort, remove their instrument from his premises.<sup>87</sup> It is a well-known principle in the law of torts that any publisher of libelous or slanderous words is as guilty of the wrong as he who first used the words; so, if these companies could be forced to render services to persons who used them for such purposes, the company, and not the wrongdoer in fact, might thereby become liable in an action for damages.<sup>88</sup> So to protect itself such company may refuse services to such persons.<sup>89</sup>

§ 260. Same continued—on refusal to pay charges or rent in arrears—charges for removing instrument—other reasons.—A telegraph or telephone company may refuse to serve or furnish its

the court will not, by its mandamus, require that facilities of a public nature be furnished to a house used for that business. For like reason, a mandamus will not lie to compel a water company to furnish water, or a light company to supply light, to a house used for carrying on an illegal business. The courts will enjoin or abate, not aid, a public nuisance."

<sup>86</sup> Pugh v. City, etc., Tel. Co., 8 Ohio Dec. 644, affirmed without opinion in 13 Wkly. Law Bul. (Ohio) 190, "If you can't get the party I want, you can shut up your damned old telephone," was sufficient to justify the telephone company in discontinuing the service. There was a dissenting opinion, apparently inspired by a doubt whether the word "damned" was to be regarded as a profane, or even an improper, word under the circumstances. Huffman v. Marcy Mutual Tel. Co., 143 Iowa, 590, 121 N. W. 1033, 23 L. R. A. (N. S.) 1010. See Kramer v. Ricksmeier, 159 Iowa, 48, 139 N. W. 1091, 45 L. R. A. (N. S.) 928, holding that abusing and threatening a woman over the telephone is not an assault.

<sup>87</sup> Pugh v. City, etc., Tel. Co., 8 Ohio Dec. 644; Huffman v. Marcy Mutual Tel. Co., 143 Iowa, 590, 121 N. W. 1033, 23 L. R. A. (N. S.) 1010, cannot discontinue the service two months after customer has been warned for using profane and indecent language.

<sup>88</sup> Grisham v. West. Union Tel., etc., Co., 238 Mo. 480, 142 S. W. 271, 37 L. R. A. (N. S.) 861, Ann. Cas. 1913A, 535; West. Union Tel., etc., Co. v. Cashman, 149 Fed. 367, 81 C. C. A. 5, 9 L. R. A. (N. S.) 140, 9 Ann. Cas. 693; McLeod v. Pacific State Tel., etc., Co., 52 Or. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. (N. S.) 810, 18 L. R. A. (N. S.) 954, 16 Ann. Cas. 1239.

<sup>89</sup> Pugh v. City, etc., Tel. Co., 8 Ohio Dec. 644.

facilities to any one who does not offer to pay the proper charges; and a regulation of a telephone company that it will not furnish its facilities to any patron in arrears for past services is reasonable and may be enforced.<sup>90</sup> The reason for the rule is that the law compels a telephone company to furnish efficient service without discrimination under reasonable regulations, and since it can maintain an efficient service only through prompt payment of its dues and tolls, the use of the summary remedy of denying service for

<sup>90</sup> Rushville, etc., Tel. Co. v. Irvin, 27 Ind. App. 62, 59 N. E. 327; Irvin v. Rushville, etc., Tel. Co., 161 Ind. 524, 69 N. E. 258; Cumberland, etc., Tel. Co. v. Hobart, 89 Miss. 252, 42 South. 349, 119 Am. St. Rep. 702; Malloch v. Great Southern, etc., Tel. Co., 49 La. Ann. 1690, 22 South. 922; Magruder v. Cumberland, etc., Tel. Co., 92 Miss. 716, 46 South. 404, 16 L. R. A. (N. S.) 560; Cumberland, etc., Tel. Co. v. Baker, 85 Miss. 486, 37 South. 1012; Buffalo County Tel. Co. v. Turner, 82 Neb. 841, 148 N. W. 1064, 130 Am. St. Rep. 699, 19 L. R. A. (N. S.) 693; Woodley v. Carolina, etc., Tel. Co., 163 N. C. 284, 79 S. E. 598, Ann. Cas. 1914D, 116; Vaught v. East Tennessee Tel. Co., 123 Tenn. 318, 130 S. W. 1050, Ann. Cas. 1912C, 132, 31 L. R. A. (N. S.) 315; State v. Independent Tel. Co., 59 Wash. 156, 109 Pac. 366, 31 L. R. A. (N. S.) 329. See People v. Manhattan Gaslight Co., 45 Barb. (N. Y.) 136; Tacoma Hotel Co. v. Tacoma Light, etc., Co., 3 Wash. 316, 28 Pac. 516, 28 Am. St. Rep. 35, 14 L. R. A. 669; Cox v. Cynthiana, 123 Ky. 363, 96 S. W. 456; Mansfield v. Humphreys Mfg. Co., 82 Ohio St. 216, 92 N. E. 233, 19 Ann. Cas. 842, 31 L. R. A. (N. S.) 301; Southwestern Tel., etc., Co. v. Danaber, 238 U. S. 482, 35 Sup. Ct. 886, 59 L. Ed. 1419, L. R. A. 1916A, 1208, reverses 94 Ark. 533, 127 S. W. 963, 30 L. R. A. (N. S.) 1027, Id., 102 Ark. 547, 144 S. W. 925.

*Rural telephone.*—A rule that rural telephone subscribers shall pay six months in advance is reasonable. Buffalo County Tel. Co. v. Turner, *supra*.

*Deduction of rent while line out of repair.*—A telephone subscriber is presumed to know that his telephone is liable to get out of order, and, if it is situated in the country that some time may elapse before it can be repaired, and such subscriber is only entitled to a deduction from his bill subsequent to the expiration of a reasonable time after the company had notice of the trouble and has failed to repair it. Buffalo County Tel. Co. v. Turner, *supra*.

*Payment, where to be made.*—A subscriber must pay for the use of the telephone at its office, and the habit of the company to present the bills through a collector at the subscriber's office or home may be abandoned on proper notice. Magruder v. Cumberland Tel., etc., Co., *supra*; Rushville, etc., Tel. Co. v. Irvin, *supra*.

*Disputed claims, payment under protest.*—Where there is a dispute over a debt, the remedy of the subscriber is to pay under protest the amount demanded, and sue for the excess; he cannot compel service by mandamus to enforce his agreement. State v. Cadwallader, 172 Ind. 619, 87 N. E. 644, affirmed in 172 Ind. 619, 89 N. E. 319, on rehearing. Hanson v. Olean Tel. Co., P. U. R. 1916B, §33, holding that a telephone company cannot refuse to serve a patron because of nonpayment of a disputed bill for service during a time when the line was not in condition and pending court proceedings to determine the amount due.



nonpayment is reasonable.<sup>91</sup> It has been held that the service may be refused for nonpayment of rental, despite the company's indebtedness to the subscriber, where the rule is reasonable.<sup>92</sup> However, such a regulation cannot be used as a means to enforce payment which it is not the duty of the subscriber to pay;<sup>93</sup> and it has even been held that if the patron was indebted to the company for services rendered under a separate contract, the company could only put an end to that contract wherein there was default.<sup>94</sup> And some cases take the view that such a regulation cannot be made the instrument by which the telephone company can become the judge in its own case, and refuse service to enforce payment of disputed bills.<sup>95</sup> The charges of these companies are regulated by the state and federal laws, and so long as charges remain within the maximum rate prescribed by these authorities, the companies can enforce a compliance therewith or refuse to render their services. But so soon as a telephone company exceeds these charges in any manner, as by rental of each of its instruments; or as a rental for its instruments and an extra charge for nonsubscribers, or as a toll station, or a charge for each conversation and a rental,<sup>96</sup> the company cannot use this as an excuse for not furnishing its instruments, provided the subscriber or patron offers to pay the rate prescribed by law.<sup>97</sup> And a telephone company whose maximum ren-

<sup>91</sup> *Rushville, etc., Tel. Co. v. Irvin*, 27 Ind. App. 62, 59 N. E. 327; *Irvin v. Rushville, etc., Tel. Co.*, 161 Ind. 524, 69 N. E. 258; *Buffalo County Tel. Co. v. Turner*, 82 Neb. 841, 148 N. W. 1064, 130 Am. St. Rep. 699, 19 L. R. A. (N. S.) 693.

<sup>92</sup> *Rushville, etc., Tel. Co. v. Irvin*, 27 Ind. App. 62, 59 N. E. 327; *Irvin v. Rushville, etc., Tel. Co.*, 161 Ind. 524, 69 N. E. 258; *Buffalo County Tel. Co. v. Turner*, 82 Neb. 841, 148 N. W. 1064, 130 Am. St. Rep. 699, 19 L. R. A. (N. S.) 693.

<sup>93</sup> *Cumberland Tel., etc., Co. v. Hobart*, 89 Miss. 252, 42 South. 349, 119 Am. St. Rep. 702, where amount due is from complainant's wife for the use of another telephone.

<sup>94</sup> *Id.*, where amount is due on house other than the one for which present service is requested.

<sup>95</sup> *State v. Kinloch Tel. Co.*, 93 Mo. App. 349, 67 S. W. 684; *State v. Nebraska Tel. Co.*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404, where a subscriber refused to pay his rental, past due, on the account of a directory not having been furnished at the time by his request; *Southwestern Tel., etc., Co. v. Luckett*, 60 Tex. Civ. App. 117, 127 S. W. 856.

<sup>96</sup> See § 237.

<sup>97</sup> *Illinois Glass Co. v. Chicago Tel. Co.*, 234 Ill. 535, 85 N. E. 200, 18 L. R. A. (N. S.) 124. See also, *Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; *Colorado Tel. Co. v. Fields*, 15 N. M. 431, 110 Pac. 571, 30 L. R. A. (N. S.) 1088, cannot charge a higher rate for short term than for yearly contracts; *Central U. Tel. Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721; *Chicago Tel. Co. v. Illinois Mfg. Asso.*, 106 Ill. App. 54, "telephone service"

tals are fixed by contract with the municipality in which it is to transact its business cannot enforce a regulation requiring patrons to pay a charge in addition thereto, for installing and transferring instruments.<sup>98</sup> A telephone company may refuse to furnish facilities to one who violates its reasonable regulations with regard to the use of its instruments, but the regulations must be entirely reasonable.<sup>99</sup> For instance, a company cannot, as a condition precedent to furnishing an applicant with telephone facilities, require him to stipulate that he will use the system of that company exclusively.<sup>100</sup>

**§ 261. Connections with extension systems privately owned.**—Occasionally subscribers have apparatus for interior systems or extension sets secured from some source other than the telephone company, and then demand of the latter connections with its lines and services at ordinary rates. Under such circumstances, the company is justified in withdrawing its services from such subscribers upon the latter's refusal to discontinue the use of such apparatus; however, it is necessary that the right of the company to prohibit the use of the apparatus not provided by it is subject to the obligation that the company itself shall be able and willing to furnish apparatus or extension sets as efficient and convenient as the state of the art affords, upon reasonable terms, and that if the company

includes subsequent improvements which may be made to render more efficient service; *Johnson v. State*, 113 Ind. 143, 15 N. E. 215, in which it was held that a fixed charge of \$1 per month, in excess of the rate allowed by the statute, for the use of telephone by nonsubscribers, which was charged and collected whether the telephone was used by the nonsubscribers or not, and without regard to the number of such persons who may use it, was in violation of a statute making it a crime to charge in excess of the rate prescribed by statute. See § 237.

*Penalty for delayed payment.*—The establishment in the franchise of a telephone company of a maximum monthly rental to be charged by it for service does not prevent its requiring the rentals to be paid in advance, and making an additional charge in case they are not paid before a certain specified day each month. *State v. Independent Tel. Co.*, 59 Wash. 156, 109 Pac. 366, 31 L. R. A. (N. S.) 329.

<sup>98</sup> *Colorado Tel. Co. v. Fields*, 15 N. M. 431, 110 Pac. 571, 30 L. R. A. (N. S.) 1088.

<sup>99</sup> *People v. Hudson River Tel. Co.*, 19 Abb. N. C. (N. Y.) 466; *Gardner v. Providence Tel. Co.*, 23 R. I. 262, 49 Atl. 1004, 55 L. R. A. 113. See chapter XIV. See, also, *Buffalo County Tel. Co. v. Turner*, 82 Neb. 841, 118 N. W. 1064, 130 Am. St. Rep. 699, 19 L. R. A. (N. S.) 693.

<sup>100</sup> *State v. Citizens' Tel. Co.*, 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139; *Gwynn v. Citizens' Tel. Co.*, 69 S. C. 434, 48 S. E. 460, 104 Am. St. Rep. 819, 67 L. R. A. 111.

Subscription for stock as condition to furnish telephone cannot be enforced. *Re Superior Rural Tel. Co.*, P. U. R. 1916A, 860.

neglects its duty to the public, and is not provided with the means to secure the accommodation of its customers, or, having at its command such appliances, refuses to furnish them except at exorbitant rates, the subscribers may supplement the imperfect service of the company with approved appliances procured elsewhere, provided that such appliances can be used in connection with the company's circuits without detriment to their harmonious operation.<sup>101</sup>

§ 262. **Same continued—other corporations—telegraph companies.**—These companies may elect as to whether they will receive from and deliver messages to telegraph companies;<sup>102</sup> but, if they tender their services to one of these companies, they are bound to receive dispatches from and for all telegraph companies in the usual course of business.<sup>103</sup> As was very ably observed by Judge Butler on this subject: "While such companies are not required to extend their facilities beyond such reasonable limits as they may prescribe for themselves, they cannot discriminate between individuals or classes which they undertake to serve. As common carriers of merchandise may prescribe the points between which they will carry and the description of goods they will accept, so, doubtless, may carriers of messages limit their business and obligations. If, therefore, the respondent had confined the use of its telephonic facilities to the carriage of personal messages for individuals, excluding those of telegraph companies and others who forward messenger hire, the relator would, probably, have no just ground of complaint."<sup>104</sup>

<sup>101</sup> *Gardner v. Providence Tel. Co.*, 23 R. I. 262, 49 Atl. 1004.

<sup>102</sup> See *Delaware, etc., Tel. Co. v. Delaware*, 50 Fed. 677, 2 C. C. A. 1, affirming (C. C.) 47 Fed. 633; *Dumont v. Peet*, 152 Iowa, 524, 132 N. W. 955; *Telegraph Company v. Telegraph, etc., Co.*, 125 Tenn. 270, 141 S. W. 845, 43 L. R. A. (N. S.) 550; *Telegraph, etc., Co. v. Anderson* (D. C.) 196 Fed. 699.

<sup>103</sup> *Chesapeake, etc., Tel. Co. v. Baltimore, etc., Tel. Co.*, 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; *Delaware, etc., Tel., etc., Co. v. Delaware*, 50 Fed. 677, 2 C. C. A. 1, affirming (C. C.) 47 Fed. 633; *People v. Hudson River Tel. Co.*, 19 Abb. N. C. (N. Y.) 466; *Philadelphia Bell Tel. Co. v. Commonwealth*, 2 Sadler, 299, 3 Atl. 825; *State v. Bell Tel. Co.*, 36 Ohio St. 296, 38 Am. Rep. 583; *Commercial Union Tel. Co. v. New England, etc., Tel. Co.*, 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161; *Missouri v. Bell Tel. Co.* (C. C.) 23 Fed. 539, in the absence of a statute a telephone company cannot be required to make a physical connection of its system with that of another company so as to give the latter physical use of its lines; *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319. See, also, *Ivanhoe Furnace Co. v. Virginia, etc., Tel. Co.*, 109 Va. 130, 63 S. E. 426.

<sup>104</sup> *Delaware, etc., Tel. Co. v. State*, 50 Fed. 677, 2 C. C. A. 1.



§ 263. **Same continued—rival companies.**—The rules laid down elsewhere<sup>105</sup> respecting the connection of lines do not make it the duty of one telephone company to connect with competing lines. The physical connection between competing telephone companies is a privilege to be created only as a result of private contract, or in obedience to some constitutional or statutory provision.<sup>106</sup> And where this right is given, either under the constitution or statute, the mere physical connection of the wires is not sufficient, but to make this connection of value the telephone company will be further required to give other companies the use of its wires, and the service of its operators which shall be as full and as efficient as that required in the discharge of the business proffered by its own subscribers.<sup>107</sup> These constitutional or statutory requirements must be construed, however, as granting the right subject to the obligation of compensating the opposing company for such connections with all its incidents, which may be done by imposing an extra charge on each message or conversation.<sup>108</sup> It has been held

<sup>105</sup> See §§ 405, 447, et seq.

<sup>106</sup> *Pacific Tel., etc., Co. v. Eshleman*, 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822; *Pacific Tel., etc., Co. v. Anderson* (D. C.) 196 Fed. 699; *Billings Mut. Tel. Co. v. Rocky Mountain Bell Tel. Co.* (C. C.) 155 Fed. 207; *State ex rel. v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; *Southwestern Tel., etc., Co. v. State* (Tex. Civ. App.) 150 S. W. 604, holding that the power may be delegated to a city which may compel connections within its limits; *Home Tel. Co. v. Sarcoxie, etc., Tel. Co.*, 236 Mo. 114, 139 S. W. 108, 36 L. R. A. (N. S.) 124; *Hooper, Tel. Co. v. Nebraska Tel. Co.*, 96 Neb. 245, 147 N. W. 674, jurisdiction of commissioners over.

Through correspondence pertaining to the course of action to which the American Telephone & Telegraph company has committed itself in response to suggestions from the Department of Justice of the federal government, the said company has made certain propositions whereby arrangements will be made promptly under which all other telephone companies may secure for their subscribers toll service over the lines of the companies in the Bell system in the ways and under the conditions therein laid out. See letter to the Attorney General from the American Telephone & Telegraph Company outlining a course of action which it has determined upon filed with the Department of Justice.

<sup>107</sup> *Billings Mut. Tel. Co. v. Rocky Mountain Bell Tel. Co.* (C. C.) 155 Fed. 207. See *Pacific Tel., etc., Co. v. Wright-Dickinson Hotel Co.* (D. C.) 214 Fed. 666; *Hooper Tel. Co. v. Nebraska Tel. Co.*, 96 Neb. 245, 147 N. W. 674; *Pioneer Tel., etc., Co. v. Grant County Tel. Co.* (Okla.) 119 Pac. 968; *Pioneer Tel. Co. v. State*, 38 Okla. 554, 134 Pac. 398; *Id.*, 144 Pac. 1060; *Southwestern Tel., etc., Co. v. State* (Tex. Civ. App.) 150 S. W. 604; *Home Tel. Co. v. Sarcoxie, etc., Tel. Co.*, 236 Mo. 114, 139 S. W. 108, 36 L. R. A. (N. S.) 124. See *State v. Tel. Co.*, 85 Wash. 29, 147 Pac. 885, each loses their independence.

<sup>108</sup> *People v. Central N. Y. Tel. Co.*, 41 App. Div. 17, 58 N. Y. Supp. 221;

that where such connection has been made voluntarily by agreement between two companies and without any stipulation as to the time of its continuance, and in which nothing is said about notice being given by either party of the termination of the contract,<sup>109</sup> the companies lose their independent status, so that the contract cannot be discontinued by either or both companies.<sup>110</sup> While some of the authorities do not agree with the effect of such voluntary agreement,<sup>111</sup> yet it seems that perfect harmony should prevail among these where two companies are consolidated, and for a time thereafter the lines are physically connected, and subscribers of either company are permitted the general use of the line as to both the exchanges, the company cannot thereafter refuse to connect the subscriber of one company with a subscriber of

Shepard v. Tel. Co., 38 Hun (N. Y.) 338; In re Baldwinsville Tel. Co., 24 Misc. Rep. 221, 53 N. Y. Supp. 574; Home Tel. Co. v. People's Tel., etc., Co., 125 Tenn. 270, 141 S. W. 845, 43 L. R. A. (N. S.) 550; Evansville Traction Co v. Henderson Bridge Co. (C. C.) 134 Fed. 973; Pacific Tel., etc., Co. v. Eshleman, 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822. See cases in note 107, supra. See, also, State v. Tel. Co., 85 Wash. 29, 147 Pac. 885; Whittenberg, etc., Tel. Co., P. U. R. 1916C, 104, Oklahoma commission has no power to order free interchange service between telephone companies.

Under the arrangement of the American Telephone & Telegraph Company, supra, it was proposed by such company that the subscribers of the independent company having toll connections should pay for such connections the regular toll charge of the Bell Company, and in addition thereto a connection charge of 10 cents for each message which originates on its lines and is carried, in whole or in part, over the lines of the Bell system.

<sup>109</sup> State ex rel. v. Cadwallader, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319, holding that such notice may terminate the contract.

<sup>110</sup> State ex rel. v. Cadwallader, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; Campbellsville Tel. Co. v. Lebanon, etc., Tel. Co., 118 Ky. 277, 80 S. W. 1114, 84 S. W. 518.

Where by the terms of the contract between two telephone companies for connection the term of the contract is fixed, it cannot be terminated by either party prior thereto, and the contract will be specifically enforced by the courts, or its breach enjoined. Gravel, etc., Tel. Co. v. Lebanon, etc., Tel. Co., 139 Ky. 827, 132 S. W. 424, modifying judgment as reported in 139 Ky. 151, 129 S. W. 559, same effect in Wayne-Monroe Tel. Co. v. Ontario Tel. Co., 60 Misc. Rep. 435, 112 N. Y. Supp. 424.

<sup>111</sup> Home Tel. Co. v. People Tel. Co., 125 Tenn. 270, 141 S. W. 845, 43 L. R. A. (N. S.) 550; Rural Home Tel. Co. v. Kentucky, etc., Tel. Co., 128 Ky. 209, 107 S. W. 787, holding that, where there is no contract for connection between two companies, although there is an actual connection, it is not sufficient to entitle one of the companies to restrain the other from terminating the connection; Bastin Tel. Co. v. Richmond Tel. Co., 117 Ky. 122, 77 S. W. 702, holding that, where the connection is under an oral contract void under the statute of frauds, one company is not liable in damages for violating the contract by refusing to make or permit a connection.

the other.<sup>112</sup> If a telephone company makes a physical connection with another exchange, it cannot refuse to make such connection with other exchanges similarly situated.<sup>113</sup> But it has been held that the mere fact that a telephone company doing a long-distance business, in order to extend its business, contracts with another company doing local business, for connection, does not obligate the latter company to give to another company the same service, as such contracts are not in restraint of trade, nor invalid as tending to create a monopoly.<sup>114</sup> While such contracts are not necessarily invalid as a violation of public policy because tending to create a monopoly, yet this restriction may render them *prima facie* invalid. This presumption, however, may be overcome by establishing the reasonableness of the restriction in view of all the circumstances, and their beneficial, rather than harmful, character so far as concerns the public at large.<sup>115</sup> As may be seen from the cases on this question, the courts are not in entire harmony as to when such a restriction is reasonable and incidental to

<sup>112</sup> *Mahan v. Michigan Tel. Co.*, 132 Mich. 242, 93 N. W. 629.

<sup>113</sup> *State ex rel. v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; *Bank v. Kinloch, etc.*, Tel. Co., 258 Ill. 202, 101 N. E. 535, Ann. Cas. 1914B, 258, 45 L. R. A. (N. S.) 465; *United States Tel. Co. v. Central Union Tel. Co.* (C. C.) 171 Fed. 130, affirmed 202 Fed. 66, 122 C. C. A. 86; *Home Tel. Co. v. Granby, etc.*, Tel. Co., 147 Mo. App. 216, 126 S. W. 773; *Central New York Tel. Co. v. Averill*, 199 N. Y. 128, 92 N. E. 206, 139 Am. St. Rep. 878, 32 L. R. A. (N. S.) 494; *State v. Bell Tel. Co.*, 36 Ohio St. 296, 38 Am. Rep. 583. But compare with *Home Tel. Co. v. People Tel. Co.*, 125 Tenn. 270, 141 S. W. 845, 43 L. R. A. (N. S.) 550; *Home Tel. Co. v. Sarcoux, etc.*, Tel. Co., 236 Mo. 114, 139 S. W. 108, 36 L. R. A. (N. S.) 124.

<sup>114</sup> In *Home Tel. Co. v. Sarcoux, etc.*, Tel. Co., 236 Mo. 114, 139 S. W. 108, 36 L. R. A. (N. S.) 124, disapproving *Home Tel. Co. v. Granby, etc.*, Tel. Co., 147 Mo. App. 216, 126 S. W. 773, the contract was for twenty-five years. In *Cumberland, etc., Tel. Co. v. State*, 100 Miss. 102, 54 South. 670, 39 L. R. A. (N. S.) 277, the contract was for five years; *United States Tel. Co. v. Middle-point Tel. Co.*, 7 Ohio N. P. (N. S.) 425, 19 Ohio Dec. 202, affirmed in 32 Ohio C. C. 18; *Id.*, 86 Ohio St. 319, 99 N. E. 1129; *Home Tel. Co. v. North Manchester Tel. Co.*, 47 Ind. App. 411, 92 N. E. 558, rehearing denied in 93 N. E. 234. See, also, *McKinley Tel. Co. v. Cumberland Tel. Co.*, 152 Wis. 359, 140 N. W. 38, sustaining a contract to run for seven years between two local telephone companies having lines in the same rural territory radiating from a city, whereby one of them, which was furnishing services within the city, was to confine its lines to the city, and the other was refrained from operating within the city, and was to take over the rural lines in the country, where both operated, and each was to furnish free connection with the other.

<sup>115</sup> Cases holding the contract void: *United Trust & Sav. Bk. v. Kinloch Long Distance Tel. Co.*, 258 Ill. 202, 101 N. E. 535, Ann. Cas. 1914B, 258, 45 L. R. A. (N. S.) 465; *United States Tel. Co. v. Central Union Tel. Co.* (C. C.) 171 Fed. 130, affirmed by Circuit Court of Appeals 202 Fed. 66, 122 C. C. A. 86.



the general purpose of competition, rather than primarily to create a monopoly.

§ 264. **Being lessees of patents—no excuse.**—It has been vigorously contended in several cases that telephone companies were not under obligation to furnish services to the entire public or to certain rival companies, where they were the lessees of telephone patent devices; but, with only one exception,<sup>116</sup> all the courts have held that they could not evade this duty on such ground.<sup>117</sup> The manner in which this question was brought about is as follows: One Alexander Graham Bell invented an apparatus for transmitting articulate speech by electricity, and the same was patented by him in 1876 in the United States, by which the exclusive right to use and license others to use, and to refuse to others the right to use said invention, was vested absolutely in said Bell and his assigns; and the whole of said rights of said Bell were by him duly assigned to, and became vested in, the American Bell Telephone Company, a Massachusetts corporation; and after the grant of said letters patent to Bell, other inventors made various improvements in his apparatus, to be used therewith, and all of which have been assigned to the said company. But before these last patent devices were assigned to said company, a controversy arose as to who were the real inventors of said devices; the result of said controversy was the assignment of all said devices to this company, by which there were certain exclusive privileges to be enjoyed by the assignors. Later the American Bell Telephone Company, assignee of all these patented devices, leased these apparatuses to other companies, under the condition that the latter companies would not furnish services to certain rival companies of lessors. These rival companies, after having been refused by these lessees to furnish them with telephone connections and services, applied to the courts to issue a mandate to force and compel such services; and the same was granted on the ground that the

<sup>116</sup> *American, etc., Tel. Co. v. Connecticut Tel. Co.*, 49 Conn. 352, 44 Am. Rep. 237.

<sup>117</sup> *People v. Hudson River Tel. Co.*, 19 Abb. N. C. (N. Y.) 466; *Chesapeake, etc., Tel. Co. v. Baltimore, etc., Tel. Co.*, 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; *State v. Bell Tel. Co.*, 36 Ohio St. 296, 38 Am. Rep. 583; *Commercial Union Tel. Co. v. New England Tel., etc., Co.*, 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161; *Bell Tel. Co. v. Commonwealth*, 2 Sadler, 299, 3 Atl. 825; *Missouri v. Bell Tel. Co. (C. C.)* 23 Fed. 539; *Delaware, etc., Tel., etc., Co. v. Delaware*, 50 Fed. 677, 2 C. C. A. 1, affirming (C. C.) 47 Fed. 633.

Contra, *American, etc., Tel. Co. v. Connecticut, etc., Tel. Co.*, 49 Conn. 352, 44 Am. Rep. 237.

condition under which the lease was made, with respect to the uses to which these devices could be put, was void.<sup>118</sup>

§ 265. *Lessee's ground for refusal.*—It has been strongly urged by the lessees of these patented devices that by reason of the fact that the American Bell Telephone Company, being the absolute and exclusive owner of such patents, having acquired the right to vend, sell and use them in any manner which it might see proper, and, having leased under such authority its patents to them, could use them only for such purposes as were prescribed in the lease. In other words, the American Bell Telephone Company was the absolute and exclusive owner of these devices; that it had the right, in granting any license to use these apparatuses, to limit such use by any condition which it saw proper to impose upon the licensee; and that the licensee acquired but a limited right, and could impart no greater right to any subscriber than that possessed by the licensee itself.<sup>119</sup> It is true that this company has acquired, through Bell, the inventor, the absolute ownership of these devices; that it is protected under its patent in the vending and selling of the patent itself; and it may lease these to any person or corporation it may see proper, or may refuse to make or use or allow any one else to make or use them; but as soon as the right of the property, in its physical substance, is placed out to any one for public use, it then loses the control over its use.<sup>120</sup> The owner may lease the devices for private purposes and restrict its uses; but so soon as it is leased for a public use the public then acquires an interest in the property in its physical nature.<sup>121</sup> It is then subject to the public control as any other property so used; and no discrimination with respect to that use can be exercised. It must be borne in mind that the right of property in the physical substance, which is the fruit of the discovery, is altogether distinct from the right in the discovery itself.<sup>122</sup> Therefore, as soon as the

<sup>118</sup> *Commercial Union Tel. Co. v. New England, etc., Tel. Co.*, 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161.

<sup>119</sup> See cases cited 117, *Supra*.

<sup>120</sup> *Commercial Union Tel. Co. v. New England, etc., Tel. Co.*, 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161.

*Exclusive right to call number.*—The adoption of the number for calling the trouble department which has been long in use by another company is not unlawful. *Rocky Mt. Bell Tel. Co. v. Utah Independent Tel. Co.*, 31 Utah, 377, 88 Pac. 26, 8 L. R. A. (N. S.) 1153.

<sup>121</sup> *Connell v. West. Union Tel. Co.*, 116 Mo. 34, 22 S. W. 345, 38 Am. St.

<sup>122</sup> *Commercial Union Tel. Co. v. New England, etc., Tel. Co.*, 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161.

owner of these patented devices leases them to be used by another company, he may restrict the lessee with respect to the making, selling or leasing of such instruments or devices; but he loses control over the property with respect to the uses to which it may be put.

§ 266. **Private unincorporated companies.**—In some instances telegraph or telephone lines or electric companies are constructed and owned by private unincorporated companies or individuals.<sup>123</sup> If this be the status of the concern, the owners thereof will be under the same obligation to furnish equal facilities to, and act impartially with, all who apply to them as if said business were incorporated.<sup>124</sup> It is the nature of the service undertaken to be performed that creates the duty to the public, and in which the public has an interest, and not simply the body that may be invested with power.<sup>125</sup> A man may use his money in any legal business he may desire, and so long as it is not invested in an enterprise in which the public may have an interest, he will have exclusive control over it, or rather over the enterprise; but so soon as the money is invested in a business in which the public has an interest, the business must be, and is, under the control of the government to that extent.<sup>126</sup>

§ 267. **Electric companies—discrimination.**—Where a corporation is duly organized under the laws of a state, with power to generate, distribute, and supply electric currents for light, heat, and power, and other purposes, to the cities of the state and the inhabitants of such cities, and having accepted a franchise from a city authorizing it to operate therein, it is bound by implication of law to make no unreasonable discriminations between those to whom the said service is to be furnished; that is, it must not be

Rep. 575, 20 L. R. A. 172; *Commercial Union Tel. Co. v. New England, etc.*, Tel. Co., 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161.

<sup>123</sup> *Magee v. Overshiner*, 150 Ind. 127, 49 N. E. 951, 65 Am. St. Rep. 358, 40 L. R. A. 370; *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; *Haines v. Crosby*, 94 Me. 212, 47 Atl. 137; *Bishop v. Riddle*, 51 Tex. Civ. App. 317, 113 S. W. 151; *State v. Twin Village Water Co.*, 98 Me. 214, 56 Atl. 763. See *Lowther v. Bridgeman*, 57 W. Va. 306, 50 S. E. 410; *Crawford Electric Co. v. Knox County Power Co.*, 110 Me. 285, 86 Atl. 119, Ann. Cas. 1914C, 933. See §§ 67, 131, 134.

<sup>124</sup> *State v. Nebraska Tel. Co.*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404. See § 248.

<sup>125</sup> *Chesapeake, etc., Tel. Co. v. Baltimore, etc., Tel. Co.*, 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167.

<sup>126</sup> *Chesapeake, etc., Tel. Co. v. Baltimore, etc., Tel. Co.*, 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167.



partial, and must serve alike all who are similarly circumstanced with reference to its system, or who are members of any class to which it has undertaken or is otherwise bound to furnish service.<sup>127</sup> The wiring of an applicant's house for lighting purposes, or the installing of radiators therein for heating purposes, is a business distinct from that of furnishing electricity for either or both of said purposes, and the company would not be under obligation to provide a house with such fixtures.<sup>128</sup> But it would be an un-

<sup>127</sup> *Thompson v. San Francisco Gas, etc., Co.*, 18 Cal. App. 30, 121 Pac. 937; *Owensboro Gas Light Co. v. Hildebrand* (Ky.) 42 S. W. 351; *Snell v. Clinton Electric Light, etc., Co.*, 196 Ill. 626, 63 N. E. 1082, 89 Am. St. Rep. 341, 58 L. R. A. 284; *State v. Waseca*, 122 Minn. 348, 142 N. W. 319, 46 L. R. A. (N. S.) 437; *State v. Butte Electric, etc., Co.*, 43 Mont. 118, 115 Pac. 44; *Schmitt v. Edison Electric Ill. Co.*, 58 Misc. Rep. 19, 110 N. Y. Supp. 44; *Armour Packing Co. v. Edison Electric Ill. Co.*, 115 App. Div. 51, 100 N. Y. Supp. 605; *Cincinnati, etc., R. R. Co. v. Bowling Green*, 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422; *Allegheny County Light Co. v. Shadyside Electric Light Co.*, 37 Pa. Super. Ct. 79; *Mercur v. Media Electric Light, etc., Co.*, 19 Pa. Super. Ct. 519; *Steinman v. Edison Electric Ill. Co.*, 43 Pa. Super. Ct. 77; *Kilbourn City v. Southern Wisconsin Power Co.*, 149 Wis. 168, 135 N. W. 499; *Economic Gas Co. v. Los Angeles*, 168 Cal. 448, 143 Pac. 717; *Elec. Co. v. Public Utility Com'rs*, 87 N. J. Law, 128, 93 Atl. 707, P. U. R. 1915C, 229. See, also, *Gainesville v. Gainesville, etc., Gas Co.*, 65 Fla. 404, 62 South. 919, 46 L. R. A. (N. S.) 1119; *Weld v. Gas, etc., Com'rs*, 197 Mass. 556, 84 N. E. 101; *Minnesota Canal, etc., Co. v. Koochiching*, 97 Minn. 429, 107 N. W. 405, 5 L. R. A. (N. S.) 638, 7 Ann. Cas. 1182; *Andrews v. North River Electric Light, etc., Co.*, 23 Misc. Rep. 512, 51 N. Y. Supp. 872; *Reiser v. Edison Electric Ill. Co.*, 76 Misc. Rep. 563, 137 N. Y. Supp. 145; *Moore v. Champlain Electric Co.*, 88 App. Div. 289, 85 N. Y. Supp. 37; *Moffat v. N. Y. Edison Company (Sup.)* 116 N. Y. Supp. 683; *Nacogdoches Light, etc., Co. v. Richardson* (Tex. Civ. App.) 138 S. W. 1080; *State v. Consumers' Power Co.*, 119 Minn. 225, 137 N. W. 1104, Ann. Cas. 1914B, 19, 41 L. R. A. (N. S.) 1181; *State v. Water & Light Com'rs*, 105 Minn. 472, 117 N. W. 827, 127 Am. St. Rep. 581, where a municipality engages in the business of furnishing electric light and power, it is held to the same duty of giving fair and impartial service to all as a private corporation. *State v. Waseca*, 122 Minn. 348, 142 N. W. 319, 46 L. R. A. (N. S.) 437; *State v. Jones*, 141 Mo. App. 299, 125 S. W. 1169. Similarly a private corporation may not give to a municipality to which it furnished electricity a preference over private consumers similarly situated. *Kilbourn City v. Southern Wisconsin Power Co.*, 149 Wis. 168, 135 N. W. 499; *Seaton Mountain Elec., etc., Co. v. Idaho Springs Inv. Co.*, 49 Colo. 122, 111 Pac. 834, 33 L. R. A. (N. S.) 1078, holding that an electric company cannot refuse to furnish heat to those not using its electricity. See, also, § 248. *Kilbourn City v. Southern, etc., P. Co.*, 149 Wis. 168, 135 N. W. 499, neither can city be favored. To same effect, see *Elec. Co. v. Public Utility Com'rs*, supra.

<sup>128</sup> *Snell v. Clinton Electric Light, etc., Co.*, 196 Ill. 626, 63 N. E. 1082, 89 Am. St. Rep. 341, 58 L. R. A. 284, reversing 95 Ill. App. 552, holding that a refusal to furnish a transformer or converter to a customer therefor, because he did not have his house wired by the company, is an unfair discrimination,

reasonable discrimination for a company to require an applicant for service to procure for it a right of way to his premises, or to provide his house with the wiring, when such conditions were not imposed upon other applicants and patrons.<sup>129</sup> These companies cannot arbitrarily charge different prices to different patrons for light or heat, but must treat all customers without unjust discrimination.<sup>130</sup> And while they are not bound, in the absence of statu-

where the company furnishes such appliances to those whose houses it has wired. See *Benson v. American Illum. Co.* (Co. Ct.) 102 N. Y. Supp. 206, defective interior wiring, excuse for supplying current; *Burke v. Mead*, 159 Ind. 252, 64 N. E. 880; *Ex parte Goodrich*, 160 Cal. 410, 117 Pac. 451, Ann. Cas. 1913A, 56, do not have to furnish lamps free of charge.

<sup>129</sup> *Thompson v. San Francisco Gas, etc., Co.*, 18 Cal. App. 30, 121 Pac. 937; *Owensboro v. Hildebrand* (Ky.) 42 S. W. 351; *State v. Butte Electric, etc., Co.*, 43 Mont. 118, 115 Pac. 44; *Andrews v. North River Electric Light, etc., Co.*, 23 Misc. Rep. 512, 51 N. Y. Supp. 872; *Reiser v. Edison Electric Ill. Co.*, 76 Misc. Rep. 563, 137 N. Y. Supp. 145; *Moffat v. N. Y. Edison Electric Co.* (Sup.) 116 N. Y. Supp. 683; *State v. Consumers' Power Co.*, 119 Minn. 225, 137 N. W. 1104, Ann. Cas. 1914B, 19, 41 L. R. A. (N. S.) 1181.

<sup>130</sup> *Snell v. Clinton Electric Light, etc., Co.*, 196 Ill. 626, 63 N. E. 1082, 89 Am. St. Rep. 341, 58 L. R. A. 284, reversing 95 Ill. App. 552; *Cincinnati, etc., R. Co. v. Bowling Green*, 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422; *Weld v. Com'rs*, 197 Mass. 556, 84 N. E. 101; *Horner v. Oxford Water & Electric Co.*, 153 N. C. 535, 69 S. E. 607, 138 Am. St. Rep. 681; *Armour Packing Company v. Edison Electric Ill. Co.*, 115 App. Div. 51, 100 N. Y. Supp. 605; *Kilbourn City v. Wisconsin Power Co.*, 149 Wis. 168, 135 N. W. 499.

Thus, in *Armour Packing Co. v. Edison Electric Ill. Co.*, supra, it was held that a company could not discriminate against one consumer in favor of others in charges for the same service under the same conditions, even though the contract fixing the rates between the parties was expressed in writing. The court said: "Here the plaintiff contracted to pay certain rates in ignorance of the unjust discrimination the defendant was making against it, which discrimination has been shown to be unlawful, and certainly the payment cannot attain to the dignity of a defense complete in itself simply because it was the subject of a contract between the parties. The contract itself was a part of the unlawful discrimination; for by its terms plaintiff was required to pay rates in excess of those charged others for the same service under the same conditions. The mere fact that the payment was required, and so by reason of a contract, cannot very well excuse the defendant for the unjust discrimination which by reason of that contract springs into being;" discriminatory charges cannot be imposed by way of penalty. *State v. Jones*, 141 Mo. App. 290, 125 S. W. 1169. A difference in charges based on a fair and reasonable classification corresponding to actual differences in the situation of consumers is not a discrimination. *Steinman v. Edison Electric Ill. Co.*, 43 Pa. Super. Ct. 77, where a rate charged to retail customers was uniform, the company furnishing lamps free, except that a discount was allowed to a certain class in lieu of furnishing lamps, it was not discriminatory where a consumer by his own act left the class where the rate was lower and entered the retail class, paying the retail rate and supplying his own lamps. *Halpern v. New*

tory enactments to treat all their patrons with absolute equality, still they are bound to furnish light and heat at a reasonable rate to

York Edison Co., 61 Misc. Rep. 288, 113 N. Y. Supp. 790. A reduced rate may be given to those signing yearly contracts. *Allegheny County Light Co. v. Shadyside Electric Light Co.*, 37 Pa. Super. Ct. 79; *Mercur v. Media Electric Light, etc., Co.*, 19 Pa. Super. Ct. 519, holding that: "The fact that a particular rate was charged for a service from which the relator voluntarily withdrew is not conclusive that it would be a fair and reasonable one after the line had been changed and poles removed. The relator had all the advantages of the contract rate and surrendered them by canceling his contract and requesting for leave to pay for the current on the meter rate. \* \* \* All agree that the company cannot give undue or unreasonable preference, or advantage to, or make unfair discrimination among its customers where the conditions are like and circumstances similar. To affect this whole rule it is not necessary for this company to cancel all of its original or special contracts, even if it has the power to do so, before it requires new customers to pay by a meter rate. This record does not disclose the full character of these contracts, nor the conditions which induced them. They may have been, and doubtless were, fair business and controlling reasons which were deemed advantageous to the company as tending to promote its interests at the time they were made, which it would be unfair and unbusinesslike to repudiate at this time. The relator elected to withdraw from a favored position, and cannot hold the company responsible for his error of judgment. By canceling his contract he surrendered all rights under it and is in the class of new customers in regard to future relations. By the meter system he is required to pay for the correct amount of current he uses, and the fairness or reasonableness of this meter rate is not questioned by him. Under the charter of the company he is entitled to service only 'at such prices as may be agreed upon' or show that he is discriminated against in favor of patrons who receive service upon like condition and under similar circumstances to his own. \* \* \* It is not sufficient to say that the contract to which the relator is entitled 'must conform to other contracts executed with same class of people.' He is entitled to a like service granted to others who are similarly conditioned, and without proof that he is denied the right the writ should not issue. The 'class of people' to whom the service is made is not material; it is the condition and character of the service required in view of location, extent, volume, etc., of the service. The mere fact that a different sum is demanded is not unfair or unjust discrimination."

In *Graver v. Edison Electric Ill. Co.*, 126 App. Div. 371, 110 N. Y. Supp. 603, it was said: "A corporation engaged in furnishing an electric current is entitled, like other quasi-public corporations, to earn a fair income upon its investment; it has a right to fix its rates upon the cost of the production, taking into account not only the cost of coal, labor, etc., but the investment which is necessary to carry on the enterprise, and, acting in good faith, it has a right to make experimental contracts for the purpose of reaching a basis for future charges even though this should result in giving for a limited time a better rate to a few customers than was given to others receiving substantially the same amount of current. To hold otherwise would be to stand in the way of the best development of the business and the fairest service to the public generally."

See *Public Service Commission v. Pacific, etc., L. Co.*, P. U. R. 1916B, 86.



every customer and without unjust discrimination.<sup>131</sup> Usually the municipality has the power to fix upon maximum rates for electricity to be consumed, which rates the company has no right to disregard, where they are reasonable in their terms and are without any discrimination as between citizens receiving the same kind and degree of services; and in the absence of more specific legislative regulation, such rates may, under some circumstances, be made the subject of judicial scrutiny and control.<sup>132</sup> While the companies must not unjustly discriminate against their customers in charges, yet a mere difference therein to different customers does not of necessity constitute a discrimination,<sup>133</sup> but the ques-

holding that separates may be fixed for different communities served by an electric utility either through the same or different systems, giving lower rates to localities enjoying natural advantages by reason of population or location.

<sup>131</sup> *Snell v. Clinton Electric Light, etc., Co.*, 196 Ill. 626, 63 N. E. 1082, 89 Am. St. Rep. 341, 58 L. R. A. 284, reversing 95 Ill. App. 552. In commenting on this, the Supreme Court of North Carolina,—in *Griffin v. Goldsboro Water Co.*, 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240, says: "If this were not so, and if corporations existing by the grant of public franchises, and supplying the great conveniences and necessities of modern city life, as water, gas, electric light, street cars, and the like, could charge any rates, however unreasonable, and could at will favor certain individuals with low rates, and charge others exorbitantly high, or refuse service altogether, the business interests and the domestic comfort of every man would be at their mercy. \* \* \* The law cannot and will not tolerate discrimination in the charges of these quasi public corporations. There must be equality of rights to all, and special privileges to none."

In *Cincinnati, etc., R. Co. v. Bowling Green*, *supra*, the court said: "The light company have acquired in the village rights that are in the nature of a monopoly. \* \* \* Both reason and authority deny to a corporation clothed with such rights and powers and bearing such relation to the public the power to arbitrarily fix the price at which it will furnish light to those who desire to use it. The company was bound to serve all of its patrons alike; it could impose on the plaintiff in error no greater charge than it exacted of others who had used its lights." Exclusion of similar service from rule, see *St. Albans v. Vermont Power, etc., Co.*, P. U. R. 1916B, 293.

<sup>132</sup> *Horner v. Oxford Water & Electric Co.*, 153 N. C. 535, 69 S. E. 607, 138 Am. St. Rep. 681.

<sup>133</sup> *Snell v. Clinton Electric Light, etc., Co.*, 196 Ill. 626, 63 N. E. 1082, 89 Am. St. Rep. 341, 58 L. R. A. 284, reversing 95 Ill. App. 552, depends upon the circumstances of the case; *Mercur v. Media Electric Light, etc., Co.*, 19 Pa. Super. Ct. 519, distance from the main electric line, the number of poles used, whether the means of access to a residence is along a public way or over private property, and the nature of the obstruction to be overcome by the company, are all proper objects for consideration in determining whether a certain charge is an unjust discrimination; *Metropolitan Electric Supply Co. v. Ginder*, 2 Ch. 799, 65 J. P. 519, 70 L. J. Ch. 862, 84 L. I. Rep. N. S. 818, 48 Wkly. Rep. 508, where the circumstances differ or the quantities of elec-

tion of what constitutes an unjust discrimination in this or in other respects depends upon the circumstances of the particular case.<sup>134</sup> These companies have the right to prescribe practically the same or similar rules and regulations as telegraph and telephone companies, and, as elsewhere discussed,<sup>135</sup> for their convenience and security, and refuse to accommodate patrons who refuse to comply therewith where they are just and reasonable.<sup>136</sup>

§ 268. Remedies.—An action of mandamus is the usual and appropriate remedy to be exercised when a telegraph, telephone, or electric company refuses, without legal cause, to furnish its

tricity do not correspond, differences may be made in the charges therefor; *Steinman v. Elec. Ill. Co.*, 43 Pa. Super. Ct. 77; *Public Service Commission v. Pacific, etc., L. Co.*, P. U. R. 1916B, 86, giving a lower rate to localities enjoying natural advantages.

*Right to make minimum charge for service.*—*State v. Water, etc., Co.*, 249 Mo. 649, 155 S. W. 826, Ann. Cas. 1914D, 452, where company has been forced to furnish light at a certain rate per kilowatt hour, it cannot contend that the rate is confiscatory simply because there is a loss on subscribers who consume less than \$1 worth, as the company is not entitled to insist on a profit on each transaction, but only on its entire business. See, also, *Gould v. Edison Electric Ill. Co.*, 29 Misc. Rep. 241, 60 N. Y. Supp. 559.

*Option of consumer under two schedules—inspection.*—See *Rhodes-Burford Home, etc., Co. v. Union Light, etc., Co.*, P. U. R. 1916B, 645.

*Several localities served by one utility—segregation—natural advantages.*—See *Public Service Commission v. Pacific Power, etc., Co.*, P. U. R. 1916B, 86.

<sup>134</sup> *Snell v. Clinton Electric Light, etc., Co.*, 196 Ill. 626, 63 N. E. 1082, 89 Am. St. Rep. 341, 58 L. R. A. 284, refusing to furnish conformer or converter to a customer without charge therefor, because he did not have his house wired by the company, is an unfair discrimination where the company furnishes such appliances free to those whose houses it has wired. *Gould v. Edison Electric Ill. Co.*, 29 Misc. Rep. 241, 60 N. Y. Supp. 559, holding that a demand that a prospective customer shall agree to pay a minimum charge of \$1.50 per month is reasonable, where it is requested to put in twelve additional lamps for the customer, each lamp necessitating an investment of \$25 on the part of the company. *Mercur v. Media Electric Light, etc., Co.*, 19 Pa. Super. Ct. 519, holding that, where a customer is transferred from the contract to the meter class of patrons at his own request, he cannot afterwards demand that he be transferred, if all persons in the latter class are treated fairly and equally and a retransfer would necessitate the incurrence of additional expense by the company. *Graver v. Edison Electric Ill. Co.*, 126 App. Div. 371, 110 N. Y. Supp. 603; *Light, etc., Co. v. Light Co.*, 37 Pa. Super. Ct. 79; *Light, etc., Co. v. Thomas (Tex. Civ. App.)* 138 S. W. 1080.

<sup>135</sup> See § 251 et seq. See, also, *State ex rel. v. Butte Elec., etc., Co.*, 43 Mont. 118, 115 Pac. 44.

<sup>136</sup> Compare *Tacoma Hotel Co. v. Tacoma Light, etc., Co.*, 3 Wash. 316, 28 Pac. 516, 14 L. R. A. 669, 28 Am. St. Rep. 35; *State v. Board of Water Com'rs*, 105 Minn. 472, 117 N. W. 827, 127 Am. St. Rep. 581; *Cumberland Tel., etc., Co. v. Hobart*, 89 Miss. 252, 42 South. 349, 119 Am. St. Rep. 702. But an electric company supplying the public with heat cannot refuse to supply such

services or the continuance of same.<sup>137</sup> These companies are not under obligations to the public, in every particular as common carriers, in that they are not insurers of correct transmission of messages; yet their duties toward the public, with respect to acting impartially toward all who apply to them, offering compliance with their reasonable regulations, are the same as common carriers. While the government will not interfere with the internal management of these companies, unless necessity demands it to do so, yet, having an interest in the concerns to the extent of seeing that their acts toward the public are impartial, it may regulate the external management of the company to that extent through the remedy mentioned. But if, after the writ has been issued, there is any showing that the company has not had the time to make the arrangements in supplying the facilities, and that they will be furnished within a reasonable time, the writ should be stayed until proper time has been given the company to make such necessary arrangements.<sup>138</sup> While this is usually the proper step to pursue in order to enforce the duties of these companies, it is also the proper procedure to compel the lessee of patented devices to furnish their instruments to all who apply for services.<sup>139</sup> And

only to those using its electricity. *Seaton Mountain Elec., etc., Co. v. Idaho Springs Inv. Co.*, 49 Colo. 122, 111 Pac. 834, 33 L. R. A. (N. S.) 1078. See, *State ex rel. v. Jones*, 141 Mo. App. 299, 125 S. W. 1169; *Gainesville v. Gainesville, etc., Elec. P. Co.*, 65 Fla. 404, 62 South. 919, 46 L. R. A. (N. S.) 1119, cannot discontinue business.

<sup>137</sup> *Crouch v. Arnett*, 71 Kan. 49, 79 Pac. 1086; *Central Union Tel. Co. v. State*, 123 Ind. 113, 24 N. E. 215; *Central Union Tel. Co. v. State*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; *Chesapeake, etc., Tel. Co. v. Baltimore, etc., Tel. Co.*, 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; *State v. Kinloch Tel. Co.*, 93 Mo. App. 349, 67 S. W. 684; *Mahan v. Michigan Tel. Co.*, 132 Mich. 242, 93 N. W. 629; *State v. Nebraska Tel. Co.*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404; *Bell Tel. Co. v. Commonwealth*, 2 Sadler, 299, 3 Atl. 825; *People v. Hudson River Tel. Co.*, 19 Abb. N. C. (N. Y.) 466; *People v. Central, etc., Tel., etc., Co.*, 41 App. Div. 17, 58 N. Y. Supp. 221; *State v. Citizens' Tel. Co.*, 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139; *State v. Sunset Tel., etc., Co.*, 30 Wash. 676, 71 Pac. 198; *Commercial Union Tel. Co. v. New England Tel., etc., Co.*, 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161; *Missouri v. Bell Tel. Co.*, 23 Fed. (C. C.) 539; *Huffman v. Marcy Mutual Tel. Co.*, 143 Iowa, 590, 121 N. W. 1033, 23 L. R. A. (N. S.) 1010; *Mason v. Consumers' Power Co.*, 119 Minn. 225, 137 N. W. 1104, Ann. Cas. 1914B, 19, 41 L. R. A. (N. S.) 1181.

<sup>138</sup> *Bell Tel. Co. v. Commonwealth (Pa.)* 3 Atl. 825. Compare *Commercial Union Tel. Co. v. New England Tel., etc., Co.*, 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161. See, also, *Missouri v. Bell Tel. Co.* (C. C.) 23 Fed. 539.

<sup>139</sup> *Id.*



in mandamus proceedings brought to enforce telephone companies leasing patented devices to furnish facilities it is not necessary to make the owner of the patent a defendant in the case.<sup>140</sup> The lessee of the patent is the only necessary party defendant, unless the latter is prevented from so doing by the owner of the patent.<sup>141</sup> While mandamus is usually the appropriate remedy where these companies have refused to furnish or to continue their services in a given case to patrons, the remedy by injunction may, in some cases, be invoked.<sup>142</sup> These companies are also liable for damages in an action at law.<sup>143</sup>

§ 269. **Measure of damages.**—While customers, having a contractual relation with a public service telephone company, may sue the latter in tort where he has suffered special injury by reason of a wrongful removal of its telephone or the discontinuance of its service, yet the statements in the decisions of the courts as to the measure of damages in such cases are so divergent that it is difficult to formulate any general rule on the subject.<sup>144</sup> Furthermore, the inconvenience, the annoyance, and the trouble of being without a telephone is a damage which no one can accurately estimate. It is such inconvenience and annoyance as is only to be fully appreciated when one is deprived of its use; its loss is a great and distinct damage, yet such damage as is not susceptible of exact meas-

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Central New York, etc., Tel. Co. v. Averill*, 199 N. Y. 128, 92 N. E. 206, 32 L. R. A. (N. S.) 494, 139 Am. St. Rep. 878; *Anderson v. Mt. Sterling Tel. Co.*, 86 S. W. 1119, 27 Ky. Law Rep. 868, contract for service in consideration of grant of right of way will be specifically enforced; *Williams v. Maysville Tel. Co.*, 119 Ky. 33, 82 S. W. 995, 26 Ky. Law Rep. 945, mandatory injunction; *Wright v. Glen Tel. Co.*, 112 App. Div. 745, 99 N. Y. Supp. 85, mandatory injunction; *Sterne v. Metropolitan Tel., etc., Co.*, 33 App. Div. 169, 53 N. Y. Supp. 467; *Central District, etc., Tel. Co. v. Commonwealth*, 114 Pa. 592, 7 Atl. 926; *Tel. Co. v. Tel., etc., Co. (C. C.)* 177 Fed. 726; *Louisville Transfer Co. v. American District Tel. Co. (Ky.)* 24 Alb. L. J. 283; *Seattle Elec. Co. v. Snoqualmie, etc., P. Co.*, 40 Wash. 380, 82 Pac. 713, 1 L. R. A. (N. S.) 1032. Where, pending injunction suit, a telephone company sold and transferred its property and rights to another, the suit cannot be conducted against the purchaser merely as its successor. *Sterne v. Metropolitan Tel., etc., Co.*, *supra*. See *Seaton Mountain Elec. Co. v. Idaho Springs In. Co.*, 49 Colo. 122, 111 Pac. 834, 33 L. R. A. (N. S.) 1078; *Gainesville v. Gainesville, etc., Elec. P. Co.*, 65 Fla. 404, 62 South. 919, 46 L. R. A. (N. S.) 1119.

<sup>143</sup> See § 269. See, also, *Gardner v. Springfield, etc., Elec. Co.*, 154 Mo. App. 666, 135 S. W. 1023; *Thompson v. Elec. Co.*, 18 Cal. App. 30, 121 Pac. 937.

<sup>144</sup> *Southern Bell Tel. Co. v. Earle*, 118 Ga. 506, 45 S. E. 319; *Atlantic Standard Tel. Co. v. Porter*, 117 Ga. 124, 43 S. E. 441; *Barton v. Cumberland Tel. Co.*, 116 La. 125, 40 South. 590; *Cumberland Tel., etc., Co. v. Hobart*, 89 Miss. 252, 42 South. 349, 119 Am. St. Rep. 702.

urement.<sup>145</sup> However, the amount of damages to be allowed will depend largely upon the facts in each particular case. The customer should not be confined to what would only be a fair compensation for the loss of the telephone or the company's service, but he should also be awarded damages for such annoyance, inconvenience, and humiliation as would be fairly attributable to the particular wrong done in being deprived of the services stipulated for.<sup>146</sup> So, together with the annoyance and inconvenience resulting from this wrongful act, it has been held that damages for mental anguish could be recovered.<sup>147</sup> And where a customer's business has been destroyed thereby, it has been held that he was entitled to recover for prospective profits from his business.<sup>148</sup> In some jurisdictions, where the refusal to furnish service has

<sup>145</sup> *Cumberland Tel., etc., Co. v. Hobart*, 89 Miss. 252, 42 South. 349, 119 Am. St. Rep. 702.

<sup>146</sup> *Carmichael v. Southern Bell Tel., etc., Co.*, 157 N. C. 21, 72 S. E. 619, Ann. Cas. 1913B, 1117, 39 L. R. A. (N. S.) 651; *Cumberland Tel., etc., Co. v. Hobart*, 89 Miss. 252, 42 South. 349, 119 Am. St. Rep. 702; *Southwestern Tel., etc., Co. v. Allen* (Tex. Civ. App.) 146 S. W. 1066, company was liable for wrongfully discontinuing service in such general damages as might reasonably be expected to follow as the natural and probable consequences of the act, and for such special damages as were the natural and probable result of the special conditions of which the company had notice. See, also, *Carmichael v. Southern Bell Tel., etc., Co.*, 162 N. C. 333, 78 S. E. 507, Ann. Cas. 1915A, 983, substantially upholding first case in note; *Vinson v. Southern Bell Tel., etc., Co.*, 188 Ala. 599, 66 South. 100, L. R. A. 1915C, 450; *Glawson v. Southern Bell, etc., Co.*, 9 Ga. App. 450, 71 S. E. 747; *Cumberland Tel., etc., Co. v. Sutton*, 156 Ky. 191, 160 S. W. 949; *Southern Tel. Co. v. King*, 103 Ark. 160, 146 S. W. 489, Ann. Cas. 1914B, 780, 39 L. R. A. (N. S.) 402; *Montgomery v. Southwestern Arkansas Tel. Co.*, 110 Ark. 480, 161 S. W. 1060; *Kevand v. New York Tel. Co.*, 159 App. Div. 628, 145 N. Y. Supp. 414; *Southwestern Tel., etc., Co. v. Andrews* (Tex. Civ. App.) 169 S. W. 218.

<sup>147</sup> *Carmichael v. Southern Bell Tel., etc., Co.*, 157 N. C. 21, 72 S. E. 619, Ann. Cas. 1913B, 1117, 39 L. R. A. (N. S.) 651.

<sup>148</sup> *Owensboro-Harrison Tel. Co. v. Wisdom* (Ky.) 62 S. W. 529, where plaintiff had a contract for three years, and his business had been destroyed by the wrongful removing of the telephone, the court said: "The measure of damages in such a case is compensation. Plaintiff is entitled to recover all loss and damage sustained as the direct or proximate consequence of defendant's breach of its contract susceptible of ascertainment by competent evidence. The plaintiff is entitled to the full value of his contract as far as ascertainable; to such damage as might reasonably be supposed to be contemplated by the parties in making the contract. Such damages are usually easily susceptible of proof." But see *Cumberland Tel., etc., Co. v. Hicks*, 89 Miss. 270, 42 South. 285, a physician cannot, in an action for cutting off his telephone service, recover for loss of practice proved only by his own testimony that certain persons told him that they had tried to reach him by telephone to secure his services. See Cum-

amounted to a willful and conscious invasion of the customer's rights, he may be awarded punitive damages,<sup>149</sup> although this would not be the case where the wrong was only mere negligence, or an honest mistake without any conscious invasion of his rights,<sup>150</sup> or where it was due merely to the inadequacy of the company's equipment to furnish the facilities demanded.<sup>151</sup> In some jurisdictions such companies are also liable for statutory penalties. While most of the cases on this subject relate to instances where the telephone company has removed its phone from or discontinued its service with one of its customers, without legal justification, there is no reason why the same law may not apply where it wrongfully refuses to install a phone for, or to furnish the necessary facilities to one demanding such, for in either case the action would be based upon the breach of the company's public duty. And the same rule of law would apply in cases arising against electric companies for failing to comply with practically the same public duties.<sup>152</sup>

*berland Tel., etc., Co. v. Hendon*, 114 Ky. 501, 71 S. W. 435, 102 Am. St. Rep. 290, 60 L. R. A. 849; *Southern Bell Tel., etc., Co. v. Earle*, 118 Ga. 506, 45 S. E. 319.

<sup>149</sup> *Carmichael v. Southern Bell Tel. Co.*, 157 N. C. 21, 72 S. E. 619, Ann. Cas. 1913B, 1117, 39 L. R. A. (N. S.) 651. See *Southern Bell Tel., etc., Co. v. Earle*, 118 Ga. 506, 45 S. E. 319; *Barton v. Cumberland Tel., etc., Co.*, 116 La. 125, 40 South. 590; *Cumberland Tel., etc., Co. v. Hendon*, 114 Ky. 501, 71 S. W. 435, 24 Ky. Law Rep. 1271, 102 Am. St. Rep. 290, 60 L. R. A. 849, where no proof of pecuniary loss, measure of damages is amount paid for service during time instrument was disconnected calculated at contract rate; *Owensboro-Harrison Tel. Co. v. Wisdom* (Ky.) 62 S. W. 529, 23 Ky. Law Rep. 97, substantial damages sustained where removal of telephone practically destroyed one branch of plaintiff's business, and jury allowed to consider profits which would have been made; *Ashley v. Rocky Mountain Bell Tel. Co.*, 25 Mont. 286, 64 Pac. 765, offered to restore telephone on payment of certain sum provable in mitigation, since plaintiff must use effort to reduce his loss; *Gwynn v. Citizens' Tel. Co.*, 69 S. C. 434, 48 S. E. 460, 67 L. R. A. 111, 104 Am. St. Rep. 819, holding that the fact that the defendant's switchboard was full may be shown in mitigation of damages, but that such fact will not preclude a recovery. See, also, *Southern Tel. Co. v. King*, 103 Ark. 160, 146 S. W. 489, 39 L. R. A. (N. S.) 402, Ann. Cas. 1914B, 780, refusal to answer call.

<sup>150</sup> *Cumberland Tel., etc., Co. v. Hendon*, 114 Ky. 501, 71 S. W. 435, 24 Ky. Law Rep. 1271, 102 Am. St. Rep. 290, 60 L. R. A. 849; *Cumberland Tel., etc., Co. v. Baker*, 85 Miss. 486, 37 South. 1012; *Gwynn v. Citizens' Tel. Co.*, 69 S. C. 434, 48 S. E. 460, 104 Am. St. Rep. 819, 67 L. R. A. 111.

<sup>151</sup> *Gwynn v. Citizens' Tel. Co.*, 69 S. C. 434, 48 S. E. 460, 104 Am. St. Rep. 819, 67 L. R. A. 111.

<sup>152</sup> See § 251. Compare *Cumberland Tel., etc., Co. v. Hobart*, 89 Miss. 252, 42 South. 349, 119 Am. St. Rep. 705.



§ 269a. **May recover overcharge.**—Telegraph, telephone, and electric companies cannot charge their patrons for services or for electric currents more than the lawful rate, and which must not be discriminatory among those similarly situated. So, where the same has been done, and an involuntary payment thereof has been made, such person thereby overcharged or discriminated against may recover the difference between that paid and that which should have been paid.<sup>153</sup> The fact that such payment, in either instance, was made in accordance to a special contract,<sup>154</sup> or that it was made without knowledge of the unlawful discrimination, will not change the rule.<sup>155</sup> On the other hand, where the customer has been undercharged for said services, or current, it seems that the company could not recover the difference between the price paid and the customary rate.<sup>156</sup>

§ 269b. **Penalty for failure to furnish current.**—There are statutes in some states which provide that if electric companies refuse to furnish their services to customers who have complied with the company's rules and regulations and have made proper demand for same, a penalty may be recovered by the customer if the services are not furnished within a certain number of days. In consequence of the fact that these penalties being looked upon with disfavor,<sup>157</sup> and the statutes creating them being penal, a strict construction is placed upon such statutes. These penalties are cumulative remedies and independent of the actual damages which may be recovered for a failure to furnish services.<sup>158</sup> It is ordinarily required under these statutes that the applicant's building should be within a reasonable distance to the plant;<sup>159</sup> that the company

<sup>153</sup> *Armour Pkg. Co. v. Edison Elec. Ill. Co.*, 115 App. Div. 51, 100 N. Y. Supp. 605; *Illinois Glass Co. v. Chicago Tel. Co.*, 234 Ill. 535, 85 N. E. 200, 18 L. R. A. (N. S.) 124, voluntarily paid.

<sup>154</sup> *Armour Pkg. Co. v. Edison Elec. Ill. Co.*, 115 App. Div. 51, 100 N. Y. Supp. 605; *Armour & Co. v. Edison Elec. Ill. Co.*, 115 App. Div. 57, 100 N. Y. Supp. 609. See *Illinois Glass Co. v. Chicago Tel. Co.*, 234 Ill. 535, 85 N. E. 200; 18 L. R. A. (N. S.) 124, where payment is voluntarily made cannot be recovered back.

<sup>155</sup> *Armour Pkg. Co. v. Edison Elec. Ill. Co.*, 115 App. Div. 51, 100 N. Y. Supp. 605; *Payne v. Witherbee, Sherman & Co.*, 200 N. Y. 572, 93 N. E. 954.

<sup>156</sup> *Lewisville Lt., etc., Co. v. Lester*, 109 Ark. 545, 160 S. W. 861. See *Vine-land v. Fowler, etc., Mfg. Co.*, 86 N. J. Law, 342, 90 Atl. 1054, L. R. A. 1915B, 711.

<sup>157</sup> *Thompson v. San Francisco, etc., Elec. Co.*, 20 Cal. App. 142, 128 Pac. 347; *Reiser v. Edison Elec. Ill. Co.*, 76 Misc. Rep. 563, 137 N. Y. Supp. 145; *Andrews v. North River Elec., etc., Co.*, 24 Misc. Rep. 671, 53 N. Y. Supp. 810.

<sup>158</sup> *Reiser v. Edison Elec. Ill. Co.*, 76 Misc. Rep. 563, 137 N. Y. Supp. 145.

<sup>159</sup> *Moore v. Champlain Elec. Co.*, 88 App. Div. 289, 85 N. Y. Supp. 37.

should have received some notice of the requirements of the applicant;<sup>160</sup> and that the applicant should make a prepayment of all sums due the company, before the latter will be liable thereunder.<sup>161</sup>

§ 269c. **Excuses for not rendering services.**—A telegraph, telephone, or an electric company cannot refuse to furnish its services to any one who has offered to comply with all the reasonable rules and regulations of the company.<sup>162</sup> Neither can one of these companies discontinue services to the public, and a burdensome ordinance will be no excuse therefor.<sup>163</sup> There may be instances, however, where the company may have a good excuse for not furnishing or continuing services.<sup>164</sup> With respect to telegraph and telephone companies, this question has been discussed elsewhere,<sup>165</sup> and so we will only mention certain instances where an electric company may be justified in refusing to furnish or continue the furnishing of electric currents. Thus, where the building desired to be lighted or heated has been wired by some other company, the company should have an opportunity to inspect the wiring of such building, and may refuse to furnish or supply the current until said inspection has been made.<sup>166</sup> In England it is necessary that a contract be made between the company and the customer before

<sup>160</sup> *Reiser v. Edison Elec. Ill. Co.*, 76 Misc. Rep. 563, 137 N. Y. Supp. 145; *Andrews v. North River Elec., etc., Co.*, 23 Misc. Rep. 512, 51 N. Y. Supp. 872; *Moffat v. Edison Co. (Sup.)* 116 N. Y. Supp. 683.

<sup>161</sup> *Thompson v. San Francisco, etc., Elec. Co.*, 20 Cal. App. 142, 128 Pac. 347.

<sup>162</sup> *State v. Nebraska Tel. Co.*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404; *Crouch v. Arnett*, 71 Kan. 49, 79 Pac. 1086; *People v. Hudson River Tel. Co.*, 19 Abb. N. C. (N. Y.) 466; *State v. Citizens' Tel. Co.*, 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139; *State v. Bell Tel. Co.*, 36 Ohio St. 296, 38 Am. Rep. 583; *Delaware, etc., Tel., etc., Co. v. Delaware*, 50 Fed. 677, 2 C. C. A. 1, affirmed (C. C.) 47 Fed. 633.

The fact that the company as a special favor to one or two persons has rendered them services which it is not obligated to furnish under terms of its franchise does not require it to furnish similar services to the others. *Younts v. Tel., etc., Co. (C. C.)* 192 Fed. 200.

*Buying quotations of Board of Trade.*—A telegraph company which buys the continuous quotations of a Board of Trade and supplies them to some cannot refuse to supply the same to others who are willing to comply with the company's rules and regulations. *West. U. Tel. Co. v. State*, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. (N. S.) 151, 6 Ann. Cas. 880.

<sup>163</sup> *Gainesville v. Gainesville, etc., Elec. P. Co.*, 65 Fla. 404, 62 South. 919, 46 L. R. A. (N. S.) 1119.

<sup>164</sup> *State v. Waseca*, 122 Minn. 348, 142 N. W. 319, 46 L. R. A. (N. S.) 437.

<sup>165</sup> See § 258 et seq. See, also, chapter XVI.

<sup>166</sup> *Benson v. American Ill. Co. (Co. Ct.)* 102 N. Y. Supp. 206.

the former can be forced to furnish its currents;<sup>167</sup> but in this country the company, it seems, can be forced to furnish the current before a contract has been completely made between the parties. The company may also refuse to furnish its currents unless there is a prepayment of the rates or charges.<sup>168</sup> And it seems that the company could also require the customer to prepay all rates and charges in arrear before it could be forced to furnish currents.<sup>169</sup> In a proceeding to compel a company to supply electricity, the burden is upon it to establish a defense predicated upon its inability, through physical, legal, financial, or other obstacles, to furnish the services demanded.<sup>170</sup>

<sup>167</sup> *Husey v. London Elec. Sy. Corp.*, 1 Ch. 411, 71 L. J. Ch. 313, 86 L. T. 166, 50 A. R. 420.

<sup>168</sup> *Minneapolis, etc., Elec. Co. v. Minneapolis (C. C.)* 194 Fed. 215; *Thompson v. San Francisco, etc., Elec. Co.*, 20 Cal. App. 142, 128 Pac. 347; *Marion Elec., etc., Co. v. Rochester*, 149 Ky. 810, 149 S. W. 977.

<sup>169</sup> See § 260, and cases cited thereunder.

<sup>170</sup> *State v. Consumers' P. Co.*, 119 Minn. 225, 137 N. W. 1104, 41 L. R. A. (N. S.) 1181, Ann. Cas. 1914B, 19.



## CHAPTER XII

## TRANSMISSION AND DELIVERY OF MESSAGES—GENERAL NATURE OF LIABILITY

- § 270. Transmission of messages—duties in general.
271. Duty of telegraph companies to transmit—arises not on contract alone.
272. Same continued—further duties—to accept and deliver—in general.
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281. Transmit without delay.
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286. Liability under statutes—all mistakes.
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300. Time to deliver.
301. Same continued—two messages of same nature received within office hours.
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303. When sendee lives several miles from office.
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309. Failure to designate with accuracy the address.
310. Penalty imposed for failure to deliver.
311. Duty to preserve secrecy of message.

- § 312. Same continued—imposed by statute.
- 313. Same continued—applicable to telephone companies.
- 314. Messages “in care of” common carriers.
- 315. Same continued—telephone.
- 316. Message for person—make reasonable search.
- 317. Same continued—when compensated.
- 318. Long-distance telephone—disconnected at intermediate points.

§ 270. **Transmission of messages—duties in general.**—While telegraph companies are not common carriers, in the strict sense of the term, in that they are not insurers of a correct transmission of messages, yet the duty which they owe the public is very similar to that of carriers.<sup>1</sup> They must serve impartially all who apply to them for services;<sup>2</sup> must be equipped with ample and modern facilities;<sup>3</sup> have only skilled, experienced, and reliable employes;<sup>4</sup> and exercise the highest degree of care and diligence in the transmission of messages.<sup>5</sup> So long as they discharge their duties in these respects, they will not be liable for damages incurred as a result of errors made in the transmission of messages; but so soon as they are guilty of negligence in either of these duties, and damages arise thereby, they will be liable. The business of these companies has become so great in the commercial world that, in order to accomplish successfully those duties imposed upon them by the public, they should be held to the strictest accountability in the performance and discharge of such duties. So, while not being insurers of a correct transmission of messages, they should be held, on account of the very great importance of their undertaking, to a strict observance of the absolute necessity of the highest degree of care in the transmission of all messages intrusted to them.

§ 271. **Duty of telegraph companies to transmit—arises not on contract alone.**—The duties and obligations of telegraph companies to transmit and deliver messages do not arise altogether from contracts. They are quasi-public corporations, exercising privileges acquired from the state and federal government, which imposes on them a greater duty than could be enjoyed if it were a mere contract made between two individuals. It is true that they can make reasonable contracts with their patrons whereby they may limit, to a

<sup>1</sup> See chapter II. See, also, *Stewart-Morehead Co. v. Postal Tel. Cable Co.*, 131 Ga. 31, 61 S. E. 1045, 127 Am. St. Rep. 205, 18 L. R. A. (N. S.) 692; *Halsted v. Postal Tel. Cable Co.*, 193 N. Y. 293, 85 N. E. 1078, 19 L. R. A. (N. S.) 1021, 127 Am. St. Rep. 952.

<sup>2</sup> See chapter II. *Stewart-Morehead Co. v. Postal Tel. Cable Co.*, 131 Ga. 31, 61 S. E. 1045, 127 Am. St. Rep. 205, 18 L. R. A. (N. S.) 692.

<sup>3</sup> See chapter II.

<sup>4</sup> See chapter X.

<sup>5</sup> See § 285.

certain extent, their common-law liabilities, but they cannot evade their entire duties and obligations which they owe the public by a contract.<sup>6</sup> This would give them too much power by which frauds would be perpetrated and impositions cast upon the public; since it is often the case that these companies are called on to transmit messages of the greatest importance, and in order to accomplish the purposes for which they are sent, they should be transmitted in the most possible haste. When this is the case, the sender has no time to investigate the purport and nature of the contract, and should not be forced, at such a time, to accept any contract which may be held out to him by the company.<sup>7</sup> It is a duty which they owe the government to make prompt and correct transmissions of messages, and it is not necessary that such a duty be imposed on them by the statutes; since it is a common-law duty.<sup>8</sup> It is true that the contract for sending gives force and effect to the duty which is imposed upon such companies, but the contract alone does not fix the measure of their duties and obligations. This contract must be controlled, to a certain extent, by the public duty; since, if there is any material part of the contract in conflict with this public duty, it will be of no force and effect.<sup>9</sup>

§ 272. **Same continued—further duties—to accept and deliver—in general.**—Telegraph companies are under a legal duty to accept, transmit and deliver, without error or delay, all proper messages presented, after they have been compensated for such service, and any injury arising proximately out of a failure to perform such duty, will subject them to damages.<sup>10</sup> They are exercising a public

<sup>6</sup> *Stewart-Morehead Co. v. Postal Tel. Cable Co.*, 131 Ga. 31, 61 S. E. 1045, 127 Am. St. Rep. 205, 18 L. R. A. (N. S.) 692; *Green v. Tel. Co.*, 136 N. C. 489, 49 S. E. 165, 67 L. R. A. 985, 103 Am. St. Rep. 955, 1 Ann. Cas. 349, holding that "a breach of this duty is a breach of the law, and for this breach an action lies, founded on the Georgia law, which action calls in the aid of a contract to support it." See, also, *Cashion v. West. U. Tel., etc., Co.*, 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160; *Cogdell v. West. U. Tel., etc., Co.*, 135 N. C. 431, 47 S. E. 490; *Landie v. West. U. Tel., etc., Co.*, 124 N. C. 528, 32 S. E. 886.

<sup>7</sup> See § 381 et seq.

<sup>8</sup> See § 255.

<sup>9</sup> *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126; *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 231; *Wadsworth v. West. U. Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864; *West. U. Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715.

<sup>10</sup> A telegram is in transit not only while it is being sent over the wires, but during the time it is in the hands of the messenger for delivery after it reaches the place where the addressee resides. *Brown v. West. U. Tel. Co.*, 85 S. C. 495, 67 S. E. 146, 137 Am. St. Rep. 914.

"*Deliver*"—*what is*.—"To deliver means to hand over. To transmit is to communicate; to send from one person to another. The terms imply, to



employment and must subject themselves to all demands of the government. As public servants, they should be ready and willing to obey any mandate or request of the public. "Their relation to the public imposes upon them the duty of undertaking as well as the duty of performing, and the violation of either duty is a negligence, a tort. It is the equivalent, therefore, of an affirmative interference by a mere private person to hinder or obstruct communication. For one of these companies not to receive or not to transmit and deliver a dispatch when it ought to do so is more than a refusal to contract or than the breach of a contract. It is a wrong as pronounced as would be that of a person who should forcibly exclude another from the telegraph office, and prevent him from handing in a dispatch which he desired to lodge for transmission. In dealing with the wrong as such, the element of contract is not involved."<sup>11</sup>

§ 273. Same continued—must accept proper messages—not improper or such as would subject the company to indictment.—The first duty of these companies is to accept all proper messages presented to them for transmission, after a payment has been made, or an offer to pay a reasonable sum for such services.<sup>12</sup> While this is the general rule, yet there may be instances when these companies may refuse to accept messages for transmission.<sup>13</sup> Thus they may refuse to accept a message for transmission, which clearly shows on its face matters which would subject them to a criminal prosecu-

some extent, the same idea, the distinction being that the latter implies separation of the actors. There is nothing to lead to the conclusion that while a message is passing over the wire it is being transmitted, and while in the possession of the messenger boy, being carried to its destination, it is being delivered. We think the whole constitutes one transaction, the passing of the message between the sender and the person to whom it is sent." *Kirby v. West. U. Tel. Co.*, 77 S. C. 404, 58 S. E. 10, 128 Am. St. Rep. 580. See *Hall v. West. U. Tel. Co.*, 59 Fla. 275, 51 South. 819, 27 L. R. A. (N. S.) 639.

<sup>11</sup> *Halsted v. Postal Tel. Cable Co.*, 193 N. Y. 293, 85 N. E. 1078, 19 L. R. A. (N. S.) 1021, 127 Am. St. Rep. 952; *West. U. Tel. Co. v. Milton*, 53 Fla. 484, 43 South. 495, 11 L. R. A. (N. S.) 560, 125 Am. St. Rep. 1077; *Stewart-Morehead Co. v. Postal Tel. Cable Co.*, 131 Ga. 31, 61 S. E. 1045, 127 Am. St. Rep. 205, 18 L. R. A. (N. S.) 692; *Green v. Tel. Co.*, 136 N. C. 489, 49 S. E. 165, 67 L. R. A. 985, 103 Am. St. Rep. 955, 1 Ann. Cas. 349; *Hall v. West. U. Tel. Co.*, 59 Fla. 275, 51 South. 819, 27 L. R. A. (N. S.) 639; *Vermilye v. Postal Tel. Cable Co.*, 205 Mass. 598, 91 N. E. 904, 30 L. R. A. (N. S.) 472; *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 260, 14 L. R. A. 95. See § 288.

<sup>12</sup> *Georgia*.—*Stewart v. Postal Tel. Cable Co.*, 131 Ga. 31, 61 S. E. 1045, 18 L. R. A. (N. S.) 692, 127 Am. St. Rep. 205; *Jeffries v. West. U. Tel. Co.*, 2 Ga. App. 853, 59 S. E. 192; *Gray v. West. U. Tel. Co.*, 87 Ga. 350.

<sup>13</sup> See § 275 et seq. When company's employes on strike, see §§ 362 and 363.

tion.<sup>14</sup> No person is under any legal duty or can be compelled by law to commit, foster or aid in the commission of a crime. The laws were enacted and are enforced to accomplish the direct opposite results. Telegraph companies are but persons in the eye of the law, enjoying certain privileges and immunities as such, and for the reason that their rights and duties toward the government are somewhat different from that of individuals is no reason why they should be under any obligation to the public to do an act which would make them liable criminally. It follows, therefore, that they are under no obligations, or can be forced, to accept a message for transmission which would have the tendency of subjecting them to

13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95; *Dunn v. West. U. Tel. Co.*, 2 Ga. App. 845, 59 S. E. 189.

*Illinois*.—*Tyler v. West. U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *Beggs v. Tel. Cable Co.*, 159 Ill. App. 247.

*Indiana*.—*Central Union Tel. Co. v. Swoveland*, 14 Ind. App. 341, 42 N. E. 1035; *West. U. Tel. Co. v. Ferguson*, 57 Ind. 495; *West. U. Tel. Co. v. State*, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. (N. S.) 153, 6 Ann. Cas. 880.

*Kentucky*.—*Commonwealth v. West. U. Tel. Co.*, 112 Ky. 355, 67 S. W. 59, 23 Ky. Law Rep. 1633, 99 Am. St. Rep. 299, 57 L. R. A. 614.

*Maine*.—*Fowler v. West. U. Tel. Co.*, 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211.

*Massachusetts*.—*Vermilye v. Postal Tel. Cable Co.*, 205 Mass. 598, 91 N. E. 904, 30 L. R. A. (N. S.) 472.

*Michigan*.—*West. U. Tel. Co. v. Carew*, 15 Mich. 525.

*Nebraska*.—*West. U. Tel. Co. v. Call Pub. Co.*, 44 Neb. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 27 L. R. A. 622; *Nebraska Tel. Co. v. State*, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113.

*New York*.—*Breese v. U. S. Tel. Co.*, 48 N. Y. 132, 8 Am. Rep. 526; *De Rutte v. N. Y.*, etc., *Electric Magnetic Tel. Co.*, 1 Daly, 547. See, also, *U. S. Tel. Co. v. West. U. Tel. Co.*, 56 Barb. 46; *Atlantic, etc., Tel. Co. v. West. U. Tel. Co.*, 4 Daly, 527.

*North Carolina*.—*Cordell v. West. U. Tel. Co.*, 149 N. C. 402, 63 S. E. 71, 22 L. R. A. (N. S.) 540.

*Tennessee*.—*Marr v. West. U. Tel. Co.*, 85 Tenn. 529, 3 S. W. 496; *Cumberland Tel. Co. v. Brown*, 104 Tenn. 56, 55 S. W. 155, 50 L. R. A. 277, 78 Am. St. Rep. 906.

*Texas*.—*West. U. Tel. Co. v. Downs*, 25 Tex. Civ. App. 597, 62 S. W. 1078; *West. U. Tel. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589.

*Vermont*.—*Commercial Union Tel. Co. v. New England Tel., etc., Co.*, 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161; *Gillis v. West. U. Tel. Co.*, 61 Vt. 461, 17 Atl. 736, 15 Am. St. Rep. 917, 4 L. R. A. 611.

*United States*.—*Primrose v. West. U. Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; *Nye v. West. U. Tel. Co. (C. C.)* 104 Fed. 628.

*Nature of liability*.—The refusal of a telegraph company, without legal excuse, to accept and transmit a message tendered to it, is an actionable tort. *Cordell v. West. U. Tel. Co.*, 149 N. C. 402, 63 S. E. 71, 22 L. R. A. (N. S.) 540.

<sup>14</sup> *Louisville v. Wehmhoff*, 116 Ky. 812, 76 S. W. 876, 79 S. W. 201, 25 Ky. Law Rep. 995, 1924; *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95; *Cordell v. West. U. Tel. Co.*, 149 N. C. 402, 63 S. E. 71, 22 L. R. A. (N. S.) 540.

a criminal prosecution, either as a principal or an accessory.<sup>15</sup> To relieve the company, however, of this duty, it must clearly appear on the face of the message that it would subject it to an indictment, and every doubt should be construed in favor of the message.<sup>16</sup> The moral effect of the telegram would not be for their consideration,<sup>17</sup> and yet they may refuse to accept any message which shows any indecency or profanity on its face.<sup>18</sup> In many instances the messages presented to the company are written in such a style or in such a manner as that it would not be apprised of their meaning or purport, and among which there may be some which are very immoral; yet the company, not being able to ascertain the meaning of these on their face, it being presumed that the operators could not read the minds and consciences of the sender, should not, therefore, be held liable for their moral effect.<sup>19</sup>

§ 274. Same continued—such as would subject to action of tort. So, for the same reasons, a telegraph company is not under obligations to any one to accept a message for transmission which would lay it liable to an action of tort.<sup>20</sup> While they may and do commit torts in many and various ways, yet they cannot be forced to do any act which would make them liable for one.<sup>21</sup> "Doubtless," as was said on this subject, "a dispatch to be entitled to transmission must be free from open indecency or profanity, and perhaps other

<sup>15</sup> Id.

<sup>16</sup> *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95, where the court said: "When a dispatch is ambiguous, the law would give the benefit of the ambiguity to the company in dealing with it either civilly or criminally for transmitting the dispatch; and hence it would be the duty of the company, in deciding whether to transmit or not, to give the benefit of the doubt to the sender."

<sup>17</sup> *West. U. Tel. Co. v. Ferguson*, 57 Ind. 495; *Commonwealth v. West. U. Tel. Co.*, 112 Ky. 355, 67 S. W. 59, 23 Ky. Law Rep. 1633, 99 Am. St. Rep. 299, 57 L. R. A. 614.

<sup>18</sup> See *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95; *West. U. Tel. Co. v. Ferguson*, 57 Ind. 495; *Nye v. West. U. Tel. Co. (C. C.)* 104 Fed. 628; *West. U. Tel. Co. v. Lillard*, 86 Ark. 208, 110 S. W. 1035, 17 L. R. A. (N. S.) 836; *Peterson v. West. U. Tel. Co.*, 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302.

<sup>19</sup> *West. U. Tel. Co. v. Ferguson*, 57 Ind. 495; *Commonwealth v. West. U. Tel. Co.*, 112 Ky. 355, 67 S. W. 59, 23 Ky. Law Rep. 1633, 99 Am. St. Rep. 299, 57 L. R. A. 614; *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 260, 14 L. R. A. 95; *Smith v. West. U. Tel. Co.*, 84 Ky. 661, 2 S. W. 483.

<sup>20</sup> *Peterson v. West. U. Tel.*, 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302. See, also, *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95.

<sup>21</sup> *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 14 L. R. A. 95, 27 Am. St. Rep. 260, 13 S. E. 562.



vices of language might condemn it; but supposing it to be proper in tone and expression, we should say that the companies would have no concern with its import unless it sought to subserve either crime or tort. If it disclosed either of these objects, it seems to us that the company, for its protection, might and should refuse to handle it. It would be unreasonable to suppose that the legislature intended telegraph companies to aid in the perpetration of crimes or actionable wrongs, for this would be to constrain them to do by legislative mandate what they would have no right to do by their own choice.”<sup>22</sup>

§ 275. **Same continued—lines down—other reasons.**—If the company's lines are down, or for any other reason it cannot transmit the messages, it may decline to accept same; but if the company accepts the message, knowing these facts, without informing the sender, it will be liable for a failure to transmit, although the transmission was impossible.<sup>23</sup> Thus, where the company's agent receives the message to be transmitted to a certain place, it will be liable for a failure to transmit, even though the company has no office at this place, which fact the agent did not know until after the message had been received.<sup>24</sup> If the name of a station is not entered in the official guide book this would be no reason for refusing to receive a message for that place.<sup>25</sup> It is presumed that the agent knows or has a means of knowing all the stations of the company.<sup>26</sup> In fact, this is the reason why these companies should be required to keep an official guide book, and if the name of the station is not entered or is incorrectly entered therein, this negligence itself would make the company liable.<sup>27</sup> It seems that it

<sup>22</sup> *Id.*

<sup>23</sup> *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 14 L. R. A. 95, 27 Am. St. Rep. 260, 13 S. E. 562. See *Baker v. West. U. Tel. Co.*, 84 S. C. 477, 66 S. E. 182, 137 Am. St. Rep. 848, holding that it is competent to explain a delay in the transmission of a telegram by showing that any trouble with the wires between the sending and delivering offices was not due to the negligence of the telegraph company, but evidence of the condition is not admissible if there is no showing of a necessity of the message going over it. See § 283, and cases.

<sup>24</sup> *West. U. Tel. Co. v. Hargrove*, 14 Tex. Civ. App. 79, 36 S. W. 1077; *West. U. v. Jones*, 69 Miss. 658, 13 South. 471, 30 Am. St. Rep. 579; *Hoaglin v. Tel. Co.*, 161 N. C. 390, 77 S. E. 417.

<sup>25</sup> *West. U. Tel. Co. v. Downs*, 25 Tex. Civ. App. 597, 62 S. W. 1078.

<sup>26</sup> *West. U. Tel. Co. v. Downs*, 25 Tex. Civ. App. 597, 62 S. W. 1078; *West. U. Tel. Co. v. Jones*, 69 Miss. 658, 13 South. 471, 30 Am. St. Rep. 579.

<sup>27</sup> *West. U. Tel. Co. v. Downs*, 25 Tex. Civ. App. 597, 62 S. W. 1078, where an operator refused to accept a message addressed to “New Waverly” on the ground that the company had no office at such place, when the company did have an office there, but it was erroneously listed in its books as “Waverly.” See, also, *State v. West. U. Tel. Co.*, 76 Ark. 124, 88 S. W. 834.

would not only be liable for a failure to transmit to a station on its line, not entered on the official guide book, but to any other place on any other line not officially entered in this guide book, but to a place it could reach.<sup>28</sup> In such a case the company would be liable as in the nature of an agent for the company on whose line the place was located, and by whose negligence the name of the station had been omitted.<sup>29</sup> In the last-cited case it would not be good reason to hold either the receiving company, or the connecting company over whose line the message was to finally reach its destination, liable for a failure to transmit, where the latter company's lines were down, which fact was not known by the first company, but was known by the latter.

§ 276. **Must be properly tendered—in writing.**—No duty or liability on the part of a telegraph company with respect to the transmission of a message arises until it has been properly tendered at the company's office for transmission.<sup>30</sup> It must be in conformity to the reasonable rules and regulations of the company.<sup>31</sup> One of the rules of the company, and one to be complied with in order to constitute proper tender, is that the message must be in writing.<sup>32</sup> "It is common knowledge," as was said by Judge Cambell, "that messages are required to be written, and upon the blanks of the company, and it would be hazardous to pursue any other course."<sup>33</sup> He further said: "In the absence of satisfactory evidence of a known course of business by the telegraph company to receive verbal messages orally delivered to operators for transmission, we

<sup>28</sup> See *West. U. Tel. Co. v. Jones*, 69 Miss. 658, 13 South. 471, 30 Am. St. Rep. 579. See, also, § 347 et seq.

<sup>29</sup> See § 454 et seq.

<sup>30</sup> *Planters' Oil Co. v. West. U. Tel. Co.*, 126 Ga. 621, 55 S. E. 495, 6 L. R. A. (N. S.) 1180. See § 511 et seq.

<sup>31</sup> *Kirby v. West. U. Tel. Co.*, 7 S. D. 623, 65 N. W. 37, 46 Am. St. Rep. 765, 30 L. R. A. 621, 624; *Id.*, 4 S. D. 105, 55 N. W. 759, 46 Am. St. Rep. 765, 30 L. R. A. 612.

<sup>32</sup> *West. U. Tel. Co. v. Liddell*, 68 Miss. 1, 8 South. 510; *People v. West. U. Tel. Co.*, 166 Ill. 15, 46 N. E. 731, 36 L. R. A. 637; *West. U. Tel. Co. v. Dozier*, 67 Miss. 288, 7 South. 325; *Rich v. West. U. Tel. Co.* (Tex. Civ. App.) 110 S. W. 93; *Kirby v. West. U. Tel. Co.*, 7 S. D. 623, 65 N. W. 37, 46 Am. St. Rep. 765, 30 L. R. A. 621, 624; *Id.*, 4 S. D. 105, 55 N. W. 759, 46 Am. St. Rep. 765, 30 L. R. A. 612. This is true, although the operator, at the request of the sender writes the message for him. *Mims v. West. U. Tel. Co.*, 82 S. C. 247, 64 S. E. 236; *West. U. v. Prevatt*, 149 Ala. 617, 43 South. 106; *West. U. v. Foster*, 64 Tex. 220, 53 Am. Rep. 754; *Gulf, etc., R. Co. v. Geer*, 5 Tex. Civ. App. 349, 24 S. W. 86; *West. U. Tel. Co. v. Edsall*, 63 Tex. 668. See, also, *Carroll v. South. Express Co.*, 37 S. C. 452, 16 S. E. 128. See, also, *Tel. Co. v. Jackson*, 163 Ala. 9, 50 South. 316; *Tel. Co. v. Benson*, 159 Ala. 254, 48 South. 712.

<sup>33</sup> *West. U. v. Dozier*, 67 Miss. 288, 7 South. 325.

are not willing to sanction the proposition that failure to transmit such a message is a ground for recovery against the company, either by statute or common law.”<sup>34</sup> When it is the rule that the messages shall be in writing, unless it has been the custom of the company to receive them orally,<sup>35</sup> it is not necessary that they should be in any particular language or in any peculiar style, provided the operator of the company understands the language or style. In other words, it is not necessary that they know the meaning of the message, provided they have the knowledge of what to send, and how.<sup>36</sup>

§ 277. **Same continued—must be on company's blank.**—Another regulation of the company, and one which is generally held to be reasonable, is that the message shall be written on one of the company's blank forms.<sup>37</sup> Mere delivery of a message, written on a leaf torn from a blank book, without any word spoken either by the plaintiff's messenger or the company's operator concerning the sending of the message, and an absence of any payment made, or tendered, of the price for transmission, is insufficient to create a liability against the company for failing to send such message.<sup>38</sup> But if the message is received by the company and paid for by the sender, the company is bound to transmit it, although it is written on paper other than its usual blanks.<sup>39</sup> A presumption of delivery for transmission arises from the receipt of a message written on one of the company's blanks.<sup>40</sup> But the fact that the message was not on one of the company's regular blanks, nor in writing at all, but was merely telephoned to the operator,<sup>41</sup> will not affect the com-

<sup>34</sup> *Id.*

<sup>35</sup> The right may be waived to the message received orally or by telephone. *People v. West. U. Tel. Co.*, 166 Ill. 15, 46 N. E. 731, 36 L. R. A. 637; *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23; *West. U. Tel. Co. v. Todd* (Ind. App.) 53 N. E. 194; *Carland v. West. U. Tel. Co.*, 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280; *West. U. Tel. Co. v. Gault*, 90 S. W. 610, 28 Ky. Law Rep. 881; *Bowie v. West. U. Tel. Co.*, 78 S. C. 424, 59 S. E. 65.

<sup>36</sup> See § 406 et seq.

<sup>37</sup> *West. U. Tel. Co. v. Dozier*, 67 Miss. 288, 7 South. 325; *West. U. Tel. Co. v. Liddell*, 68 Miss. 1, 8 South. 510; *Kirby v. West. U. Tel. Co.*, 7 S. D. 623, 67 N. W. 37, 46 Am. St. Rep. 765, 30 L. R. A. 621, 624; *Id.*, 4 S. D. 105, 55 N. W. 759, 46 Am. St. Rep. 765, 30 L. R. A. 612.

<sup>38</sup> *West. U. Tel. Co. v. Liddell*, 68 Miss. 1, 8 South. 510.

<sup>39</sup> *West. U. Tel. Co. v. Jones*, 69 Miss. 658, 13 South. 471, 30 Am. St. Rep. 579; *West. U. Tel. Co. v. Hill*, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058. See *Alexander v. West. U. Tel. Co.*, 158 N. C. 473, 74 S. E. 449, 42 L. R. A. (N. S.) 407.

<sup>40</sup> *West U. Tel. Co. v. Russell* (Tex. Civ. App.) 31 S. W. 698.

<sup>41</sup> See cases in 35, *supra*, as to waiver. See *Alexander v. West. U. Tel.*



pany's liability<sup>42</sup> where the negligence complained of is a failure to transmit after a delivery to the company.<sup>43</sup> The rule that the company's forms shall be used is a reasonable one, for it contains that part of the company's contract which must be accepted and agreed to by the sender; and to compel it to accept messages on other paper would deprive it of some of the privileges and immunities it could otherwise claim.<sup>44</sup> It is true that the courts have held that some of these stipulations were of no force and effect, but this is no reason why such companies may not relieve themselves from liabilities by those which are reasonable. These companies are entitled to the protection of the laws, and this rule will protect them in many instances and should be enforced. The message should be made out on the blank form and signed either by the sender or his agent in order to hold him liable for the stipulation therein.<sup>45</sup> For, if an agent of the telegraph company receives a message for transmission, written on a plain piece of paper, and attaches it to one of such blanks without calling the attention of the sender to the regulations printed thereon, he acts as agent for the company alone, and the sender is not bound by such regulations; but he may recover for the negligence of the company in the transmission of the message.<sup>46</sup>

§ 278. **Delivery to messenger boy—not delivery to company.**—A delivery of a message to one of the company's messenger boys, written on one of its blanks, is not a delivery to the company, unless it has been accepted by the latter at one of the transmitting offices.<sup>47</sup> It is very often the case that a message is written out on

Co., 158 N. C. 473, 74 S. E. 449, 42 L. R. A. (N. S.) 407; *Planters' Cotton Oil Co. v. West. U. Tel. Co.*, 126 Ga. 621, 55 S. E. 495, 6 L. R. A. (N. S.) 1180.

<sup>42</sup> *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23; *Carland v. West. U. Tel. Co.*, 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280; *West. U. Tel. Co. v. Todd* (Ind. App.) 53 N. E. 194; *Bowie v. West. U. Tel. Co.*, 78 S. C. 424, 59 S. E. 65.

<sup>43</sup> *Planters' Cotton Oil Co. v. West. U. Tel. Co.*, 126 Ga. 621, 55 S. E. 495, 6 L. R. A. (N. S.) 1180; *West. U. Tel. Co. v. Gault*, 90 S. W. 610, 28 Ky. Law Rep. 881.

<sup>44</sup> If a person insists upon erasing from the printed condition of a telegraph company a reasonable and valid stipulation contained therein, the company may refuse to receive the message. *Kirby v. West. U. Tel. Co.*, 7 S. D. 623, 65 N. W. 37, 46 Am. St. Rep. 765, 30 L. R. A. 621, 624; *Id.*, 4 S. D. 105, 55 N. W. 759, 46 Am. St. Rep. 765, 30 L. R. A. 612; *Vermilye v. Postal Tel. Cable Co.*, 207 Mass. 401, 93 N. W. 635, holding that rule is not binding on sender who has no knowledge of it.

<sup>45</sup> See § 340. See, also, *Cordell v. West. U. Tel. Co.*, 149 N. C. 402, 63 S. E. 71, 22 L. R. A. (N. S.) 540.

<sup>46</sup> *Harris v. West. U. Tel. Co.*, 121 Ala. 519, 25 South. 910, 77 Am. St. Rep. 70.

<sup>47</sup> *Stamey v. West. U. Tel. Co.*, 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95.

one of the company's blanks, and given to one of the messenger boys by the sender with the request that he deliver it to the company for transmission; notwithstanding that this may be the usual way the sender has of delivering messages for transmission, yet a delivery to the company in such a manner would not be a proper delivery to it. The reason assigned for the soundness of this rule is that on nearly if not all of these blanks there is a stipulation to the effect that, when messages are delivered to the messenger boy, he shall be considered the agent of the sender and not that of the company in that particular business, and when the sender signs the message he should be bound by this stipulation.<sup>48</sup> It is a reasonable regulation; since, in some cases, the operator of the company may have reasons for not accepting a message for transmission and of which the messenger would have no knowledge.<sup>49</sup> It is well known that the messengers are usually young and inexperienced boys, and of course are not familiar with the rules in regard to the proper messages to be accepted for transmission. It follows, therefore, that if a delivery to a messenger should be considered a delivery to the company, the latter would be liable for failure to send a message delivered to its messenger, although to do so would subject the company to an indictment or to an actionable wrong.<sup>50</sup> If, however, the message has been delivered to one of the transmitting offices of the company, and it is a proper message for transmission, it is then a delivery to the company.<sup>51</sup>

**§ 279. Same continued—prepayment of charges before accepting.**—Although telegraph companies are exercising a public function and must, therefore, serve all impartially who apply to them, yet, for this reason, it is not presumed that these companies can be forced to accept a message for transmission without first being paid a reasonable compensation for its transmission, or a tender made for same.<sup>52</sup> The fixed rates for the transmission and delivery having been paid, or an offer having been made in legal tender, it is then a sufficient delivery to the company for acceptance.<sup>53</sup> The

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Ayres v. West. U. Tel. Co.*, 65 App. Div. 149, 72 N. Y. Supp. 634; *Alexander v. West. U. Tel. Co.*, 158 N. C. 473, 74 S. E. 449, 42 L. R. A. (N. S.) 407.

<sup>52</sup> *West. U. Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; *West. U. Tel. Co. v. Cunningham*, 99 Ala. 314, 14 South. 579; *West. U. Tel. Co. v. Henley*, 157 Ind. 90, 60 N. E. 682; *West. U. Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; *Macpherson v. West. U. Tel. Co.*, 52 N. Y. Super. Ct. 232; *West. U. Tel. Co. v. Liddell*, 68 Miss. 1, 8 South. 510; *West. U. Tel. Co. v. Snodgrass*, 94 Tex. 284, 60 S. W. 308, 86 Am. St. Rep. 851; *Cogdell v. West. U. Tel. Co.*, 135 N. C. 431, 47 S. E. 490.

<sup>53</sup> Payment to messenger of company delivering message is payment to company. *West. U. Tel. Co. v. Hill*, 163 Ala. 18, 50 South. 248, 23 L. R. A.

company may refuse to accept a message until this requirement has been performed; but, if the agent has accepted one for transmission without prepayment, the company cannot escape liability, by evidence that its rule required prepayment,<sup>54</sup> in the absence of a showing that the sender knew of such a rule.<sup>55</sup> Of course there may be exceptions to this rule,<sup>56</sup> as, for instance, where a message is presented to a company with the instruction of the sender to collect the charges from the party to whom the message is addressed.<sup>57</sup> It is then the duty of the company to accept the message, if it has reasonable grounds to believe that the sendee will pay for its transmission.<sup>58</sup>

**§ 280. Same continued—failure to receive—damages—functions.** When a telegraph company willfully refuses to accept a proper message from any one who has complied with all the reasonable conditions demanded by the company, it will be liable for exemplary damages, although it will not be liable for such damages, where its refusal to transmit arises from a misunderstanding as to the nature and meaning of the message.<sup>59</sup> Thus, where a company refuses to accept a message for transmission because it had reasons to believe that it was intended to promote an illegal purpose, but in which it was mistaken, the court held that it was liable in damages, but could not be held liable for exemplary or punitive damages.<sup>60</sup> Where a message is properly prepared and presented, and

(N. S.) 648, 19 Ann. Cas. 1058; Hall v. West. U. Tel. Co., 59 Fla. 275, 51 South. 819, 27 L. R. A. (N. S.) 639.

<sup>54</sup> West. U. Tel. Co. v. Henley, 157 Ind. 90, 60 N. E. 682; West. U. Tel. Co. v. Cunningham, 99 Ala. 314, 14 South. 579.

<sup>55</sup> West. U. Tel. Co. v. Cunningham, 99 Ala. 314, 14 South. 579.

<sup>56</sup> May extend credit therefor. West. U. Tel. Co. v. Henley, 157 Ind. 90, 60 N. E. 682; West. U. Tel. Co. v. Cunningham, 99 Ala. 314, 14 South. 579.

<sup>57</sup> West. U. Tel. Co. v. Snodgrass, 94 Tex. 284, 60 S. W. 308, 86 Am. St. Rep. 851; West. U. Tel. Co. v. Cunningham, 99 Ala. 314, 14 South. 579; Cogdell v. West. U. Tel. Co., 135 N. C. 431, 47 S. E. 490; West. U. Tel. Co. v. Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224.

<sup>58</sup> West. U. Tel. Co. v. Henley, 157 Ind. 90, 60 N. E. 682.

<sup>59</sup> West. U. Tel. Co. v. Ferguson, 57 Ind. 495. See Hall v. West. U. Tel. Co., 59 Fla. 275, 51 South. 819, 27 L. R. A. (N. S.) 639; Cordell v. West. U. Tel. Co., 149 N. C. 402, 63 S. E. 71, 22 L. R. A. (N. S.) 540.

<sup>60</sup> A company cannot refuse to accept a message couched in decent language, and not libelous, because purpose for which may be to accomplish, or aid in the accomplishment, of an illegal or immoral act. West. U. Tel. Co. v. Ferguson, 57 Ind. 495; Gray v. West. U. Tel. Co., 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95; Commonwealth v. West. U. Tel. Co., 112 Ky. 355, 67 S. W. 59, 23 Ky. Law Rep. 1633, 99 Am. St. Rep. 299, 57 L. R. A. 614, holding that a telegraph company has no more right to refuse to send a message, when the charges are paid or tendered, when couched in decent language on the ground that the information may be used



the company then refuses to accept it, the sender may enforce the acceptance by mandamus proceedings.<sup>61</sup>

§ 281. **Transmit without delay.**—The next duty of a telegraph company, after accepting a message, is to transmit it without unnecessary delay;<sup>62</sup> and, on the failure to do so, the company will be liable to any one who may be damaged thereby.<sup>63</sup> One of the fundamental reasons why the business of these companies has become so great, and that which induces the public to resort to them, is that it is a means by which the business of the greatest importance may be accomplished in the shortest possible time. This being the case, these companies by implication, necessarily hold themselves out to the public to use all diligence in the transmission of all messages intrusted to them.<sup>64</sup> This does not mean, however, an im-

for an illegal or immoral purpose, than a railroad company has to refuse to carry a passenger who tenders or pays his fare because latter believed that his purpose in going to a certain place was to commit an illegal or immoral act.

<sup>61</sup> *Friedman v. Gold, etc., Tel. Co.*, 32 Hun (N. Y.) 4.

<sup>62</sup> *Birney v. N. Y., etc., Printing Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607; *West. U. v. Jones*, 69 Miss. 658, 13 South. 471, 30 Am. St. Rep. 579; *Baldwin v. West. U. Tel. Co.*, 93 Ga. 692, 21 S. E. 212, 44 Am. St. Rep. 194; *Hocutt v. West. U. Tel. Co.*, 147 N. C. 186, 60 S. E. 980; *Burnett v. West. U. Tel. Co.*, 39 Mo. App. 599; *U. S. Tel. Co. v. Wenger*, 55 Pa. 262, 93 Am. Dec. 751; *West. U. Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715; *Tel. Co. v. Landry* (Tex. Civ. App.) 134 S. W. 848. This is true although the message is one which the company may have refused to accept. *West. U. Tel. Co. v. Jones*, 69 Miss. 658, 13 South. 471, 30 Am. St. Rep. 579, message not on regular blank; *West. U. Tel. Co. v. Cunningham*, 99 Ala. 314, 14 South. 579, charges not prepaid; *West. U. Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715, unless it would have been unlawful for the company to transmit same; *West. U. Tel. Co. v. Young*, 138 Ala. 240, 36 South. 374; *Kirk v. West. U. Tel. Co.* (C. C.) 90 Fed. 809.

<sup>63</sup> *West. U. Tel. Co. v. Cunningham*, 99 Ala. 314, 14 South. 579; *Bartlett v. West. U. Tel. Co.*, 62 Me. 209, 16 Am. Rep. 437; *West. U. Tel. Co. v. Jobe*, 6 Tex. Civ. App. 403, 25 S. W. 168, 1036. It is liable for such damage as is the direct and natural result of its failure to deliver a message intrusted to it for transmission. *West. U. Tel. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843. It is said that a person injured by the delay in delivering a message to him is not limited in his recovery to such damages as might reasonably have been within the contemplation of the parties, but recovery may be had for all the injurious results which flow therefrom by ordinary natural sequence. *McPeck v. West. U. Tel. Co.*, 107 Iowa, 356, 78 N. W. 63, 43 L. R. A. 214, 70 Am. St. Rep. 205; *Johnson v. West. U. Tel. Co.*, 79 Miss. 58, 89 Am. St. Rep. 584, 29 South. 787; *Birney v. N. Y., etc., Printing Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607, where the operator forgot about the message and made no effort to transmit it; *U. S. Tel. Co. v. Wenger*, 55 Pa. 262, 93 Am. Dec. 751; *West. U. Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715.

<sup>64</sup> *West. U. Tel. Co. v. Emerson*, 161 Ala. 221, 49 South. 820; *West. U. Tel. Co. v. Hill*, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas.

mediate transmission at all times.<sup>65</sup> If it is not within the power of the company to make an immediate transmission,<sup>66</sup> as where it is prevented from making such by the public enemy or by the act of God, it would not be liable for any injury caused by the delay in the transmission.<sup>67</sup> So also, if the delay has been caused by the

1058; *West. U. Tel. Co. v. Cunningham*, 99 Ala. 314, 14 South. 579; *Daughtery v. Amer. U. Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435.

*Florida*.—*West. U. Tel. Co. v. Hyer*, 22 Fla. 637, 1 South. 129, 1 Am. St. Rep. 222.

*Illinois*.—See *Ins. Co. v. Tel. Co.*, 247 Ill. 84, 93 N. E. 134, 30 L. R. A. (N. S.) 1170, 139 Am. St. Rep. 314.

*Iowa*.—*McNeil v. Tel. Co.*, 154 Iowa, 241, 134 N. W. 611, 38 L. R. A. (N. S.) 727, Ann. Cas. 1914A, 1294.

*Kentucky*.—*Tel. Co. v. Sisson*, 155 Ky. 624, 160 S. W. 168; *Cumberland Tel. etc., Co. v. Quigley*, 129 Ky. 788, 112 S. W. 897, 19 L. R. A. (N. S.) 575.

*Nevada*.—*Mackay v. West. U. Tel. Co.*, 16 Nev. 222.

*New York*.—*Pearsall v. West. U. Tel. Co.*, 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662; *Leonard v. N. Y. Elec. Magnetic Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446.

*South Carolina*.—*Brown v. West. U. Tel. Co.*, 85 S. C. 495, 67 S. E. 146, 137 Am. St. Rep. 914.

*Texas*.—*West. U. Tel. Co. v. True*, 101 Tex. 236, 106 S. W. 315, reversing on other grounds (Tex. Civ. App.) 103 S. W. 1180; *Mitchell v. West. U. Tel. Co.*, 12 Tex. Civ. App. 262, 33 S. W. 1016; *Tel. Co. v. White* (Tex. Civ. App.) 149 S. W. 790.

*United States*.—*Behm v. West. U. Tel. Co.*, Fed. Cas. No. 1,234, 8 Biss. 131; *Beasley v. West. U. Tel. Co. (C. C.)* 39 Fed. 181.

<sup>65</sup> See *Birney v. N. Y., etc., Printing Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607; *West. U. Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715; *Tel. Co. v. Ivy*, 177 Fed. 63, 100 C. C. A. 481.

Must use reasonable care and diligence in transmitting, *West. U. Tel. Co. v. McDonald*, 42 Tex. Civ. App. 229, 95 S. W. 691; *Beasley v. West. U. Tel. Co. (C. C.)* 39 Fed. 181; and in determining the question the circumstances of each case should be considered, *Beasley v. West. U. Tel. Co. (C. C.)* 39 Fed. 181, including the amount of the message, *Cumberland Tel., etc., Co. v. Quigley*, 129 Ky. 788, 112 S. W. 897, 19 L. R. A. (N. S.) 575; *Beasley v. West. U. Tel. Co. (C. C.)* 39 Fed. 181.

The company need not transmit a message received on Sunday unless it relates to a matter of charity or necessity. *Willingham v. West. U. Tel. Co.*, 91 Ga. 449, 18 S. E. 298; *Rogers v. West. U. Tel. Co.*, 78 Ind. 169, 41 Am. Rep. 558; *West. U. Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224. But the rule would be otherwise if it did relate to one of these. *Burnett v. West. U. Tel. Co.*, 39 Mo. App. 599.

A company would not be justified in not transmitting the message because one of its rules had not been complied with, but which was waived by the acceptance of the message. *West. U. Tel. Co. v. Cunningham*, 99 Ala. 314, 14 South. 579.

<sup>66</sup> See *Glover v. West. U. Tel. Co.*, 78 S. C. 502, 59 S. E. 526; *Tel. Co. v. Ivy*, 177 Fed. 63, 100 C. C. A. 481.

<sup>67</sup> *Bierhaus v. West. U. Tel. Co.*, 8 Ind. App. 246, 34 N. E. 581; *West. U. Tel. Co. v. Davis*, 95 Ga. 522, 22 S. E. 642; *Taylor v. West. U. Tel. Co.*, 107 Mo. App. 105, 80 S. W. 697; *Smith v. West. U. Tel. Co.*, 57 Mo. App. 259; *Jacob v. West. U. Tel. Co.*, 135 Mich. 600, 98 N. W. 402; *Leonard v. N. Y., etc., Elec. Magnetic Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *Kirby v. West. U.*

company transmitting the message, without negligence, in a circuitous route,<sup>68</sup> where the same could not be sent direct, on the account of the arrangement of its offices and office hours, it would not be liable.<sup>69</sup> And if it be necessary to send the message through a repeating office, sufficient time must be given for other business at that office;<sup>70</sup> but if the business is such at the repeating office, or at any other office, as to require more than one operator, and only one being in charge of such office, the company would be liable for a delay caused thereby.<sup>71</sup> If the delay has been caused by any undue advantage of the company over the sender, it will not be relieved from any injuries arising directly therefrom. As where the

Tel. Co., 4 S. D. 105, 55 N. W. 759, 46 Am. St. Rep. 765, 30 L. R. A. 612; Glover v. West. U. Tel. Co., 78 S. C. 502, 59 S. E. 526; West U. Tel. Co. v. McGown, 42 Tex. Civ. App. 565, 93 S. W. 710; West. U. Tel. Co. v. Birge-Forbes Co., 29 Tex. Civ. App. 526, 69 S. W. 181; Faubion v. West. U. Tel. Co., 36 Tex. Civ. App. 98, 81 S. W. 56; West. U. Tel. Co. v. Stiles (Tex. Civ. App.) 35 S. W. 76; Beasley v. West. U. Tel. Co. (C. C.) 39 Fed. 181; Stephenson v. Montreal Tel. Co., 16 U. C. Q. B. 530. See, also, chapter XV.

<sup>68</sup> Leavell v. West. U. Tel. Co., 116 N. C. 211, 21 S. E. 391, 27 L. R. A. 843, 47 Am. St. Rep. 798; West. U. Tel. Co. v. Jones, 69 Miss. 658, 13 South. 471, 30 Am. St. Rep. 579; West. U. Tel. Co. v. Henderson, 89 Ala. 510, 18 Am. St. Rep. 148, 7 South. 419.

<sup>69</sup> West. U. Tel. Co. v. Ford, 77 Ark. 531, 92 S. W. 528, 7 Ann. Cas. 228; West. U. Tel. Co. v. Love-Banks Co., 73 Ark. 205, 83 S. W. 949, 3 Ann. Cas. 712; West. U. Tel. Co. v. Crumpton, 138 Ala. 632, 36 South. 517; West. U. Tel. Co. v. Georgia Cot. Co., 94 Ga. 444, 21 S. E. 835; Jacob v. West. U. Tel. Co., 135 Mich. 600, 98 N. W. 402; West. U. Tel. Co. v. Crider, 107 Ky. 600, 54 S. W. 963, 21 Ky. Law Rep. 1336; West. U. Tel. Co. v. Van Cleave, 107 Ky. 464, 54 S. W. 827, 92 Am. St. Rep. 366; West. U. Tel. Co. v. Steenbergen, 107 Ky. 469, 54 S. W. 829, 21 Ky. Law Rep. 1289; Davis v. West. U. Tel. Co., 66 S. W. 17, 23 Ky. Law Rep. 1758; West. U. Tel. Co. v. Harding, 103 Ind. 505, 3 N. E. 172; Sweet v. Postal Tel., etc., Co., 22 R. I. 344, 47 Atl. 881, 53 L. R. A. 732; Ayers v. West. U. Tel. Co., 65 App. Div. 149, 72 N. Y. Supp. 634; Roberts v. West. U. Tel. Co., 73 S. C. 520, 53 S. E. 985, 114 Am. St. Rep. 100; Bonner v. West. U. Tel. Co., 71 S. C. 303, 51 S. E. 117; Harrison v. West. U. Tel. Co., 71 S. C. 386, 51 S. E. 119; McCaul v. West. U. Tel. Co., 114 Tenn. 661, 88 S. W. 325; West. U. Tel. Co. v. Neel, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847; Brown v. West. U. Tel. Co., 6 Utah, 219, 21 Pac. 988; West. U. Tel. Co. v. Byrd, 34 Tex. Civ. App. 594, 79 S. W. 40; West. U. Tel. Co. v. Christensen (Tex. Civ. App.) 78 S. W. 744; Davis v. West. U. Tel. Co., 46 W. Va. 48, 32 S. E. 1026; West. U. Tel. Co. v. McConico, 27 Tex. Civ. App. 610, 66 S. W. 592; West. U. Tel. Co. v. Rawls (Tex. Civ. App.) 62 S. W. 136; Robinson v. West. U. Tel. Co. (Tex. Civ. App.) 43 S. W. 1053; West. U. Tel. Co. v. Gibson (Tex. Civ. App.) 53 S. W. 712; West. U. Tel. Co. v. McMillan (Tex. Civ. App.) 30 S. W. 298; West. U. Tel. Co. v. May, 8 Tex. Civ. App. 176, 27 S. W. 760; West. U. Tel. Co. v. Murray (Tex. Civ. App.) 26 S. W. 996; West. U. Tel. Co. v. Wingate, 6 Tex. Civ. App. 394, 25 S. W. 439; West. U. Tel. Co. v. Merrill (Tex. Civ. App.) 22 S. W. 826; Given v. West. U. Tel. Co. (C. C.) 24 Fed. 119; Beasley v. West. U. Tel. Co. (C. C.) 39 Fed. 181.

<sup>70</sup> Behm v. West. U. Tel. Co., 8 Biss. 131, Fed. Cas. No. 1,234.

<sup>71</sup> West. U. Tel. Co. v. Scirele, 103 Ind. 227, 2 N. E. 604.



sender's consent to a delay, under a misapprehension induced by the company's agent, creates no estoppel on his part.<sup>72</sup>

§ 282. **Burden of evidence—delay—presumption.**—When an action is being maintained for an injury caused by an error or a delay in the transmission of a message, the burden of proof is on the company to show that the delay was not caused by its negligence.<sup>73</sup> It would be an unreasonable rule of evidence to compel the sender to furnish such proof, since to do so would be nothing less than to deprive him of his redress for injuries arising from such causes. The transmission of the message is within the exclusive control of the company's servants, and if any of these should be guilty of negligence, it would generally be committed beyond the reach of the sender, but within the knowledge of the company. This being the case, it is better for the burden of proof to be on the company, when it may exonerate itself for the negligent act, rather than to impose such proof on the sender. In some instances a delay in the transmission of messages will be presumed to have been caused by the company's negligence. Thus a delay of ten or twelve hours in transmission, if unexplained, will create a presumption of negligence on the part of the company,<sup>74</sup> and a delay of very much less time may, under peculiar circumstances, raise the presumption of negligence;<sup>75</sup> yet the company may overcome this presumption by competent evidence.<sup>76</sup>

§ 283. **Duty to inform sender when delay unavoidable.**—When a telegraph company, for any cause, cannot transmit a message,<sup>77</sup> or when it will be unavoidably delayed,<sup>78</sup> it is the duty of its agent, in all cases, to inform the sender of such fact,<sup>79</sup> especially when the

<sup>72</sup> *West. U. Tel. Co. v. Seffel*, 31 Tex. Civ. App. 134, 71 S. W. 616; *Seffel v. West. U. Tel. Co.* (Tex. Civ. App.) 65 S. W. 897.

<sup>73</sup> *West. U. Tel. Co. v. Scirele*, 103 Ind. 227, 2 N. E. 604; *Pope v. West. U. Tel. Co.*, 9 Ill. App. 283; *West. U. Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728; *Baker v. West. U. Tel. Co.*, 84 S. C. 477, 66 S. E. 182, 137 Am. St. Rep. 848; *Strong v. West. U. Tel. Co.*, 18 Idaho, 389, 109 Pac. 910, 30 L. R. A. (N. S.) 409, Ann. Cas. 1912A, 55.

<sup>74</sup> *Kendall v. West. U. Tel. Co.*, 56 Mo. App. 192; *West. U. Tel. Co. v. Clark* (Tex. Civ. App.) 25 S. W. 990.

<sup>75</sup> *Id.*

<sup>76</sup> *Smith v. West. U. Tel. Co.*, 57 Mo. App. 259.

<sup>77</sup> *Buchanan v. West. U. Tel. Co.* (Tex. Civ. App.) 100 S. W. 974.

<sup>78</sup> *Swan v. West. U. Tel. Co.*, 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153; *West. U. Tel. Co. v. Bickerstaff*, 100 Ark. 1, 138 S. W. 997, Ann. Cas. 1913B, 242; *West. U. Tel. Co. v. Hill*, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058. But see *Stephenson v. Montreal Tel. Co.*, 16 U. C. Q. B. 530.

<sup>79</sup> *Alabama*.—*West. U. Tel. Co. v. McMorris*, 158 Ala. 563, 48 South. 349, 132 Am. St. Rep. 46.

*Indiana*.—*West. U. Tel. Co. v. Bierhaus*, 12 Ind. App. 17, 39 N. E. 881; *Id.*,

message shows on the face its importance;<sup>80</sup> when these facts are within the knowledge of the agent, or such as he ought to know,

8 Ind. App. 563, 36 N. E. 161; West. U. Tel. Co. v. Moore, 12 Ind. App. 136, 39 N. E. 874, 54 Am. St. Rep. 515.

*Missouri*.—Brashears v. West. U. Tel. Co., 45 Mo. App. 433.

*North Carolina*.—Sherrill v. West. U. Tel. Co., 117 N. C. 352, 23 S. E. 277; Id., 116 N. C. 655, 21 S. E. 429; Hendricks v. West. U. Tel. Co., 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658; Laudie v. West. U. Tel. Co., 126 N. C. 431, 35 S. E. 810, 78 Am. St. Rep. 668; Bright v. West. U. Tel. Co., 132 N. C. 317, 43 S. E. 841; Hinson v. Postal Tel. Cable Co., 132 N. C. 460, 43 S. E. 945; Bryan v. West. U. Tel. Co., 133 N. C. 603, 45 S. E. 938; Cogdell v. West. U. Tel. Co., 135 N. C. 431, 47 S. E. 490; Hood v. West. U. Tel. Co., 135 N. C. 622, 47 S. E. 607; Green v. West. U. Tel. Co., 136 N. C. 506, 49 S. E. 171, 1 Ann. Cas. 358; Hall v. West. U. Tel. Co., 139 N. C. 369, 52 S. E. 50; Carter v. West. U. Tel. Co., 141 N. C. 374, 54 S. E. 274; Woods v. West. U. Tel. Co., 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581.

*South Carolina*.—Campbell v. West. U. Tel. Co., 74 S. C. 300, 54 S. E. 571; Bolton v. West. U. Tel. Co., 76 S. C. 529, 57 S. E. 543; Lyles v. West. U. Tel. Co., 77 S. C. 174, 57 S. E. 725, 12 L. R. A. (N. S.) 534.

*Tennessee*.—West. U. Tel. Co. v. Robinson, 97 Tenn. 638, 37 S. W. 545, 34 L. R. A. 431.

*Texas*.—Anderson v. West. U. Tel. Co., 84 Tex. 17, 19 S. W. 285; West. U. Tel. Co. v. Sweetman, 19 Tex. Civ. App. 435, 47 S. W. 676; West. U. Tel. Co. v. Davis, 24 Tex. Civ. App. 427, 59 S. W. 46; West. U. Tel. Co. v. Birge-Forbes Co., 29 Tex. Civ. App. 526, 69 S. W. 181; West. U. Tel. Co. v. Sorsby, 29 Tex. Civ. App. 345, 69 S. W. 122; Faubion v. West. U. Tel. Co., 36 Tex. Civ. App. 98, 81 S. W. 56; West. U. Tel. Co. v. Bruner (Tex.) 19 S. W. 149; Evans v. West. U. Tel. Co. (Tex. Civ. App.) 56 S. W. 609; West. U. Tel. Co. v. Kuykendall (Tex. Civ. App.) 86 S. W. 61; West. U. Tel. Co. v. McDonald, 42 Tex. Civ. App. 229, 95 S. W. 691; West. U. Tel. Co. v. Ayers, 47 Tex. Civ. App. 557, 105 S. W. 1165.

*United States*.—Swan v. West. U. Tel. Co., 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153; Box v. Postal Tel. Co., 165 Fed. 138, 91 C. C. A. 172, 28 L. R. A. (N. S.) 566.

Some cases hold that the sender must be promptly notified of delay in the transmission or delivery of a message. Swan v. West. U. Tel. Co., 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153, certiorari denied 195 U. S. 628, 25 Sup. Ct. 787, 49 L. Ed. 351; Hendricks v. West. U. Tel. Co., 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658; Green v. West. U. Tel. Co., 136 N. C. 506, 49 S. E. 171, 1 Ann. Cas. 358; Carter v. West. U. Tel. Co., 141 N. C. 374, 54 S. E. 274; Evans v. West. U. Tel. Co. (Tex. Civ. App.) 56 S. W. 609.

Failure to notify sender of delay in transmission or delivery of a message is in itself evidence of negligence. Swan v. West. U. Tel. Co., *supra*; Cogdell v. West. U. Tel. Co., 135 N. C. 431, 47 S. E. 490; Carter v. West. U. Tel. Co., *supra*; Woods v. West. U. Tel. Co., 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581; West. U. Tel. Co. v. Hargrove, 14 Tex. Civ. App. 79, 36 S. W. 1077.

It has, however, been held that the duty of the telegraph company to notify the sender of its inability to send a message is not an absolute one; that, at most, it can be only a question of whether, under all the circumstances, a reasonable prudent person would pursue such a course; and that the necessity and sufficiency of notice are questions for the jury. Faubion v. West. U. Tel. Co., 36 Tex. Civ. App. 98, 81 S. W. 56; West. U. Tel. Co. v. Sorsby, 29 Tex.

<sup>80</sup> West. U. Tel. Co. v. Harding, 103 Ind. 505, 3 N. E. 172; Box v. Postal Tel. Cable Co., 165 Fed. 138, 91 C. C. A. 172, 28 L. R. A. (N. S.) 566, citing author.

and he fails to give such information, this will be evidence of negligence, although it may not be negligence per se.<sup>81</sup> Mitchell, C. J., in discussing this subject, said: "It might well be that in a case when a message was delivered, which showed upon its face the importance of speedy transmission, and other means of making the communication were unavoidable to the sender, which might be resorted to, if he was informed that the one chosen was ineffectual, or his conduct might otherwise be materially controlled thereby, the company would be bound at its peril to ascertain and disclose its inability to serve him, or render itself liable to respond in damages."<sup>82</sup> It may not be negligence within itself in failing to inform the sender of the unavoidable delay in transmission, but it would be unquestionably evidence of negligence. "In many instances, by

Civ. App. 345, 69 S. W. 122; West. U. Tel. Co. v. Davis (Tex. Civ. App.) 51 S. W. 258.

Failure to notify the sender of the nondelivery of a message will not warrant a recovery of damages which are speculative and not proximately related to such failure. Cahn v. West. U. Tel. Co., 48 Fed. 810, 1 C. C. A. 107; Kagy v. West. U. Tel. Co., 37 Ind. App. 73, 76 N. E. 792, 117 Am. St. Rep. 278; Cumberland Tel., etc., Co. v. Atherton, 122 Ky. 154, 91 S. W. 257; Barnes v. West. U. Tel. Co., 24 Nev. 125, 50 Pac. 438, 77 Am. St. Rep. 791; Poteet v. West. U. Tel. Co., 74 S. C. 491, 55 S. E. 113; Stephenson v. Montreal Tel. Co., 16 U. C. Q. B. 530.

*Delay in transmission.*—It is held that, when a telegraph company learns of defects existing along its lines of communication which will prevent or delay the transmission of messages, its duty is promptly to notify the sender in order that he may have an opportunity to accomplish his purpose in some other available manner. Fleischer v. Pac. Postal Tel. Cable Co. (C. C.) 55 Fed. 738, affirmed 66 Fed. 899, 14 C. C. A. 166; Swan v. West. U. Tel. Co., 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153; West. U. Tel. Co. v. Bierhaus, 12 Ind. App. 17, 39 N. E. 881; Id., 8 Ind. App. 563, 36 N. E. 161; Laudie v. West. U. Tel. Co., 126 N. C. 431, 35 S. E. 810, 78 Am. St. Rep. 668; West. U. Tel. Co. v. Sorsby, 29 Tex. Civ. App. 345, 69 S. W. 122; West. U. Tel. Co. v. Birge-Forbes Co., 29 Tex. Civ. App. 526, 69 S. W. 181; Faubion v. West. U. Tel. Co., 36 Tex. Civ. App. 98, 81 S. W. 56; West. U. Tel. Co. v. Birge-Forbes Co., supra, holding that a notice posted in the company's office that its line is down, and that it is behind in its business, and that all messages will be delayed in transmission, are not sufficient to charge the sender with these facts; West. U. Tel. Co. v. Sorsby, supra, holding that, where a connecting line over which a message must be sent notifies the transmitting office of its inability to send the message because of trouble on its lines, it is the clear duty of the transmitting office as agent of the sender to advise its principal to that effect. Refer to § 291.

<sup>81</sup> Fleischer v. Pac. Postal Tel. Cable Co. (C. C.) 55 Fed. 738; West. U. Tel. Co. v. Cohen, 73 Ga. 522; Bierhaus v. West. U. Tel. Co., 8 Ind. App. 246, 34 N. E. 581; West. U. Tel. Co. v. Harding, 103 Ind. 505, 3 N. E. 172; West. U. Tel. Co. v. Birge-Forbes Co., 29 Tex. Civ. App. 526, 69 S. W. 181. Compare Ohio R., etc., Co. v. Applewhite, 52 Ind. 540; Pittsburg, etc., R. Co. v. Nuzum 50 Ind. 141, 19 Am. Rep. 703; Laudie v. West. U. Tel. Co., 126 N. C. 431, 35 S. E. 810, 78 Am. St. Rep. 668.

<sup>82</sup> West. U. Tel. Co. v. Harding, 103 Ind. 505, 3 N. E. 172.



such a course, the damage would be greatly lessened, if not entirely avoided. A better address might be given, mutual friends might be communicated with, or even a letter might reach the addressee. In any event the sender might be relieved from great anxiety, and would know what to expect. Moreover, it would tend to show diligence on the part of the company.”<sup>83</sup>

§ 284. **Must transmit without error.**—After a telegraph company has accepted a message to be sent over its wires, it must exercise due and proper care to transmit it correctly.<sup>84</sup> They are not common carriers, and are not, therefore, insurers of a correct transmission of messages, but, as they have assumed public functions and solicited public trade, proper care, under the circumstances, must be exercised in carrying on their business. The value of a message depends upon its correctness. If it is changed in any material part, it is not the same message as that delivered for transmission, and may materially affect the rights of both the person sending and the person receiving it.<sup>85</sup> Oftentimes messages sent by telegrams are of the most important class of news, and are prepared in the briefest manner; the slightest change or error made by the company might likely incur serious injury or loss. It is a further fact that the transmission of these messages is intrusted to the exclusive control of the servants of the company—the sender doing nothing more than preparing the message for transmission. The companies for these reasons should prepare themselves with the best material for such business, and have the most suitable, skilled and competent men to manage and operate their machinery. Telegraph companies are often confronted with many uncontrollable hindrances; as where the wires are exposed to the interference of strangers; a surcharge of electricity in the atmosphere, or a failure or an irregularity in the electrical current, may stop communica-

<sup>83</sup> *Hendricks v. West. U. Tel. Co.*, 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658.

<sup>84</sup> *Kemp v. West. U. Tel. Co.*, 28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363, and this irrespective of the question of punctuality in their delivery; *West. U. Tel. Co. v. Rountree*, 92 Ga. 611, 18 S. E. 979, 44 Am. St. Rep. 93; *West. U. Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; *Pegram v. West. U. Tel. Co.*, 100 N. C. 28, 6 S. E. 770, 6 Am. St. Rep. 557. See extended notes to *West. U. Tel. Co. v. Blanchard*, 45 Am. Rep. 496; *West. U. Tel. Co. v. Cooper*, 10 Am. St. Rep. 784; *West. U. Tel. Co. v. Hyer*, 1 Am. St. Rep. 229; and *Postal Tel. Cable Co. v. Lathrop*, 131 Ill. 575, 19 Am. St. Rep. 55, 7 L. R. A. 474, 23 N. E. 583.

<sup>85</sup> *Kemp v. West. U. Tel. Co.*, 28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363.

*Not liable as common carriers—Reason.*—Notwithstanding that, in an able opinion, telegraph companies were held to be liable as bailees for hire, yet in this same opinion good reasons were given why such companies should

tion; and they are also subject to danger from accident, malice and climatic influences.<sup>86</sup> In the early state of their existence, they were more often interfered with by these hindrances, but many of

not be held liable as common carriers. The court said: "There are three classes of cases in which the law has settled the principle, independent of the stipulations in the contract, to govern when alleged injuries have been received by one at the hands of another. These are: First, bailments; second, duties undertaken by one claiming to be skilled in the matter which he undertakes, such as professional employments; and, third, common carriers. As to the two first, the principle is that reasonable and due care and skill, according to the nature and character of the work done or service rendered, is guaranteed, and in case of injury, to be exempt, the defendant must show the presence of this care and skill, or, what is the same thing, the absence of negligence and inexcusable carelessness. As to the latter, to wit, common carriers, the more stringent principle is that nothing but an act of God or irresistible force, expressed in the books as the public enemies, will exempt. Now in which of these classes shall telegraph companies be placed, or to which have they been regarded as belonging? It is true the business in which these companies are engaged is quasi-public, but there is a wide difference between them and common carriers, and the foundation upon which the very stringent doctrine of nonexemption, except for an uncontrollable cause, is imposed by the law upon common carriers, is altogether wanting as to a telegraph company. There is no motive or opportunity for a telegraph company to make mistakes or commit errors. There is no inducement or possibility for such companies to appropriate anything which may be intrusted to them, to their own benefit, at the sacrifice of their employer's interests. Their business is simply to transmit messages by the medium of that mysterious agent electricity, which with increasing progress is now being made to contribute so wonderfully and so usefully to our wants. In the discharge of their duties the principal qualifications required are experience, practice, and good faith on the part of their agents and servants, but even with the best qualified employes much depends upon electric, atmospheric, and other subtle influences beyond the reach of experience and the utmost skill. While, therefore, there is reason for holding them responsible for the qualifications necessary for the proper performance of the work which they purpose to do, as the first classes mentioned above are held, to wit, professional employes and bailees, yet there is no reason for holding them as insurers like common carriers. Common carriers transport goods, merchandise, and other corporeal materials, which are constantly in their possession from the commencement of their trip until the destinations are reached, and it is entirely reasonable that they should guard and protect these goods against all dangers which can be warded off by human power. But telegraph companies transmit ideas—intangible and fleeting things—which when placed upon the wire instantly escape from the hands of the operators, and in a moment, yea, in the twinkling of an eye, are hundreds and thousands of miles away, far beyond the reach and control of him who started them upon their distant mission, passing through different parallels of latitude or degrees of longitude, as the case may be, with the rapidity of thought, but encountering for themselves all the dangers or obstacles that may be met by the way. To apply the rule of common carriers to these companies would, it seems to us, be extremely unjust, and to hold them absolutely liable as insurers would greatly impair this mode of correspondence, crippling, if not destroying, a most important and growing department of business." *Pinckney v. Tel. Co.*, 19 S. C. 71, 45 Am. Rep. 765.

<sup>86</sup> *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126.

these by degrees have been overcome by improvements in their machinery. We can look back but a few years and marvel at the vast improvements which have been injected into this line of business, and no one can imagine what a few years in the future will bring about. It will be but a question of time when these companies will have made such vast improvements on their instruments as will enable them to overcome a greater part of these hindrances, and, when the time should come, they should be held as insurers of an accurate and correct transmission of messages.

§ 285. *Same—degree of care in transmission.*—The very aims and purposes for which telegraphic institutions are inaugurated and operated would be destroyed if they were permitted to escape the responsibilities arising from a negligent failure to transmit and deliver messages.<sup>87</sup> They are not insurers against mistakes and errors which may be made in the transmission of messages, unless they are made so by statute or by an agreement to that effect,<sup>88</sup> yet,

<sup>87</sup> *Florida.*—West. U. Tel. Co. v. Merritt, 55 Fla. 462, 46 South. 1024, 127 Am. St. Rep. 169.

*Georgia.*—West. U. Tel. Co. v. Cohen, 73 Ga. 522; Stewart v. Postal Tel. Cable Co., 131 Ga. 31, 61 S. E. 1045, 127 Am. St. Rep. 205, 18 L. R. A. (N. S.) 692; West. U. Tel. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480. See, also, West. U. Tel. Co. v. Rountree, 92 Ga. 611, 18 S. E. 979, 44 Am. St. Rep. 93.

*Illinois.*—Tyler v. West. U. Tel. Co., 60 Ill. 421, 14 Am. Rep. 38; West. U. Tel. Co. v. Tyler, 74 Ill. 168, 24 Am. Rep. 279; West. U. Tel. Co. v. Hart, 62 Ill. App. 120.

*Indiana.*—West. U. Tel. Co. v. Meek, 49 Ind. 53.

*Iowa.*—Turner v. Hawkeye Tel. Co., 41 Iowa, 458, 20 Am. Rep. 605.

*Maine.*—Bartlett v. West. U. Tel. Co., 62 Me. 209, 16 Am. Rep. 437.

*Massachusetts.*—May v. West. U. Tel. Co., 112 Mass. 90.

*Mississippi.*—West. U. Tel. Co. v. Lyon, 93 Miss. 590, 47 South. 344.

*Missouri.*—Reed v. West. U. Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492. See Miller v. West. U. Tel. Co., 157 Mo. App. 580, 138 S. W. 887.

*Nebraska.*—West. U. Tel. Co. v. Kemp, 44 Neb. 194, 62 N. W. 451, 48 Am. St. Rep. 723.

*North Carolina.*—Hedrick v. West. U. Tel. Co., 167 N. C. 234, 83 S. E. 358.

*New York.*—Rittenhouse v. Independent Tel. Line, 44 N. Y. 263, 4 Am. Rep. 673, affirming 1 Daly, 474; Pearsall v. West. U. Tel. Co., 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662; Leonard v. N. Y., etc., Electro Magnetic Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446; Wolfskehl v. West. U. Tel. Co., 46 Hun, 542; De Rutte v. N. Y., etc., Electro Magnetic Tel. Co., 1 Daly, 547.

*Ohio.*—West. U. Tel. Co. v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500.

*South Carolina.*—Painter v. West. U. Tel. Co., 100 S. C. 65, 84 S. E. 293.

*Texas.*—West. U. Tel. Co. v. Ragland (Civ. App.) 61 S. W. 421; Womack v. West. U. Tel. Co., 58 Tex. 176, 44 Am. Rep. 614; West. U. Tel. Co. v. Tobin (Civ. App.) 56 S. W. 540; West. U. Tel. Co. v. Hines, 22 Tex. Civ. App. 315, 54 S. W. 627; West. U. Tel. Co. v. Saxon (Civ. App.) 138 S. W. 1091.

*Wisconsin.*—Sherrerd v. West. U. Tel. Co., 146 Wis. 197, 131 N. W. 341.

*Canada.*—Lane v. Montreal Tel. Co., 7 U. C. C. P. 23.

<sup>88</sup> Halsted v. Postal Tel. Cable Co., 193 N. Y. 293, 85 N. E. 1078, 19 L. R. A.



on account of the importance and magnitude of the business intrusted to them, the highest degree of care should be required of them in this respect.<sup>89</sup> It is not understood, however, that this would impose a liability upon the company for want of skill or knowledge not reasonably attainable in the art; nor for errors or imperfections which arise from causes not within its control, or which are not capable of being guarded against.<sup>90</sup> So they will not

(N. S.) 1021, 127 Am. St. Rep. 952; West. U. Tel. Co. v. Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744; Breese v. U. S. Tel. Co., 48 N. Y. 132, 8 Am. Rep. 526; West. U. Tel. Co. v. Carew, 15 Mich. 525; De Rutte v. N. Y., etc., Electro Magnetic Tel. Co., 1 Daly (N. Y.) 547; Pinckney v. West. U. Tel. Co., 19 S. C. 71, 45 Am. Rep. 765; West. U. Tel. Co. v. Neill, 57 Tex. 283, 44 Am. Rep. 589; West. U. Tel. Co. v. Edsall, 63 Tex. 668; West. U. Tel. Co. v. Brown (Tex. Civ. App.) 75 S. W. 359; Abraham v. West. U. Tel. Co. (C. C.) 23 Fed. 315; Primrose v. West. U. Tel. Co., 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; White v. West. U. Tel. Co. (C. C.) 14 Fed. 710. See, also, Pearsall v. West. U. Tel. Co., 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662; Leonard v. N. Y., etc., Electro Magnetic Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446.

<sup>89</sup> Providence-Washington Ins. Co. v. West. U. Tel. Co., 247 Ill. 84, 93 N. E. 134, 139 Am. St. Rep. 314, 30 L. R. A. (N. S.) 1170; Stewart-Morehead Co. v. Postal Tel. Cable Co., 131 Ga. 31, 61 S. E. 1045, 18 L. R. A. (N. S.) 692, 127 Am. St. Rep. 205; Coit v. West. U. Tel. Co., 130 Cal. 657, 63 Pac. 83, 53 L. R. A. 687, 80 Am. St. Rep. 153, where statute requires great care; Stone v. Postal Tel. Cable Co., 35 R. I. 498, 87 Atl. 319, 46 L. R. A. (N. S.) 180.

*Death messages.*—Cases holding only ordinary care required in death messages: West. U. Tel. Co. v. Duke, 108 Ark. 8, 156 S. W. 452; Barnes v. Postal Tel. Cable Co., 156 N. C. 150, 72 S. E. 78; Poulnot v. West. U. Tel. Co., 69 S. C. 545, 48 S. E. 622; West. U. Tel. Co. v. McDonald, 42 Tex. Civ. App. 229, 95 S. W. 691; Cumberland Tel. Co. v. Maxberry, 134 Ky. 642, 121 S. W. 447. But see West. U. Tel. Co. v. Hendricks, 29 Tex. Civ. App. 413, 68 S. W. 720; Balderston v. West. U. Tel. Co., 79 S. C. 160, 60 S. E. 435; Stuart v. West. U. Tel. Co., 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623; Kernodle v. West. U. Tel. Co., 141 N. C. 436, 54 S. E. 423, 8 Ann. Cas. 469.

<sup>90</sup> White v. West. U. Tel. Co. (C. C.) 14 Fed. 710; Bartlett v. West. U. Tel. Co., 62 Me. 209, 16 Am. Rep. 437, in which the court said: "To require a degree of care and skill commensurate with the importance of the trust imposed is in accordance with the principles of law applicable to all undertakings of whatever kind, whether professional, mechanical, or that of the common laborer. There is no reason why the business of sending messages by telegraph should be made an exception to the general rule. This requires skill as well as care. If the work is difficult, greater skill is required. It is often necessary to intrust to this mode of communication matters of great moment, and therefore the law requires great care. It is necessary to use instruments of somewhat delicate nature and accurate adjustment, and therefore they must be so made as to be reasonably sufficient for the purpose. The company, holding itself out to the public as ready and willing to transmit messages by this means, pledges to that public the use of instruments proper for the purpose, and that degree of skill and care adequate to accomplish the object proposed. In case of failure in any of these respects, the company would undoubtedly be liable for the damages resulting. This would not impose any liability for want of skill or knowledge not reasonably attainable in the present state of the art, nor for errors resulting from the peculiar and

be liable for errors due to climatic or other uncontrollable hindrances temporarily affecting the operation of their lines.<sup>91</sup> So also the fact that these companies must exercise the highest degree of care in the transmission of messages does not mean that they shall be transmitted *verbatim et literatim et punctuatim*, but if the messages are transmitted and delivered in substantially the same way as they were when delivered to the company for transmission, the company will have discharged its duty, and will not, therefore, be liable if there are only immaterial errors<sup>92</sup> made, and as a result of which the addressee is not misled or injured thereby.<sup>93</sup> The same degree of care is required over connecting lines as over the receiving company's lines.<sup>94</sup>

§ 286. **Liability under statutes—all mistakes.**—In some states there are statutes which provide that telegraph companies are liable for all mistakes and errors made in the transmission of mes-

unknown condition of the atmosphere, or any agency from whatever source which the degree of care spoken of is insufficient to guard against or avoid."

<sup>91</sup> *White v. West. U. Tel. Co.* (C. C.) 14 Fed. 710. The company will not be liable where the error was due to uncontrollable causes if it exercised due care. *Pinekney v. West. U. Tel. Co.*, 19 S. C. 71, 45 Am. Rep. 765; *West. U. Tel. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *West. U. Tel. Co. v. Brown* (Tex. Civ. App.) 75 S. W. 359.

<sup>92</sup> No better rule can be given than that of Judge Campbell, who says: "Can it be supposed that for changing my signature or address from Campbell to Camel, or Campel, or Cambelle, or Cowmel, according to the form of writing which is sometimes met with, in a message sent by me or to me, and promptly delivered, and accomplishing the purpose, and doing no harm, the penalty would be incurred? To so hold would impute to the legislature a spirit of injustice and cruelty that would seriously reflect on its attempt to legislate in this matter for the public interest." *West. U. Tel. Co. v. Clarke*, 71 Miss. 157, 14 South. 452, under a statute imposing a penalty for failure to "transmit correctly." The court further said: "If the message transmitted and delivered must be a reproduction *verbatim et literatim et punctuatim* of that written to be sent or the penalty denounced by the section may be recovered, the statute is needlessly severe. No interest requires such nicety, and it may be justly assumed that the legislature had in view not only 'reasonable time' for delivery, but reasonable conformity to the terms of the message so as to present it to the sendee in such time as to effect the purpose for which it is sent."

<sup>93</sup> *West. U. Tel. Co. v. Clarke*, 71 Miss. 157, 14 South. 452; *Newsome v. West. U. Tel. Co.*, 144 N. C. 178, 56 S. E. 863.

<sup>94</sup> *White v. West. U. Tel. Co.* (C. C.) 14 Fed. 710; *Smith v. West. U. Tel. Co.*, 84 Tex. 359, 19 S. W. 441, 31 Am. St. Rep. 59. Compare *Falvey v. Georgia R.*, 76 Ga. 597, 2 Am. St. Rep. 58; *I. C. R. Co. v. Frankenberg*, 54 Ill. 88, 5 Am. Rep. 92; *McCarthy v. Gulf, etc., R. Co.*, 79 Tex. 33, 15 S. W. 164, and notes to *Wells v. Thomas*, 72 Am. Dec. 230; *Lawrence v. Winona, etc., R. Co.*, 2 Am. Rep. 141; *Gray v. Jackson*, 12 Am. Rep. 40; *Hill v. Syracuse, etc., R. Co.*, 29 Am. Rep. 166; *Nashville, etc., R. Co. v. Sprayberry*, 35 Am. Rep. 708; *Hadd v. United States Express Co.*, 36 Am. Rep. 761; *Louisville, etc., R. Co. v. Weaver*, 42 Am. Rep. 664.

sages.<sup>95</sup> While regulations made in accordance with these statutes are held to be reasonable, it is claimed that they are not liable for such mistakes or errors which are caused by some act not within the control of the company.<sup>96</sup> They are only liable for the negligent acts of their servants and not for any other.<sup>97</sup> A statute providing that these companies shall transmit and deliver messages with "due diligence," and prescribing a penalty for failure to comply with the terms of the statute, relates to the time within which messages must be transmitted and delivered, and not to the accuracy and correctness in sending and transmitting them.<sup>98</sup>

§ 287. **Same continued—damages—actual—errors in transmission.**—There is a distinction to be drawn, as may be seen, between errors made in the transmission of a message and delays made in the delivery of same, wherein the penalty can only be inflicted on a failure to promptly deliver the message.<sup>99</sup> These statutory provisions have no effect whatever on errors made in the transmission; where such errors are made, the injured party is entitled to all actual damages arising thereby, irrespective of the question of punctuality in their delivery.<sup>100</sup> There must, however, be actual damages caused by the error in the transmission, otherwise a recovery could not be had.<sup>101</sup> Thus, if through a mistake in the transmission of a telegram the owner of property is induced to sell it for its then market value, he suffers no damage and cannot recover any, although, when the property subsequently advanced in value, he purchased a part thereof at the advanced rate;<sup>102</sup> and again, if

<sup>95</sup> *Kemp v. West. U. Tel. Co.*, 28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363.

<sup>96</sup> *West. U. Tel. Co. v. Rountree*, 92 Ga. 611, 44 Am. St. Rep. 93, 18 S. E. 979.

<sup>97</sup> See § 285.

<sup>98</sup> *West. U. Tel. Co. v. Rountree*, 92 Ga. 611, 18 S. E. 979, 44 Am. St. Rep. 93.

<sup>99</sup> See §§ 271, 288.

<sup>100</sup> *West. U. Tel. Co. v. Rountree*, 92 Ga. 611, 18 S. E. 979, 44 Am. St. Rep. 93.

<sup>101</sup> *Pepper v. Telegraph Co.*, 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699; *Pearsall v. West. U. Tel. Co.*, 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662; *West. U. Tel. Co. v. Stevenson*, 128 Pa. 442, 18 Atl. 441, 5 L. R. A. 515, 15 Am. St. Rep. 687; *West. U. Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; *West. U. Tel. Co. v. Edsall*, 74 Tex. 329, 12 S. W. 41, 15 Am. St. Rep. 835; *Alexander v. West. U. Tel. Co.*, 66 Miss. 161, 5 South. 397, 3 L. R. A. 71, 14 Am. St. Rep. 556; *Reed v. West. U. Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609; *West. U. Tel. Co. v. Rountree*, 92 Ga. 611, 18 S. E. 979, 44 Am. St. Rep. 93; *Shingleur v. West. U. Tel. Co.*, 72 Miss. 1030, 18 South. 425, 30 L. R. A. 444, 48 Am. St. Rep. 604; *West. U. Tel. Co. v. Beals*, 56 Neb. 415,

<sup>102</sup> *Id.*



a broker is directed by telegraph to sell cotton for the sender of the message on the latter's account, at a designated price, and the company makes a mistake in sending the telegram, whereby the sender contracts to sell for a less price, the latter is under no obligation to deliver the cotton, but, if he does so, constrained by a desire to maintain his business credit, or other reasons, he cannot recover from the telegraph company, for his payment of the loss is purely voluntary and gratuitous.<sup>103</sup>

§ 288. Duty to deliver—addressee—in general.—Subject to reasonable regulations as to delivery limits,<sup>104</sup> telegraph companies are bound to deliver all messages sufficiently addressed,<sup>105</sup> when this can be done by the exercise of reasonable diligence;<sup>106</sup> and in case of a wrongful or negligent failure to do so they will be liable for damages caused by such failure.<sup>107</sup> It is seldom these companies

76 N. W. 903, 71 Am. St. Rep. 682; West. U. Tel. Co. v. Flint River Lumber Co., 114 Ga. 576, 40 S. E. 815, 88 Am. St. Rep. 36; Hughes v. West. U. Tel. Co., 114 N. C. 70, 41 Am. St. Rep. 782, 19 S. E. 100.

<sup>103</sup> Shingleur v. West. U. Tel. Co., 72 Miss. 1030, 18 South. 425, 48 Am. St. Rep. 604, 30 L. R. A. 440.

<sup>104</sup> See § 302 et seq.

<sup>105</sup> West. U. Tel. Co. v. Gougar, 84 Ind. 176; West. U. Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728; Pope v. West. U. Tel. Co., 9 Ill. App. 283; West. U. Tel. Co. v. Lindley, 62 Ind. 371; State v. West. U. Tel. Co., 172 Ind. 20, 87 N. E. 641; West. U. Tel. Co. v. Johnsey, 49 Tex. Civ. App. 487, 109 S. W. 251; West. U. Tel. Co. v. Allen, 30 Okl. 229, 119 Pac. 981, 38 L. R. A. (N. S.) 348.

When a message in foreign language is accepted for delivery in a country using that language, the same must be delivered regardless whether the company's agent at the point of destination did or did not understand the language. West. U. Tel. Co. v. Oliearri (Tex. Civ. App.) 110 S. W. 930.

<sup>106</sup> Fowler v. West. U. Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211; West. U. Tel. Co. v. Elliott, 131 Ky. 340, 115 S. W. 228, 22 L. R. A. (N. S.) 761; Hinson v. Postal Tel. Cable Co., 132 N. C. 460, 43 S. E. 945; Hargrave v. West. U. Tel. Co. (Tex. Civ. App.) 60 S. W. 687; West. U. Tel. Co. v. Cox (Tex. Civ. App.) 74 S. W. 922; West. U. Tel. Co. v. Burgess (Tex. Civ. App.) 43 S. W. 1033; Ross v. West. U. Tel. Co., 81 Fed. 676, 26 C. C. A. 564; West. U. Tel. Co. v. McMullin, 98 Ark. 347, 135 S. W. 909; Barnes v. Tel. Cable Co., 156 N. C. 150, 72 S. E. 78. See Stone & Co. v. Postal Tel. Cable Co., 35 R. I. 498, 87 Atl. 319, 46 L. R. A. (N. S.) 180.

<sup>107</sup> West. U. Tel. Co. v. Krichbaum, 145 Ala. 409, 41 South. 16; Hender-shot v. West. U. Tel. Co., 106 Iowa, 529, 76 N. W. 828, 68 Am. St. Rep. 313; Arkansas, etc., R. Co. v. Stroude, 82 Ark. 117, 100 S. W. 760; Postal Tel. Cable Co. v. Pratt, 85 S. W. 225, 27 Ky. Law Rep. 430; Milliken v. West. U. Tel. Co., 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281; Edwards v. West. U. Tel. Co., 147 N. C. 126, 60 S. E. 900; Lyne v. West. U. Tel. Co., 123 N. C. 129, 31 S. E. 350; West. U. Tel. Co. v. Johnsey, 49 Tex. Civ. App. 487, 109 S. W. 251; West. U. Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 589, 10 Am. St. Rep. 772, 1 L. R. A. 728; West. U. Tel. Co. v. O'Fiel, 47 Tex. Civ. App. 40, 104 S. W. 406; West. U. Tel. Co. v. Craigie, 44 Tex. Civ. App. 214, 90 S. W. 681; West. U. Tel. Co. v. Cain (Tex. Civ. App.) 40 S. W. 624; West. U. Tel. Co. v. Birchfield, 15 Tex. Civ. App. 426, 30 S. W. 1002; Mc-

are resorted to for the purpose of transmitting news unless the same pertains to business of the greatest importance, and necessarily to be accomplished in the shortest possible time; since, if it were otherwise, the postal system, which is of much less expense and in which there is a greater reliance of secrecy, would be used as the means of accomplishing this purpose.<sup>108</sup> It is just as great a duty and is just as binding on a telegraph company to use due diligence in delivering a telegram to the addressee, or one in whose care it is directed, as that to be exercised in its transmission;<sup>109</sup> since a mere transmission from one station to another would avail nothing. It is part of the contract whereby the company has undertaken to transmit the messages, and therefore just as essential as that of the transmission itself;<sup>110</sup> since a failure of the company to comply with this part of the contract would bring about the same results, as even a complete failure to transmit the message.<sup>111</sup> To

Millan v. West. U. Tel. Co., 60 Fla. 131, 53 South. 329, 29 L. R. A. (N. S.) 891; Tel. Cable Co. v. Oil Co., 140 Ky. 506, 131 S. W. 277; West. U. Tel. Co. v. Olivarri, 104 Tex. 203, 135 S. W. 1158; West. U. Tel. Co. v. Williams (Tex. Civ. App.) 137 S. W. 148; Stone v. Postal Tel. Cable Co., 35 R. I. 498, 87 Atl. 319, 46 L. R. A. (N. S.) 180.

<sup>108</sup> West. U. Tel. Co. v. Adams, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844.

<sup>109</sup> West. U. Tel. Co. v. Moore, 12 Ind. App. 136, 39 N. E. 874, 54 Am. St. Rep. 515; Brown v. West. U. Tel. Co., 85 S. C. 495, 67 S. E. 146, 137 Am. St. Rep. 914, holding that the failure of the company to convey the information from the sender to the addressee, and not the wrongful act of an agent at any particular point prior to the delivery of the message to the addressee, constitutes the delict; a message is in transit not only while it is being sent over the wires, but during the time it is in the hands of the messenger for delivery, after it reaches the place where addressee resides, and there is no sound reason why the company should be liable when the agent in the state from which the message has been sent, or an agent along the line, is guilty of negligence, and yet not be liable for an act of negligence on the part of the messenger to whom the telegram is handed for delivery by the agent of the terminal office; that it would be against public policy to require the plaintiff to prove at what point on the defendant's line the failure occurred, or to permit the defendant to show that the message was delayed at some specific point on its line, and thus make the plaintiff's right of recovery dependent upon the laws of that place. See § 302. But see Stone & Co. v. Postal Tel. Cable Co., 35 R. I. 498, 87 Atl. 319, 4 L. R. A. (N. S.) 180, holding that the telegraph company is not bound to exercise the highest degree of diligence and promptness in delivering a message, or to use the greatest care as to the place of delivery. See, also, West. U. Tel. Co. v. Adams, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844.

<sup>110</sup> West. U. Tel. Co. v. Gougar, 84 Ind. 176; West. U. Tel. Co. v. Adams, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844.

*Right of sender to recall message.*—The negligent failure of the company to carry out its agreement to stop delivery of the message may expose it to liability to damages. Bertuch v. Tel., etc., Co., 79 Misc. Rep. 10, 139 N. Y. Supp. 289.

<sup>111</sup> Hendricks v. West. U. Tel. Co., 126 N. C. 304, 78 Am. St. Rep. 658, 35

perform this part of their duty, they must keep a sufficient number of messenger boys at their stations to make such deliveries, and they cannot escape this duty by showing that the business of the office at the receiving station was not sufficient to justify the employment of an additional agent to make delivery.<sup>112</sup>

§ 289. **Excuse for nondelivery.**—There are few instances where telegraph companies are excused for not making a prompt delivery, since it is presumed that, when they accept a message for transmission, it is within their power to carry out the obligations of their contracts to promptly deliver. There may, however, be some instances where they are excusable for not making a prompt or even for making any delivery at all.<sup>113</sup> For instance, where the address of the sendee is not sufficiently given in that his name is not correctly written or his street number is improperly given,<sup>114</sup> or where the charges for transmission are not given or tendered either by the sender or sendee,<sup>115</sup> or when the message is transmitted at a time, as at night, when the receiving office has no messenger boy, and it is not the usual custom to have one at that time; in this latter case, however, the message should be delivered early the next morning.<sup>116</sup> Where the sendee is quarantined, on account of some contagious disease, or where he cannot be found<sup>117</sup> after diligent in-

S. E. 543; *Brown v. West. U. Tel. Co.*, 85 S. C. 495, 67 S. E. 146, 137 Am. St. Rep. 914.

<sup>112</sup> *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; *West. U. Tel. Co. v. Parsons*, 72 S. W. 800, 24 Ky. Law Rep. 2008; *Brown v. West. U. Tel. Co.*, 85 S. C. 495, 67 S. E. 146, 137 Am. St. Rep. 914. Compare *Belim v. West. U. Tel. Co.*, 8 Biss. 131, Fed. Cas. No. 1,234.

Where delivery was guaranteed, error to instruct the jury that "it was not due diligence to entrust a guaranteed message to a stranger to carry on foot a distance of two and one-half miles." *West. U. Tel. Co. v. Daniels*, 15 Ky. Law Rep. 813.

<sup>113</sup> *Prevented by circumstances over which the company had no control.*—*Fowler v. West. U. Tel. Co.*, 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211.

*Message destroyed by burning of telegraph office.*—*West. U. Tel. Co. v. Stracner* (Tex. Civ. App.) 152 S. W. 845.

<sup>114</sup> See § 307.

<sup>115</sup> See § 279.

<sup>116</sup> See chapter XIV.

<sup>117</sup> *West. U. Tel. Co. v. Cross*, 116 Ky. 5, 74 S. W. 1098, 76 S. W. 162, 25 Ky. Law Rep. 268, 646; *West. U. Tel. Co. v. Elliott*, 131 Ky. 340, 115 S. W. 228, 22 L. R. A. (N. S.) 761; *Hinson v. Postal Tel. Cable Co.*, 132 N. C. 460, 43 S. E. 945; *West. U. Tel. Co. v. Cox* (Tex. Civ. App.) 74 S. W. 922. Inquiry at all hotels, one boarding house, picture store and office, and office of another company sufficient where addressee was a traveling picture man. *Hargrave v. West. U. Tel. Co.* (Tex. Civ. App.) 60 S. W. 687; *West. U. Tel. Co. v. Burgess* (Tex. Civ. App.) 43 S. W. 1033; *West. U. Tel. Co. v. Wright*, 169 Ala. 104, 53 South. 95.



quiry for his whereabouts,<sup>118</sup> or where he lives unreasonably far beyond the free delivery limits and the charges for such delivery have not been prepaid,<sup>119</sup> the company would be excused for a non-delivery.

§ 290. **Same continued—not excused for.**—A telegraph company cannot be excused for liabilities caused by a delay in delivering a message by proof that it was not the custom of the physician, the sendee, to make professional calls at a distance without prepayment or guaranteed payment of his charges;<sup>120</sup> or that the message relates to a sale of “futures,” unless it is made a crime or tort to speculate in “futures,” or would subject the company to indictment or civil action to receive and transmit a message in relation thereto;<sup>121</sup> or that the contract for its transmission and delivery was entered into on Sunday, if the emergency to which the telegram related was the death and burial of the father of the person to whom it was addressed.<sup>122</sup> A stipulation on the company’s blank, requiring messages to be repeated, is no defense to an action brought to recover damages for a delay, or for failure in delivering a message, where the same has not been repeated;<sup>123</sup> nor does a regulation requiring the prepayment of special delivery charges before transmission for a telegram to be delivered beyond free delivery limits excuse delay in delivery or nondelivery of a telegram, unless the sender knows or is informed that the residence of the sendee is beyond the free delivery limits, and of the amount of the special delivery charges.<sup>124</sup> A telegraph company will not be excused for nondelivery on the ground that the sender did not inform the operator of its importance, when they fail to show that, if the operator had received such information, he would have changed the method

<sup>118</sup> *Miller v. West. U. Tel. Co.*, 159 N. C. 501, 75 S. E. 795; *Hendershot v. West. U. Tel. Co.*, 106 Iowa, 529, 76 N. W. 828, 68 Am. St. Rep. 313; *West. U. Tel. Co. v. Krichbaum*, 145 Ala. 409, 41 South. 16; *Lyne v. West. U. Tel. Co.*, 123 N. C. 129, 31 S. E. 350; *West. U. Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772; *West. U. Tel. Co. v. O-Fiel*, 47 Tex. Civ. App. 40, 104 S. W. 406; *West. U. Tel. Co. v. James*, 31 Tex. Civ. App. 503, 73 South. 79; *West. U. Tel. Co. v. Waller*, 37 Tex. Civ. App. 515, 84 S. W. 695.

<sup>119</sup> See § 302 et seq.

<sup>120</sup> *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148.

<sup>121</sup> *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 13 S. E. 562, 14 L. R. A. 95, 27 Am. St. Rep. 259; *Smith v. West. U. Tel. Co.*, 84 Ky. 664, 2 S. W. 483.

<sup>122</sup> *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 30 Am. St. Rep. 23, 9 South. 414. See, also, note 65, ante.

<sup>123</sup> *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 30 Am. St. Rep. 23, 9 South. 414.

<sup>124</sup> *West. U. Tel. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843.

of the transmission, or the time in which it would have been sent, the agency employed, the price demanded therefor, or the skill used in the transmission;<sup>125</sup> nor will it be excused on the ground that the business of the office where it was received was not sufficient to justify the employment of a messenger.<sup>126</sup> They cannot be excused for a delay by contending that the sender should have sent the message sooner, instead of waiting until the last moment,<sup>127</sup> nor by setting up the fact that the message as offered was not in writing.<sup>128</sup>

§ 291. **Duty to inform sender of nondelivery.**—As a general rule, it is not the duty of the telegraph company to inform the sender that the telegram cannot be delivered, or the sendee cannot be found,<sup>129</sup> but when it is convenient or practical for the company to impart such information, especially where the message shows on its face its importance, it should do so; otherwise the company will be liable for all damages directly arising therefrom.<sup>130</sup> Thus, where a mother telegraphs to a friend to meet the remains of her child at a certain place, and she has been assured of the fact that

<sup>125</sup> *Hendricks v. West. U. Tel. Co.*, 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658; *West. U. Tel. Co. v. Hyer Bros.*, 16 Am. & Eng. Corp. Cas. 232.

<sup>126</sup> *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 9 South. 419.

<sup>127</sup> *Pope v. West. U. Tel. Co.*, 14 Ill. App. 531; *West. U. Tel. Co. v. Bruner (Tex.)* 19 S. W. 149.

<sup>128</sup> *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23.

<sup>129</sup> *West. U. Tel. Co. v. Davis (Tex. Civ. App.)* 51 S. W. 258.

<sup>130</sup> *Cogdell v. West. U. Tel. Co.*, 135 N. C. 431, 47 S. E. 490; *Hendricks v. West. U. Tel. Co.*, 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658, the reason is to enable the sender to remedy the defect, or to resort to any or further or other means of communication with the addressee; *West. U. Tel. Co. v. Garrett*, 46 Tex. Civ. App. 430, 102 S. W. 456; *Johnson v. West. U. Tel. Co.*, 75 S. C. 54, 54 S. E. 826, where operator agrees to notify the sender in case a message is not delivered within a certain time, negligent not to do so; otherwise if this in no way caused or contributed to the injury complained of; *Sturtevant v. Tel. Co.*, 109 Me. 479, 84 Atl. 998; *Ellison v. West. U. Tel. Co.*, 163 N. C. 5, 79 S. E. 277; *Dempsey v. West. U. Tel. Co.*, 92 S. C. 577, 75 S. E. 977, notice should be sent to the place indicated in the telegram when different from the place of sending; *West. U. Tel. Co. v. Erwin (Tex. Civ. App.)* 147 S. W. 607. See *West. U. Tel. Co. v. Allen*, 30 Okl. 229, 119 Pac. 981, 38 L. R. A. (N. S.) 348; *Fleischner v. Pac. Postal Tel. Cable Co. (C. C.)* 55 Fed. 738, affirmed 66 Fed. 899, 14 C. C. A. 166; *Swan v. West. U. Tel. Co.*, 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153, certiorari denied 195 U. S. 628, 25 Sup. Ct. 787, 49 L. Ed. 351; *Box v. Postal Tel. Cable Co.*, 165 Fed. 138, 91 C. C. A. 172, 28 L. R. A. (N. S.) 566; *West. U. Tel. Co. v. Bierhaus*, 12 Ind. App. 17, 39 N. E. 881; *Id.*, 8 Ind. App. 563, 36 N. E. 161; *West. U. Tel. Co. v. Moore*, 12 Ind. App. 136, 39 N. E. 874, 54 Am. St. Rep. 515; *Brashears v. West. U. Tel. Co.*, 45 Mo. App. 433; *Sherrill v. West. U. Tel. Co.*, 117 N. C. 352, 23 S. E. 277; *Id.*, 116 N. C. 655, 21 S. E. 429; *Bright v. West. U. Tel. Co.*, 132 N. C. 317, 43 S. E. 841; *Hinson v. Postal Tel. Cable Co.*, 132 N. C. 460, 43 S. E. 945; *Bryan v. West. U. Tel. Co.*, 133 N. C. 603, 45 S. E. 938; *Cogdell v. West. U. Tel. Co.*, 135 N. C. 431, 47 S. E. 490; *Hood v. West. U. Tel. Co.*,

the same was delivered, but in fact it had not been, and the company could have easily informed her of the nondelivery, it will be liable for all damages caused by her accompanying the remains to this place by railroad without giving her an opportunity of making

135 N. C. 622, 47 S. E. 607; *Campbell v. West. U. Tel. Co.*, 74 S. C. 300, 54 S. E. 571; *Bolton v. West. U. Tel. Co.*, 76 S. C. 529, 57 S. E. 543; *Lyles v. West. U. Tel. Co.*, 77 S. C. 174, 57 S. E. 725, 12 L. R. A. (N. S.) 534; *West. U. Tel. Co. v. Robinson*, 97 Tenn. 638, 37 S. W. 545, 34 L. R. A. 431; *Anderson v. West. U. Tel. Co.*, 84 Tex. 17, 19 S. W. 285; *West. U. Tel. Co. v. Sweetman*, 19 Tex. Civ. App. 435, 47 S. W. 676; *West. U. Tel. Co. v. Davis*, 24 Tex. Civ. App. 427, 59 S. W. 46; *West. U. Tel. Co. v. Birge-Forbes Co.*, 29 Tex. Civ. App. 526, 69 S. W. 181; *West. U. Tel. Co. v. Sorsby*, 29 Tex. Civ. App. 345, 69 S. W. 122; *Faubion v. West. U. Tel. Co.*, 36 Tex. Civ. App. 98, 81 S. W. 56; *West. U. Tel. Co. v. Bruner (Tex.)* 19 S. W. 149; *Evans v. West. U. Tel. Co. (Tex. Civ. App.)* 56 S. W. 609; *West. U. Tel. Co. v. McDonald*, 42 Tex. Civ. App. 229, 95 S. W. 691; *West. U. Tel. Co. v. Ayres*, 47 Tex. Civ. App. 557, 105 S. W. 1165.

Some cases hold that the sender must be promptly notified of delay in the transmission or delivery of a message. *Swan v. West. U. Tel. Co.*, *supra*; *Hendricks v. West. U. Tel. Co.*, *supra*; *Green v. West. U. Tel. Co.*, *post*; *Carter v. West. U. Tel. Co.*, *post*.

*Duty to wire back.*—It has been held that if due search has been made for the addressee and he cannot be found, it is still required of the company to wire back for a better address; otherwise it would be evidence of negligence. *Hendricks v. West. U. Tel. Co.*, 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658; *Cogdell v. West. U. Tel. Co.*, 135 N. C. 431, 47 S. E. 490; *Woods v. West. U. Tel. Co.*, 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581; *Postal Tel. Cable Co. v. Nichols*, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A. (N. S.) 870, 14 Ann. Cas. 369; *Green v. West. U. Tel. Co.*, 136 N. C. 506, 49 S. E. 171, 1 Ann. Cas. 358; *Hall v. West. U. Tel. Co.*, 139 N. C. 369, 52 S. E. 50. But see *Cumberland Tel.*, etc., *Co. v. Atherton*, 28 Ky. Law Rep. 1100, 91 S. W. 257; *Johnson v. West. U. Tel. Co.*, 75 S. C. 54, 54 S. E. 826, holding that, where it does not appear that the sender of a telegraph message could have used any other means of communication in time to have prevented the addressee from taking an unnecessary journey, the latter cannot recover damages therefor, based on the telegraph company's failure to notify the sender, as its agent had agreed to do within two hours, if the message could not be delivered that night; *Poteet v. West. U. Tel. Co.*, 74 S. C. 491, 55 S. E. 113, holding that there can be no recovery for the failure to notify the sender of the nondelivery of a message because of the addressee's temporary absence from his residence, requesting the latter to come on the first train, as his child was dead, where notice, if given, would not have enabled the sender, by use of other means of communication, to have given the addressee notice in time for him to have come that day. See, also, *Carter v. West. U. Tel. Co.*, 141 N. C. 374, 54 S. E. 274.

It has been held that the duty of the telegraph company to notify the sender of its inability to send a message is not an absolute one; that, at most, it can be only a question of whether, under all the circumstances, a reasonably prudent person would pursue such a course, and that the necessity or sufficiency of notice are questions for the jury. *Faubion v. West. U. Tel. Co.*, 36 Tex. Civ. App. 98, 81 S. W. 56; *West. U. Tel. Co. v. Sorsby*, 29 Tex. Civ. App. 345, 69 S. W. 122; *West. U. Tel. Co. v. Davis (Tex. Civ. App.)* 51 S. W. 258.

Failure to notify the sender of the nondelivery of a message will not war-



other arrangements.<sup>131</sup> It is not negligence *per se* to fail to disclose such information to the sender, but it is an evidence of negligence.<sup>132</sup>

§ 292. **To whom made—delivery.**—After a telegraph company has accepted and transmitted a message, it is under *prima facie* obligations to deliver the message to the sendee in person,<sup>133</sup> unless other arrangements have been made, and it will be liable for any injury caused by such breach of duty. Arrangements may be made between the company and the party to whom the messages are sent by which a delivery to some third party would relieve the former of further duty.<sup>134</sup> The sender could not object to such arrangements; for a delivery of a message which would be good in law as between the addressee and the company is good as between the sender and the company.<sup>135</sup> A party may instruct the company to

rant a recovery of damages which are speculative and not proximately related to such failure. *Cahn v. West. U. Tel. Co.*, 48 Fed. 810, 1 C. C. A. 107; *Kagy v. West. U. Tel. Co.*, 37 Ind. App. 73, 76 N. E. 792, 117 Am. St. Rep. 278; *Cumberland Tel., etc., Co. v. Atherton*, 122 Ky. 154, 91 S. W. 257; *Barnes v. West. U. Tel. Co.*, 24 Nev. 125, 50 Pac. 438, 77 Am. St. Rep. 791; *Poteet v. West. U. Tel. Co.*, 74 S. C. 491, 55 S. E. 113; *Stephenson v. Montreal Tel. Co.*, 16 U. C. Q. B. 530.

<sup>131</sup> *Laudie v. West. U. Tel. Co.*, 126 N. C. 431, 35 S. E. 810, 78 Am. St. Rep. 668.

<sup>132</sup> *Laudie v. West. U. Tel. Co.*, 126 N. C. 431, 35 S. E. 810, 78 Am. St. Rep. 668; *Swan v. West. U. Tel. Co.*, 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153; *Cogdell v. West. U. Tel. Co.*, 135 N. C. 431, 47 S. E. 490; *Carter v. West. U. Tel. Co.*, 141 N. C. 374, 54 S. E. 274; *Woods v. West. U. Tel. Co.*, 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581; *West. U. Tel. Co. v. Hargrove*, 14 Tex. Civ. App. 79, 36 S. W. 1077.

<sup>133</sup> *Pope v. West. U. Tel. Co.*, 9 Ill. App. 283; *Glover v. West. U. Tel. Co.*, 78 S. C. 502, 59 S. E. 526; *West. U. Tel. Co. v. Newhouse*, 6 Ind. App. 422, 33 N. E. 800; *West. U. Tel. Co. v. Mitchell*, 91 Tex. 454, 44 S. W. 274, 66 Am. St. Rep. 906, 40 L. R. A. 209; *West. U. Tel. Co. v. Houghton*, 82 Tex. 561, 17 S. W. 846, 27 Am. St. Rep. 918, 15 L. R. A. 129; *West. U. Tel. Co. v. Bruner (Tex.)* 19 S. W. 149; *West. U. Tel. Co. v. Franklin*, 129 Tenn. 656, 168 S. W. 151.

*Instances of improper delivery.*—To the addressee's minor son while passing the company's office, *Mott v. West. U. Tel. Co.*, 142 N. C. 532, 55 S. E. 363; to a neighbor of the addressee delivering it to the addressee, *West. U. Tel. Co. v. Belew*, 32 Tex. Civ. App. 338, 74 S. W. 799; telegram addressed to a certain person at the freightyards of the railroad company, the company not justified in leaving it with the yardmaster, who does not know the addressee, *West. U. Tel. Co. v. Newhouse*, 6 Ind. App. 422, 33 N. E. 800; to business partner of private or social telegram, *Glover v. West. U. Tel. Co.*, 78 S. C. 502, 59 S. E. 526; to the captain of a steamboat on which the addressee is a passenger, *Davies v. West. Steamboat Co.*, 94 Me. 379, 47 Atl. 896, 53 L. R. A. 239.

<sup>134</sup> *Thompson v. West. U. Tel. Co.*, 10 Tex. Civ. App. 120, 30 S. W. 250; *West. U. Tel. Co. v. Pierce*, 95 Tex. 578, 68 S. W. 771, reversing (Tex. Civ. App.) 67 S. W. 920, and distinguishing *West. U. Tel. Co. v. Young*, 77 Tex. 245, 13 S. W. 985, 19 Am. St. Rep. 751; *West. U. Tel. Co. v. Evans*, 5 Tex. Civ. App. 55, 23 S. W. 998; *West. U. Tel. Co. v. Barefoot*, 97 Tex. 159, 76 S. W. 914, 64 L. R. A. 491; *West. U. Tel. Co. v. Franklin*, 129 Tenn. 656, 168 S. W. 157.

<sup>135</sup> *Norman v. West. U. Tel. Co.*, 31 Wash. 577, 72 Pac. 474.

leave all messages at his place of business, and a delivery to such place would be a sufficient delivery;<sup>136</sup> or the addressee may make the company's messenger his agent, so that he could not hold the company for the messenger's mistakes.<sup>137</sup> But in order to relieve the company of any responsibility, the arrangements to leave the message with some third party must be made by special agreements between the company and the party to whom the messages are addressed; and generally the same must be in writing, as a mere verbal instruction to the company's messenger at some place other than at its office would not be sufficient.<sup>138</sup>

§ 293. **Delivery to wife.**—Is a delivery of a message to a wife sufficient? In answering this question, it is necessary to consider the circumstances in each particular case. Generally speaking, a delivery to a wife is not *per se* sufficient as matter of law.<sup>139</sup> The wife, as such, is not in law the general agent of her husband.<sup>140</sup> If the husband should be absent from home, the wife may be the proper party to whom the message should be delivered,<sup>141</sup> for she is the most likely of all persons in the world to know of her husband's whereabouts, and thus be enabled to send the message to him immediately.<sup>142</sup> And the husband, in case of his absence from home, may be estopped from denying the rights of his wife in accepting a message for him. Thus, if she has been at the head of his business, about which the message concerns, or if it has been the custom for the messages to be delivered to her in his absence, the company, under such circumstances, would be justified in delivering the message to her: but even then, if the message has importance on its face, the company would not be relieved from its duty to deliver to the addressee until after having made diligent search and inquiry for him. The reason of this is that the business about

<sup>136</sup> West. U. Tel. Co. v. Woods, 56 Kan. 737, 44 Pac. 989.

<sup>137</sup> Norman v. West. U. Tel. Co., 31 Wash. 577, 72 Pac. 474.

<sup>138</sup> Given v. West. U. Tel. Co. (C. C.) 24 Fed. 119. Not the duty to deliver message to one not authorized to accept, where the addressee is absent. West. U. Tel. Co. v. Moseley, 28 Tex. Civ. App. 562, 67 S. W. 1059; West. U. Tel. Co. v. Mitchell, 91 Tex. 454, 44 S. W. 274, 66 Am. St. Rep. 906, 40 L. R. A. 209; West. U. Tel. Co. v. Redinger (Tex. Civ. App.) 63 S. W. 156.

<sup>139</sup> West. U. Tel. Co. v. Mitchell, 91 Tex. 454, 44 S. W. 274, 66 Am. St. Rep. 906, 40 L. R. A. 209; West. U. Tel. Co. v. Moseley, 28 Tex. Civ. App. 562, 67 S. W. 1059.

<sup>140</sup> West. U. Tel. Co. v. Mitchell, 91 Tex. 454, 44 S. W. 274, 66 Am. St. Rep. 906, 40 L. R. A. 209.

<sup>141</sup> *Relating to family matters.*—West. U. Tel. Co. v. Hendricks, 29 Tex. Civ. App. 413, 68 S. W. 720.

<sup>142</sup> West. U. Tel. Co. v. Clark, 14 Tex. Civ. App. 563, 38 S. W. 255; West. U. Tel. Co. v. Woods, 56 Kan. 737, 44 Pac. 989; Given v. West. U. Tel. Co. (C. C.) 24 Fed. 119.

which the message pertains may be different from that over which the wife may have control, and about which she may have any knowledge. While it may be likely that the wife would know of her husband's whereabouts, in a general way, when absent from his home town, yet it is not possible that she has been informed of all of his business affairs. So the contents of a message may be concerning business of great importance to him and on which he would act immediately, but if delivered to his wife, she might not, for the above reason, notify him immediately of the contents, whereby he would be injured by her negligence.<sup>143</sup> It is, therefore, better to impose the duty upon the telegraph company to deliver messages to the addressee in person, especially where it shows importance on its face, or when it is about business of which the wife has no knowledge; and this duty does not cease until the company has made diligent inquiries for the addressee.<sup>144</sup>

§ 294. **Delivery to hotel clerk—not sufficient.**—It has been held that when a telegraph company has delivered, to a clerk of a hotel, a message addressed to one of the guests or boarders in his absence from his place of business, and the same is receipted by the clerk, that the company has fulfilled its duties.<sup>145</sup> The ground on which this reason was based was that it was one of the implied duties of a hotel clerk to receive and accept all messages addressed to their guests or boarders in their absence.<sup>146</sup> But there is a later opinion—and a better one we think—which holds to the contrary. In this case the court, said: "The question presented is whether or not the mere relation of hotelkeeper and lodger and boarder creates, in law, an authority in the former or his clerk to receive telegrams addressed to the latter. It must be answered in the negative, since there is no evidence stated from which it might be inferred as a fact that Cobb had constituted the clerk of the hotel his agent or servant for such purposes; there is nothing to be considered but the fact that he boarded and lodged at the hotel. If such an authority arose from that fact alone, it could only be because the performance of such services by the keeper of the hotel was among the duties imposed on him by law toward those so boarding with him. Should it be assumed that the full relation of innkeeper and guest existed (which does not appear), and that all of the duties arising from it rested on the keeper of this hotel, we know of no authority that would include among them that of receiving and assuming the re-

<sup>143</sup> *Given v. West. U. Tel. Co. (C. C.) 24 Fed. 119.*

<sup>144</sup> See § 292.

<sup>145</sup> *West. U. Tel. Co. v. Trissal, 98 Ind. 566.*

<sup>146</sup> *Id.*



sponsibility of safely delivering telegrams. We can see no reason why such a duty would exist, if not voluntarily assumed, any more than that of receiving other notices or transacting other business for the boarder.<sup>147</sup> Of course if it has been the custom to deliver all messages to a hotel clerk and a special arrangement to that effect has been made between the latter and guest or boarder, then a delivery to the clerk will be sufficient.<sup>148</sup>

**§ 295. Where two parties have same name—delivery to one.**—It may occasionally happen that there are two parties at the place the message is sent having the same name as that to which the message is addressed. Under such circumstances, has the company performed its duty when it has delivered the message to one of these parties? The answer to this question rests wholly and entirely upon the fact as to whether or not the company has any knowledge whatever, derived from any source, of the real party addressed. Thus, if the company has been conducting a communication prior thereto for one of these parties, or if the telegram is in reference to the business, occupation or standing of one of these parties, or if one of these parties to whom the message may be delivered ascertains the fact after reading it that he is not the real addressee and informs the messenger or operator of this fact, or if there is any other means by which the company may be enlightened as to who the real addressee is, it will not be relieved from liability until the message shall have been delivered to him, or good reasons shown for not doing so.<sup>149</sup> If, on the other hand, the company has no means of ascertaining which of the two parties is the real addressee, a delivery to one is sufficient.

**§ 296. In care of another.**—When a message is addressed to one party in care of another, the company has performed its duty when it delivers the message to the party in whose care it is directed. The telegraph company contracts to deliver the message to the party in whose care it is directed and not to the addressee; and when it has performed this duty, its liability ceases.<sup>150</sup> Such delivery is sufficient although no effort has been made to find the ad-

<sup>147</sup> West. U. Tel. Co. v. Trissal, 98 Ind. 506.

<sup>148</sup> See § 292.

<sup>149</sup> Sherrill v. West. U. Tel. Co., 116 N. C. 654, 21 S. E. 400. Where one message is sent to two persons at the same address, the company may be liable for damage caused by sending separate messages to each addressee. Tel. Co. v. Bank, 7 Ala. App. 637, 62 South. 250.

<sup>150</sup> See West. U. Tel. Co. v. Newhouse, 6 Ind. App. 422, 33 S. E. 800; West. U. Tel. Co. v. Rowell, 153 Ala. 295, 45 South. 73; Hinson v. Postal Tel. Cable Co., 132 N. C. 460, 43 S. E. 945; Lefler v. West. U. Tel. Co., 131 N. C. 355, 42 S. E. 819, 59 L. R. A. 477; Sweet v. West. U. Tel. Co., 139 Mich. 322, 102 N. W.

addressee.<sup>151</sup> And when the address is in care of a railroad company at a certain place, a delivery to its agent there is sufficient.<sup>152</sup> It has further been held that a delivery to the party in whose care it is sent is sufficient although he refuses to accept the message;<sup>153</sup> but we think a better holding is that, when this party refuses to accept the message and the company knows of the real addressee's whereabouts, it should make reasonable efforts to deliver the message to him, especially when the message shows importance on its face.<sup>154</sup> If the person in whose care the message is sent cannot be found, it is the duty of the company to make diligent search for the party addressed;<sup>155</sup> in order to entirely relieve the company it would be a good plan for the sender to be notified of this fact; and yet it is not a necessary duty to do this, unless the same is practicable.<sup>156</sup> An agreement may be made between either the sender or addressee and the company's operator to deliver the message to a certain person in a certain manner, and, when the company has

850, 5 Ann. Cas. 730; West. U. Tel. Co. v. McCaul, 115 Tenn. 99, 90 S. W. 856; West. U. Tel. Co. v. Young, 77 Tex. 245, 13 S. W. 985, 19 Am. St. Rep. 751; West. U. Tel. Co. v. Mitchell, 91 Tex. 454, 44 S. W. 274, 66 Am. St. Rep. 906, 40 L. R. A. 209; West. U. Tel. Co. v. Shaw, 40 Tex. Civ. App. 277, 90 S. W. 58; West. U. Tel. Co. v. Terrell, 10 Tex. Civ. App. 60, 30 S. W. 70; West. U. Tel. Co. v. Elliott, 7 Tex. Civ. App. 482, 27 S. W. 219. See West. U. Tel. Co. v. Oakley (Tex. Civ. App.) 181 S. W. 507, delivery to either of two parties to either sufficient. But see West. U. Tel. Co. v. Schoonmaker (Tex.) 181 S. W. 263, where company negligently changed name of addressee.

<sup>151</sup> West. U. Tel. Co. v. Terrell, 10 Tex. Civ. App. 60, 30 S. W. 70.

<sup>152</sup> Lefier v. West. U. Tel. Co., 131 N. C. 355, 42 S. E. 819, 59 L. R. A. 477; West. U. Tel. Co. v. Shaw, 40 Tex. Civ. App. 277, 90 S. W. 58. See, also, Hendricks v. West. U. Tel. Co., 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658. See § 314. See, also, West. U. Tel. Co. v. Smith, 164 Ky. 270, 175 S. W. 375.

<sup>153</sup> West. U. Tel. Co. v. Thompson (Tex. Civ. App.) 31 S. W. 318. But ordinarily where a person in whose care a telegram is addressed refuses to receive the same, the telegraph company must make a reasonable effort to send it to the sendee, and, failing in that, should wire back for a better address. See West. U. Tel. Co. v. Smith, 164 Ky. 270, 175 S. W. 375.

<sup>154</sup> Hinson v. Postal Tel. Cable Co., 132 N. C. 460, 43 S. E. 945. Contra, West. U. Tel. Co. v. Young, 77 Tex. 245, 13 S. W. 985, 19 Am. St. Rep. 751.

<sup>155</sup> West. U. Tel. Co. v. Houghton, 82 Tex. 561, 17 S. W. 846, 15 L. R. A. 129, note, 27 Am. St. Rep. 918; West. U. Tel. Co. v. Jackson, 19 Tex. Civ. App. 273, 46 S. W. 279; West. U. Tel. Co. v. Barefoot, 97 Tex. 159, 76 S. W. 914, 64 L. R. A. 491; See, also, West. U. Tel. Co. v. Mitchell, 91 Tex. 454, 44 S. W. 274, 40 L. R. A. 209, 66 Am. St. Rep. 906; West. U. Tel. Co. v. De Jarles, 8 Tex. Civ. App. 109, 27 S. W. 792; West. U. Tel. Co. v. Houghton, 82 Tex. 561, 17 S. W. 846, 27 Am. St. Rep. 918, 15 L. R. A. 129; West. U. Tel. Co. v. Waller, 37 Tex. Civ. App. 515, 84 S. W. 695, message addressed "care some hotel," duty not discharged by inquiring at the various hotels in the place, if, by ordinary care, the addressee could be found elsewhere; Lyne v. West. U. Tel. C., 123 N. C. 129, 31 S. E. 350, question for jury. See West. U. Tel. Co. v. Elliot, 130 Ky. 340, 115 S. W. 228, 22 L. R. A. (N. S.) 761.

<sup>156</sup> See § 291.

complied with this agreement, it will be relieved from further responsibility.<sup>157</sup> But whatever arrangements this third party may have made with the company with respect to the message addressed to him will not be binding with respect to the messages addressed in his care.<sup>158</sup> Thus, if there is an arrangement made between the company and the third party whereby all messages may be delivered to him by telephone, this does not mean that messages sent in his care may be delivered in the same manner,<sup>159</sup> but in such cases it is the duty of the company to deliver to him in person<sup>160</sup> a written copy of the telegram.<sup>161</sup> The reason of this rule is very clear. When a message is addressed to this party and is delivered to him over a telephone or by other similar means, by an agreement to that effect, it has reached its destination, and he is in a position to understand its contents and may act on it as he may see fit; but in the other instance, where he is the party in whose care it is addressed, he is not a principal and may not be in a position to comprehend its meaning nor understand it sufficiently to enable him to redeliver it to the addressee correctly and promptly. He should have a written copy delivered to him by the company in order that he may deliver to the real addressee the same identical message received by him.<sup>162</sup>

**§ 297. To authorized agent.**—A delivery will be sufficient if it is made to a clerk of a hotel of which the addressee is a guest or boarder;<sup>163</sup> or to the wife of the addressee;<sup>164</sup> or a member of a firm or corporation;<sup>165</sup> or to any other party who is authorized to act as agent in receiving messages. But, in order for the company

<sup>157</sup> *Thompson v. West. U. Tel. Co.*, 10 Tex. Civ. App. 120, 30 S. W. 250; *West. U. Tel. Co. v. Barefoot*, 97 Tex. 159, 76 S. W. 914, 64 L. R. A. 491.

<sup>158</sup> *Norman v. West. U. Tel. Co.*, 31 Wash. 577, 72 Pac. 474.

<sup>159</sup> *West. U. Tel. Co. v. Pearce*, 95 Tex. 578, 68 S. W. 771, reversing (Tex. Civ. App.) 67 S. W. 920.

<sup>160</sup> *West. U. Tel. Co. v. McCaul*, 115 Tenn. 99, 90 S. W. 856; *Thompson v. West. U. Tel. Co.*, 10 Tex. Civ. App. 120, 30 S. W. 250; *West. U. Tel. Co. v. Hendricks*, 29 Tex. Civ. App. 413, 68 S. W. 720; *West. U. Tel. Co. v. McFrancis* (Tex. Civ. App.) 149 S. W. 574. Not proper to deliver message to a business associate, *West. U. Tel. Co. v. McCaul*, 115 Tenn. 99, 90 S. W. 856; or to his wife, *Thompson v. West. U. Tel. Co.*, 10 Tex. Civ. App. 120, 30 S. W. 250; or to an agent designated to receive messages addressed to him personally, *West. U. Tel. Co. v. Pearce*, 95 Tex. 578, 68 S. W. 771, reversing (Tex. Civ. App.) 67 S. W. 920; if both parties are absent, should be delivered at the residence of the addressee, *West. U. Tel. Co. v. Hendricks*, 26 Tex. Civ. App. 366, 66 S. W. 341.

<sup>161</sup> *West. U. Tel. Co. v. Pearce*, 95 Tex. 578, 68 S. W. 771, reversing (Tex. Civ. App.) 67 S. W. 920.

<sup>162</sup> *West. U. Tel. Co. v. McCaul*, 115 Tenn. 99, 90 S. W. 856; *Thompson v. West. U. Tel. Co.*, 10 Tex. Civ. App. 120, 30 S. W. 250.

<sup>163</sup> See § 294.

<sup>164</sup> See § 293.

<sup>165</sup> See § 292.



to be relieved from any liability, the message must be delivered to that party. Thus, where a message was addressed to "T. W. Pearsall & Co.," but the company delivered it in an envelope addressed "T. W. Pearsall," a member of the firm of T. W. Pearsall & Co., it was considered at the office of T. W. Pearsall & Co. as Mr. Pearsall's private mail and was not opened until his arrival. It was an important message requiring immediate attention, and would have been attended to promptly had it been addressed to the firm instead of to Mr. Pearsall personally. In consequence of the delay thus occasioned, the plaintiff suffered damage for which it was held that he could recover of the company.<sup>166</sup> It is not necessary, in every instance, to authorize any one to act as agent for the party addressed, but, if there is shown sufficient proof that the addressee cannot be found after diligent search, there is an implied agency existing between the sender and some one closely allied in the sendee's business or social affairs after the former has been notified of this fact;<sup>167</sup> as, where the telegraph company telephoned to the addressee's place of business and learning that he was out of town for several days, caused the message to be delivered to his wife at his residence, and then informed the sender of what had been done, it was held that this was a sufficient delivery.<sup>168</sup>

§ 298. **Manner of delivery—written copy.**—It is incumbent upon a telegraph company, as one of its essential duties, to deliver to the addressee a written copy of the telegram.<sup>169</sup> This is always the best means by which the exact words of the message may be delivered, in order that the addressee may act thereon. It would be very difficult for operators or messengers to understand and remember the contents of all messages received by them during their daily course of business. Their minds being taxed with other business, it would be impossible for them to remember exactly the wording of any particular message, especially where they are not further interested in it than that of receiving it as all others; and when they have no knowledge—and it is presumed that they have none—of the business about which the message is sent, they surely could not understand it as well as the party to whom it was addressed. For these reasons, the best means of delivering the exact words of a

<sup>166</sup> *Persall v. West. U. Tel. Co.*, 44 Hun. (N. Y.) 532, affirmed 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662.

<sup>167</sup> *West. U. Tel. Co. v. Trissal*, 98 Ind. 566; *West. U. Tel. Co. v. Barefoot*, 97 Tex. 159, 76 S. W. 914, 64 L. R. A. 491.

<sup>168</sup> *Given v. West. U. Tel. Co. (C. C.)* 24 Fed. 119.

<sup>169</sup> *West. U. Tel. Co. v. Pearce*, 95 Tex. 578, 68 S. W. 771; *Brashears v. West. U. Tel. Co.*, 45 Mo. App. 433; *Barnes v. West. U. Tel. Co. (C. C.)* 120 Fed. 550. Compare *Norman v. West. U. Tel. Co.*, 31 Wash. 577, 72 Pac. 474.

message is by delivering a written copy of the message. Furthermore, the sendee having this written copy before him is much more capable of advising himself how to act upon same. By having a written copy of the telegram, the errors or the inaccuracies which may be made in the transmission could be shown more easily by comparing this copy with the one delivered to the company for transmission.<sup>170</sup> It is true that the sendee may waive this duty of the company, as by granting it the right to deliver the message over a telephone line;<sup>171</sup> but none save messages addressed to the sendee could be waived.<sup>172</sup> If it were only delivered to him in care of another he could not waive this duty, but the same would have to be delivered in writing.<sup>173</sup> When telegrams are addressed to him and delivered by telephone, the messenger acts as his and not the company's agent in that particular business, if he has waived his rights for a personal delivery.<sup>174</sup>

§ 299. **No duty to forward messages.**—A telegraph company is under no obligation to forward a telegram to a party who has moved into another locality,<sup>175</sup> but this duty may be assumed by an agreement to that effect entered into between the company at its office and the sender.<sup>176</sup> Thus it has been held that, when the company has been paid the extra charges for delivering beyond the free delivery limit, and payment for any additional charges has been guaranteed,<sup>177</sup> the operator at the receiving station knowing that the

<sup>170</sup> *Brashears v. West. U. Tel. Co.*, 45 Mo. App. 433; *Barnes v. West. U. Tel. Co. (C. C.)* 120 Fed. 550.

<sup>171</sup> *Norman v. West. U. Tel. Co.*, 31 Wash. 577, 77 Pac. 474; *Hellams v. West. U. Tel. Co.*, 70 S. C. 83, 49 S. E. 12; *Lyles v. West. U. Tel. Co.*, 77 S. C. 174, 57 S. E. 725, 12 L. R. A. (N. S.) 534; *West. U. Tel. Co. v. Sorsby*, 29 Tex. Civ. App. 345, 69 S. W. 122. See *West. U. Tel. Co. v. Wright*, 169 Ala. 104, 53 South. 95; *King v. West. U. Tel. Co.*, 89 Ark. 402, 117 S. W. 521; *West. U. Tel. Co. v. Douglass (Tex. Civ. App.)* 124 S. W. 488; *West. U. Tel. Co. v. Price*, 137 Ky. 758, 126 S. W. 1100, 29 L. R. A. (N. S.) 836. See *West. U. Tel. Co. v. Oakley (Tex. Civ. App.)* 181 S. W. 507, cited in note 174, *infra*.

<sup>172</sup> *West. U. Tel. Co. v. Pearce*, 95 Tex. 578, 68 S. W. 771, reversing (*Tex. Civ. App.*) 67 S. W. 920.

<sup>173</sup> *Id.*

<sup>174</sup> *Norman v. West. U. Tel. Co.*, 31 Wash. 577, 72 Pac. 474; *West. U. Tel. Co. v. Oakley (Tex. Civ. App.)* 151 S. W. 507, consigned to telephone, but operator attempts to find addressee by phone, telegraph company liable for negligence of telephone company.

<sup>175</sup> *Thorp v. West. U. Tel. Co.*, 84 Iowa, 190, 50 N. W. 675; *Abbott v. West. U. Tel. Co.*, 86 Minn. 44, 90 N. W. 1. See, also, *West. U. Tel. Co. v. Redinger (Tex. Civ. App.)* 63 S. W. 156.

<sup>176</sup> *Thorp v. West. U. Tel. Co.*, 84 Iowa, 190, 50 N. W. 675; *West. U. Tel. Co. v. Bierhaus*, 8 Ind. App. 563, 36 N. E. 161; *Abbott v. West. U. Tel. Co.*, 86 Minn. 44, 90 N. W. 1.

<sup>177</sup> *Abbott v. West. U. Tel. Co.*, 86 Minn. 44, 90 N. W. 1.

message is important, and that the addressee is temporarily in another city—where the company had an office—is under a duty to send it to him there, and for his failure in this respect will lay the company liable.<sup>178</sup> But the company is not liable for failing to forward a message to an absent addressee, where it exercises due diligence to make personal delivery, and the operator is not aware of his temporary address, although the messenger boy in charge of the message might easily have learned where the addressee was, if he had inquired at any of the places where he attempted to make delivery.<sup>179</sup> Where an agreement is made of this kind to forward a message, it is binding on the company only for a reasonable time, which is a question of fact.<sup>180</sup>

§ 300. *Time to deliver.*—It is the duty of all telegraph companies, after assuming the responsibilities attached to the nature of a business which they follow, to deliver messages to the proper party as soon after their transmission as is reasonably practicable;<sup>181</sup>

<sup>178</sup> *West. U. Tel. Co. v. Hendricks*, 26 Tex. Civ. App. 366, 63 S. W. 341. See *West. U. Tel. Co. v. Alford*, 110 Ark. 379, 161 S. W. 1027, 50 L. R. A. (N. S.) 94, forwarding by telephone instead of by telegraph liable for. To same effect see *West. U. Tel. Co. v. Smith*, 164 Ky. 270, 175 S. W. 375.

<sup>179</sup> *West. U. Tel. Co. v. Redinger* (Tex. Civ. App.) 63 S. W. 156.

<sup>180</sup> *Harper v. West. U. Tel. Co.*, 92 Mo. App. 304; *Thorp v. West. U. Tel. Co.*, 84 Iowa, 190, 50 N. W. 675, holding that it was a question for the jury whether twenty-six days was a reasonable time to which an agreement to forward would extend.

<sup>181</sup> *Alabama.*—*West. U. Tel. Co. v. Hill*, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058.

*Arkansas.*—*West. U. Tel. Co. v. Gillis*, 97 Ark. 226, 133 S. W. 833.

*Indiana.*—*West. U. Tel. Co. v. Moore*, 12 Ind. App. 136, 39 N. E. 874, 54 Am. St. Rep. 515; *Julian v. West. U. Tel. Co.*, 98 Ind. 327; *Reese v. West. U. Tel. Co.*, 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583.

*Iowa.*—*Harkness v. West. U. Tel. Co.*, 73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672.

*Kentucky.*—*West. U. Tel. Co. v. Parsons*, 72 S. W. 800, 24 Ky. Law Rep. 2008.

*Missouri.*—*Bliss v. Baltimore, etc., Tel. Co.*, 30 Mo. App. 103.

*North Carolina.*—*Hendricks v. West. U. Tel. Co.*, 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658; *Cogdell v. West. U. Tel. Co.*, 135 N. C. 431, 47 S. E. 490; *Cannon v. West. U. Tel. Co.*, 100 N. C. 200, 6 S. E. 731, 6 Am. St. Rep. 590.

*Oklahoma.*—*Blackwell Milling, etc., Co. v. West. U. Tel. Co.*, 17 Okl. 376, 89 Pac. 235, 10 Ann. Cas. 855.

*Tennessee.*—*Cumberland Tel. Co. v. Brown*, 104 Tenn. 56, 55 S. W. 155, 78 Am. St. Rep. 906, 50 L. R. A. 277.

*Texas.*—*West. U. Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844; *West. U. Tel. Co. v. Neel*, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847; *West. U. Tel. Co. v. Moran*, 52 Tex. Civ. App. 117, 113 S. W. 625.

*United States.*—*West. U. Tel. Co. v. Lawson*, 182 Fed. 369, 105 C. C. A. 451.



and on a negligent or wrongful failure so to do, they will be liable for all the damages arising directly therefrom.<sup>182</sup> It is as great if not a greater duty to make as prompt a delivery as to be exercised in its transmission.<sup>183</sup> It is not an easy matter to lay down a fixed rule prescribing the degree of promptness necessary in the delivery of every particular message. They must deliver the message as soon as reasonably practicable after its transmission, and in determining this question it is necessary to take into consideration the surrounding circumstances.<sup>184</sup> Thus, if the company's office to which the message is sent is a small business office, on account of which there are only a few messengers required in the general course of business, and there is an extra amount of telegraphic work going on at the time the message is sent, a delay caused by such rush of business must be considered in determining the question of negligent delay in delivery.<sup>185</sup> The time required for copying and addressing the message and for numbering it,<sup>186</sup> the distance the sendee lives from the office, and the difficulty in reaching him, must

<sup>182</sup> West. U. Tel. Co. v. Hanley, 85 Ark. 263, 107 S. W. 1168; Hendershot v. West. U. Tel. Co., 106 Iowa. 529, 76 N. W. 828, 68 Am. St. Rep. 313; Reese v. West. U. Tel. Co., 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583; West U. Tel. Co. v. Parsons, 72 S. W. 800, 24 Ky. Law Rep. 2008; West. U. Tel. Co. v. Lehman, 106 Md. 318, 67 Atl. 241, 14 Ann. Cas. 736; Suttle v. West. U. Tel. Co., 148 N. C. 480, 62 S. E. 593, 128 Am. St. Rep. 631; Bryant v. Amer. Tel. Co. 1 Daly (N. Y.) 575; Blackwell Milling, etc., Co. v. West. U. Tel. Co., 17 Okl. 376, 89 Pac. 235, 10 Ann. Cas. 855; Smith v. West. U. Tel. Co., 77 S. C. 378, 58 S. E. 6, 12 Ann. Cas. 654; Kirby v. West. U. Tel. Co., 77 S. C. 404, 58 S. E. 10, 122 Am. St. Rep. 580; West. U. Tel. Co. v. Moran, 52 Tex. Civ. App. 117, 113 S. W. 625; West. U. Tel. Co. v. Kibble, 53 Tex. Civ. App. 222, 115 S. W. 643; West. U. Tel. Co. v. Johnsey, 49 Tex. Civ. App. 487, 109 S. W. 251; West. U. Tel. Co. v. Ayres, 47 Tex. Civ. App. 557, 105 S. W. 1165; West. U. Tel. Co. v. Craig, 44 Tex. Civ. App. 214, 90 S. W. 681; West. U. Tel. Co. v. Roberts, 34 Tex. Civ. App. 76, 78 S. W. 522; Sherrill v. West. U. Tel. Co., 155 N. C. 250, 71 S. E. 330; West. U. Tel. Co. v. Hosea (Tex. Civ. App.) 133 S. W. 298; Markley v. West. U. Tel. Co., 159 Iowa, 557, 141 N. W. 443.

<sup>183</sup> West. U. Tel. Co. v. Moore, 12 Ind. App. 136, 39 N. E. 874, 54 Am. St. Rep. 515. See Stone & Co. v. Postal Tel. Cable Co., 35 R. I. 498, 87 Atl. 319, 46 L. R. A. (N. S.) 180.

<sup>184</sup> Ayres v. West. U. Tel. Co., 65 App. Div. 149, 72 N. Y. Supp. 634; West. U. Tel. Co. v. McConnico, 27 Tex. Civ. App. 610, 66 S. W. 592; West. U. Tel. Co. v. De Jarles, 8 Tex. Civ. App. 109, 27 S. W. 792; West. U. Tel. Co. v. Evans, 108 Ark. 39, 156 S. W. 424.

*The character of the message itself must be considered.* Reese v. West. U. Tel. Co., 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583; Bryant v. Amer. Tel. Co. 1 Daly (N. Y.) 575; Suttle v. West. U. Tel. Co., 148 N. C. 480, 62 S. E. 593, 128 Am. St. Rep. 631; Brown v. West. U. Tel. Co., 6 Utah, 219, 21 Pac. 988.

<sup>185</sup> West. U. Tel. Co. v. Neel, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847.

<sup>186</sup> West. U. Tel. Co. v. McConnico, 27 Tex. Civ. App. 610, 66 S. W. 592; Davis v. West. U. Tel. Co., 66 S. W. 17, 23 Ky. Law Rep. 1758; West. U. Tel. Co. v. Virginia Paper Co., 87 Va. 418, 12 S. E. 755.

be considered in determining the degree of diligence exercised.<sup>187</sup> A telegram delivered in its regular order, within half an hour of the time it was received at its destination, is delivered within a reasonable time;<sup>188</sup> and where the operator promised the addressee to deliver his message "at once," the company is still bound to ordinary diligence.<sup>189</sup> A delay of five hours in delivering a message, the urgency of which is known to the company, is negligence, when it attempts to find the addressee down town and at his office, but fails to leave notice there or to visit his residence within the free delivery limits, where he might have been found.<sup>190</sup> What is due diligence in this respect is a question of fact, and not one to be left to the judgment of the company.<sup>191</sup>

**§ 301. Same continued—two messages of same nature received within office hours.**—There is a peculiar duty with respect to the time of delivery where there are two messages having relation to the same matter, and transmitted to the same party within a short period of each other, but the first delivered is not transmitted until after the other. If the company is not guilty of negligence in delivering one before the other, it will not be liable. It may have good reasons to give why this accident was caused, as that the telegrams were sent out by the two different messengers, but the one carrying the second message happens to find the sendee before the first.<sup>192</sup> But if the messages show on their faces—which they ought to show—the time when each was delivered to the company, the sendee could hardly be heard to complain, for he would have notice of the time when they were transmitted and could act accordingly. The

<sup>187</sup> Ayres v. West. U. Tel. Co., 65 App. Div. 149, 72 N. Y. Supp. 634; Altman v. West. U. Tel. Co. (Sup.) 84 N. Y. Supp. 54.

<sup>188</sup> Julian v. West. U. Tel. Co., 98 Ind. 327.

<sup>189</sup> West. U. Tel. Co. v. De Jarles, 8 Tex. Civ. App. 109, 27 S. W. 792.

*Express agreement.*—By express agreement the company may bind itself to deliver a message within or before a certain time, Suttle v. West. U. Tel. Co., 148 N. C. 480, 62 S. E. 593, 128 Am. St. Rep. 631; otherwise it does not insure to do so regardless of circumstances, Ayres v. West. U. Tel. Co., 65 App. Div. 149, 72 N. Y. Supp. 634; West. U. Tel. Co. v. Munford, 87 Tenn. 190, 10 S. W. 318, 10 Am. St. Rep. 630, 2 L. R. A. 601; West. U. Tel. Co. v. De Jarles, 8 Tex. Civ. App. 109, 27 S. W. 792; immediate delivery is not required, West. U. Tel. Co. v. Patrick, 92 Ga. 607, 18 S. E. 980, 44 Am. St. Rep. 90; Ayres v. West. U. Tel. Co., 65 App. Div. 149, 72 N. Y. Supp. 634; West. U. Tel. Co. v. McCormico, 27 Tex. Civ. App. 610, 66 S. W. 592; West. U. Tel. Co. v. Hays (Tex. Civ. App.) 63 S. W. 171, severe storm delays the delivery, not liable.

<sup>190</sup> Hendershot v. West. U. Tel. Co., 106 Iowa, 529, 76 N. W. 828, 68 Am. St. Rep. 313.

<sup>191</sup> Telephone Co. v. Brown, 104 Tenn. 56, 55 S. W. 153, 78 Am. St. Rep. 906, 50 L. R. A. 277.

<sup>192</sup> Cannon v. West. U. Tel. Co., 100 N. C. 300, 6 S. E. 731, 6 Am. St. Rep. 590.

company may make reasonable office hours, within which all messages should be received for immediate delivery, and should they not be received within that time, the company would not be duty bound to deliver the message until the office was opened, and as soon thereafter as practicable.<sup>193</sup> A person desiring a message delivered at an unusual hour should inquire whether it will be delivered at that time, and, in the absence of such inquiry, the telegraph company does not become answerable for the delay by its failure to volunteer the information that the office to which the message is addressed is not open for business until later.<sup>194</sup> And if two messages are delivered to the company for transmission at different times, but the office to which they were to be sent is closed when both are delivered, the company would not be liable in the absence of negligence, if the second message should be delivered before the one first tendered for transmission.<sup>195</sup>

§ 302. **Free delivery limit.**—In many instances the addressee of a message lives some distance from the company's office, and to require the latter to deliver the message to such party, without extra compensation, might impose on it an unreasonable burden; so these companies may prescribe rules by which they may agree to deliver all messages within a certain radius of their offices, free of charge, and require extra compensation for all delivery beyond this radius.<sup>196</sup> These regulations are generally to be found on the

<sup>193</sup> See § 247 et seq.

<sup>194</sup> *West. U. Tel. Co. v. Neel*, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847.

<sup>195</sup> *Cannon v. West. U. Tel. Co.*, 100 N. C. 300, 6 S. E. 731, 6 Am. St. Rep. 590; *Hocker v. West. U. Tel. Co.*, 45 Fla. 363, 34 South. 901.

<sup>196</sup> *West. U. Tel. Co. v. Archer*, 96 Ark. 213, 131 S. W. 702, Ann. Cas. 1912B, 593; *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148, holding that: "Free delivery within a half mile is not a restriction of a right, but a qualified privilege granted. It is not an inherent right; for if it were, in the absence of restriction, it would have no limits. To show to what absurd results this would lead, let us suppose the contract to transmit a message is silent about free delivery. If we hold the clause in controversy to be restricted of a right, then, in the case supposed, the telegraph company would be bound to deliver to the sendee, no matter how great the distance to his residence. Free delivery is a conditional obligation, contingent on the sendee's residence being within the area of free delivery; and until the condition is shown, the telegraph company is not put in default." *West. U. Tel. Co. v. Whitson*, 145 Ala. 426, 41 South. 405; *West. U. Tel. Co. v. Ward*, 23 Ind. 377, 85 Am. Dec. 462; *Arkansas, etc., R. Co. v. Stroude*, 82 Ark. 117, 100 S. W. 760; *West. U. Tel. Co. v. Trotter*, 55 Ill. App. 659; *West. U. Tel. Co. v. Smith*, 93 Ga. 635, 21 S. E. 166; *West. U. Tel. Co. v. Harvey*, 67 Kan. 729, 74 Pac. 250; *West. U. Tel. Co. v. Cross*, 116 Ky. 5, 74 S. W. 1098, 76 S. W. 162, 25 Ky. Law Rep. 268, 646; *Cumberland Tel., etc., Co. v. Atherton*, 122 Ky. 154, 91 S. W. 257, 28 Ky. Law Rep. 1100; *West. U. Tel. Co. v. Matthews*, 113 Ky. 188, 67 S. W. 849, 24 Ky. Law Rep. 3; *West. U. Tel. Co. v. Mathews*, 107 Ky. 663, 55 S. W. 427, 21 Ky. Law Rep. 1405; *West. U. Tel. Co. v. Scott*, 87 S. W. 289, 27



telegraph blanks, and are presumed to have been accepted at the time of signing and delivery of the telegram to the company. While this is the general way these regulations are made and entered into, yet there are statutes in some states containing the same stipulations, and they bind all who contract business with these companies within their jurisdiction.<sup>197</sup> Of course, this free delivery limit must be reasonable,<sup>198</sup> and in determining this question the surrounding circumstances must be considered. The size of the town or city and location of the surrounding country are the principal questions to be considered in arriving at this fact.<sup>199</sup> It has been held that a radius of one-half mile in a city of five thousand inhabitants, and a radius of one mile in cities having more than this number, was a reasonable distance within which to give free delivery.<sup>200</sup> When the addressee lives beyond the free delivery limit, and this fact is known by the sender, it is his duty to pay an extra compensation

Ky. Law Rep. 975; *Roche v. West. U. Tel. Co.*, 70 S. W. 39, 29 Ky. Law Rep. 845; *West. U. Tel. Co. v. McCaul*, 115 Tenn. 99, 90 S. W. 856; *Reynolds v. West. U. Tel. Co.*, 81 Mo. App. 223; *McCaul v. West. U. Tel. Co.*, 114 Tenn. 661, 88 S. W. 325; *West. U. Tel. Co. v. Swearingen*, 95 Tex. 420, 67 S. W. 767, reversing (Tex. Civ. App.) 65 S. W. 1080; *West. U. Tel. Co. v. Jennings*, 98 Tex. 465, 84 S. W. 1056; *Anderson v. West. U. Tel. Co.*, 84 Tex. 17, 19 S. W. 285; *West. U. Tel. Co. v. Ayers*, 41 Tex. Civ. App. 627, 93 S. W. 199; *West. U. Tel. Co. v. Bryant*, 35 Tex. Civ. App. 442, 80 S. W. 406; *West. U. Tel. Co. v. Byrd*, 34 Tex. Civ. App. 594, 79 S. W. 40; *West. U. Tel. Co. v. Christensen* (Tex. Civ. App.) 78 S. W. 744; *Hargrave v. West. U. Tel. Co.* (Tex. Civ. App.) 60 S. W. 687; *West. U. Tel. Co. v. Redinger*, 22 Tex. Civ. App. 362, 54 S. W. 417; *West. U. Tel. Co. v. Teague*, 8 Tex. Civ. App. 444, 27 S. W. 958; *West. U. Tel. Co. v. Taylor*, 3 Tex. Civ. App. 310, 22 S. W. 532; *Whittemore v. West. U. Tel. Co.* (C. C.) 71 Fed. 651; *Given v. West. U. Tel. Co.* (C. C.) 24 Fed. 119. In *State v. West. U. Tel. Co.*, 172 Ind. 20, 87 N. E. 641, the court said: "In the absence of statutory regulations, it is within the power of telegraph companies to prescribe reasonable rules by which they will undertake and agree to deliver all messages within a certain radius of their office free of charge, and require extra compensation for free delivery beyond this radius." To the same effect is *Roche v. West. U. Tel. Co.*, 70 S. W. 39, 24 Ky. Law Rep. 845; *Campbell v. West. U. Tel. Co.*, 74 S. C. 300, 54 S. E. 571, holding that: "The law imposes upon it the duty of delivering all messages when the persons to whom they are addressed reside within a reasonable distance from the terminal office. The company, however, has a right to make reasonable regulations as to free delivery limits, and as to additional charges for services rendered beyond such limits." *West. U. Tel. Co. v. Jennings*, 98 Tex. 465, 84 S. W. 1056; *West. U. Tel. Co. v. Benson*, 159 Ala. 254, 48 South. 712.

<sup>197</sup> *State v. West. U. Tel. Co.*, 172 Ind. 20, 87 N. E. 641.

<sup>198</sup> *West. U. Tel. Co. v. Ayers*, 41 Tex. Civ. App. 627, 93 S. W. 199.

<sup>199</sup> *West. U. Tel. Co. v. Benson*, 159 Ala. 254, 48 South. 712.

<sup>200</sup> *West. U. Tel. Co. v. Trotter*, 55 Ill. App. 659; *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; *West. U. Tel. Co. v. Emerson*, 161 Ala. 221, 49 South. 820, holding that the failure to establish free delivery limits at a place in which fifty or one hundred persons live is not unreasonable nonaction. But in *West. U. Tel. Co. v. Whitson*, 145

for such delivery;<sup>201</sup> and the company is under no obligation to accept the message for transmission until this is paid.<sup>202</sup> It is held in some courts that, if the fact is not known by either the sender or the operator that the sendee lives beyond the free delivery limit, the company is under no obligation to deliver the message, if the extra charges are not paid, waived or guaranteed to be paid;<sup>203</sup> but the better holding, however, is that the company is under obligations to deliver the message if the sendee lives within a reason-

Ala. 626, 41 South. 405, it was said that the establishment of a free delivery limit and a regulation with respect to the delivery of messages beyond which is in the nature of an exception to the general obligation of duty imposed upon a company. And in *West. U. Tel. Co. v. Burns*, 164 Ala. 252, 51 South. 373, it was held that "the burden of showing that such limits had been established and the area of same" was upon the company. In *West. U. Tel. Co. v. Ayers*, 41 Tex. Civ. App. 627, 93 S. W. 199, it was held that a rule establishing free delivery limits is binding on the sender, unless the rule is unreasonable. In *West. U. Tel. Co. v. Trotter*, 55 Ill. App. 659, a rule establishing the free delivery limits of a town of less than five thousand inhabitants at one-half mile from the office was held to be a reasonable one. To the same effect is *West. U. Tel. Co. v. Cross*, 116 Ky. 5, 74 S. W. 1098, 76 S. W. 162.

<sup>201</sup> *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; *West. U. Tel. Co. v. Emerson*, 161 Ala. 221, 49 South. 820. Compare *West. U. Tel. Co. v. Holcomb* (Tex. Civ. App.) 152 S. W. 190.

<sup>202</sup> See § 288 et seq. See *Smith v. West. U. Tel. Co.*, 168 N. C. 515, 84 S. E. 796.

<sup>203</sup> *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; *Whittemore v. West. U. Tel. Co.* (C. C.) 71 Fed. 651; *West. U. Tel. Co. v. Mathews*, 107 Ky. 663, 55 S. W. 427; *Roche v. West. U. Tel. Co.*, 70 S. W. 39, 24 Ky. Law Rep. 845; *West. U. Tel. Co. v. Cross*, 116 Ky. 5, 74 S. W. 1098, 76 S. W. 162; *Anderson v. West. U. Tel. Co.*, 84 Tex. 17, 19 S. W. 285; *West. U. Tel. Co. v. Warren* (Tex. Civ. App.) 36 S. W. 314; *West. U. Tel. Co. v. Drake*, 13 Tex. Civ. App. 572, 36 S. W. 786; *West. U. Tel. Co. v. Merrill*, 144 Ala. 618, 39 South. 121, 113 Am. St. Rep. 66. So it is held to be a *prima facie* duty of the sender to know where the sendee lives with respect to the free delivery limits, and no duty evolves upon the company other than to transmit to their terminal and to make a reasonable search for the sendee in the limit, especially where the sender knows of the existence of the rules of the company. *West. U. Tel. Co. v. Trotter*, 55 Ill. App. 659; *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148. See, also, *West. U. Tel. Co. v. Merrill*, 144 Ala. 618, 39 South. 121, 113 Am. St. Rep. 66; *West. U. Tel. Co. v. Burns*, 164 Ala. 252, 51 South. 373, holding that the burden is upon the plaintiff to show that the addressee resided within such limits. On the other hand, it has been said that a telegraph company "does not say that the message will not be delivered beyond such limits, but that 'a special charge will be made to cover the cost of such delivery,' which would seem clearly to imply that it would be delivered. No fixed limit of distance nor definite sum is specified, and it is difficult to see how the sender can be presumed to know either in the absence of information from the company." *Hendricks v. West. U. Tel. Co.*, 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658; *Hood v. West. U. Tel. Co.*, 135 N. C. 622, 47 S. E. 607.

able distance beyond the delivery limit,<sup>204</sup> provided he will pay for such extra charges.<sup>205</sup> It will hardly be necessary, at this place, to

<sup>204</sup> *West. U. Tel. Co. v. Moore*, 12 Ind. App. 136, 39 N. E. 874, 54 Am. St. Rep. 515. The court in this case disagreed with the holding in the case of *West. U. Tel. Co. v. Henderson*, above cited, and said:

"We are aware that in *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148, it is declared that the sender is bound to know whether the sendee lives within the free delivery limits and must himself provide, beforehand, for delivery if he does not. We do not, however, concur in the reasoning or conclusion of this case upon this proposition. Many men have occasion to communicate with others in cities and towns where they are totally ignorant of the distances between the company's receiving station and the addressee's residence. Even if they know the street and number, they may still be wanting in a knowledge of the location with reference to the station.

"Such a regulation as we are now considering would, as it seems to us, be harsh, inequitable and unnecessary. When the patron pays to the company the amount which he believes, in good faith, covers its entire charge for the service, and the company receives it and the message, he has a right to expect that the company will carry the message to the person addressed, if within the statutory delivery limits, and present it to him for delivery. If there be then any additional sum due, the company may require its payment before it surrenders the message to the sendee, if it prefers to do so rather than rely solely upon the sender for its payment. The company will thus be furnished ample protection, and the expectations and purposes of the sender of the message will not be disappointed.

"This course seems to us to afford a much fairer and more equitable solution of the problem as to what is the duty of the company than to hold that it may stop the message halfway upon its course, and thus really render to the sender no service, after receiving from him what both thought to be the full price therefor. We apprehend that, if such a course were followed, there would be few instances where the sendee would refuse to receive the message, and pay the delivery charge if proper.

"If he did, a notification to the sender, in most of those few instances, would bring the money from him. If, however, the company might occasionally lose a delivery charge, the loss to it would be trifling and incon siderable when compared with the possible loss and inconvenience to the public and patrons who have relied in good faith upon their delivery of the message."

<sup>205</sup> *Martin v. West. U. Tel. Co.*, 81 S. C. 432, 62 S. E. 833. The company must either deliver the message or notify the sender that the addressee lives beyond the free delivery limits and require the extra charge to be paid or guaranteed, *Gainey v. West. U. Tel. Co.*, 136 N. C. 261, 48 S. E. 653; *Edwards v. West. U. Tel. Co.*, 147 N. C. 126, 60 S. E. 900; *Martin v. West. U. Tel. Co.*, 81 S. C. 432, 62 S. E. 833; especially where the fact is not known to the sender, who in good faith pays all that is asked of him for the delivery of the message, *Bright v. West. U. Tel. Co.*, 132 N. C. 317, 43 S. E. 841; *Bryan v. West. U. Tel. Co.*, 133 N. C. 603, 45 S. E. 938; *Hood v. West. U. Tel. Co.*, 135 N. C. 622, 47 S. E. 607. See *West. U. Tel. Co. v. Davis*, 24 Tex. Civ. App. 427, 59 S. W. 46; *West. U. Tel. Co. v. Sweetman*, 19 Tex. Civ. App. 435, 47 S. W. 676, sender not presumed to know the free delivery limit does not extend to the residence of the addressee. Rules applicable at least where company receives messages on paper containing no such stipulations, *Anderson v. West. U. Tel. Co.*, 84 Tex. 17, 19 S. W. 285; or where the addressee resides in the town or city to which the telegram is



enter into the reasons given to sustain each of the above holdings; but suffice it to say that these companies may prescribe regulations whereby they may exact of all their patrons an extra compensation for all deliveries made beyond the free delivery limit,<sup>206</sup> when the fact is known at the time the message is tendered for acceptance. And on failure so to do the company is under no obligation to deliver the message;<sup>207</sup> but if the fact is not known, it is the duty of the company to deliver the message on the sender's paying for the extra charges.<sup>208</sup> In those jurisdictions holding the first rule, it is held that the company may waive the right to exact of the sender the extra compensation,<sup>209</sup> or he may give a written guaranty to pay all additional charges incurred in delivering the message beyond the free delivery limit,<sup>210</sup> and then the company is under obligation to deliver.

**§ 303. When sendee lives several miles from office.**—Very often messages are sent to persons who live in the country or several miles from the receiving office of the company; and then, surely, the latter would be under no obligation whatever to make such de-

addressed, but beyond delivery limits. See, also, *West. U. Tel. Co. v. Harvey*, 67 Kan. 729, 74 Pac. 250; *West. U. Tel. Co. v. Shockley*, 57 Tex. Civ. App. 30, 122 S. W. 945.

Sender, being informed of the extra charge, fails or does not undertake to pay same, company not bound to deliver. *West. U. Tel. Co. v. Bryant*, 35 Tex. Civ. App. 442, 80 S. W. 406. But see *West. U. Tel. Co. v. Moore*, 12 Ind. App. 136, 39 N. E. 874, 54 Am. St. Rep. 515. *West. U. Tel. Co. v. Webb*, 98 Ark. 87, 135 S. W. 366, company may waive rules prescribing limits. See, also, *West. U. Tel. Co. v. Wonnack*, 9 Tex. Civ. App. 607, 29 S. W. 932; *West. U. Tel. Co. v. Cain* (Tex. Civ. App.) 40 S. W. 624.

<sup>206</sup> *Campbell v. West. U. Tel. Co.*, 74 S. C. 300, 54 S. E. 571.

<sup>207</sup> See *Gainey v. West. U. Tel. Co.*, 136 N. C. 261, 48 S. E. 653; *Smith v. West. U. Tel. Co.*, 168 N. C. 515, 84 S. E. 796.

<sup>208</sup> *Lyles v. West. U. Tel. Co.*, 77 S. C. 174, 57 S. E. 725, 12 L. R. A. (N. S.) 534. If the service charge for delivery beyond the free delivery limit has been paid, it does not become effective until the answering message is received, *Hargrave v. West. U. Tel. Co.* (Tex. Civ. App.) 60 S. W. 687; *West. U. Tel. Co. v. Mathews*, 107 Ky. 663, 55 S. W. 427, 21 Ky. Law Rep. 1405; but liable for the negligent delay in sending the service message, *West. U. Tel. Co. v. Ayres*, 47 Tex. Civ. App. 557, 105 S. W. 1165; or in failing to make delivery thereafter, *West. U. Tel. Co. v. Ayres*, 47 Tex. Civ. App. 557, 105 S. W. 1165; *West. U. Tel. Co. v. Mathews*, 107 Ky. 663, 55 S. W. 427, 21 Ky. Law Rep. 1405. Where sender pays the service charge when the message is delivered to the company, negligence in the company not to wire information to the terminal office. *Edwards v. West. U. Tel. Co.*, 147 N. C. 126, 60 S. E. 900. But see *Hargrave v. West. U. Tel. Co.* (Tex. Civ. App.) 60 S. W. 687.

<sup>209</sup> *Roche v. West. U. Tel. Co.*, 70 S. W. 39, 24 Ky. Law Rep. 845; *West. U. Tel. Co. v. O'Keefe* (Tex. Civ. App.) 29 S. W. 1137.

<sup>210</sup> *Reynolds v. West. U. Tel. Co.*, 81 Mo. App. 223.

livery,<sup>211</sup> unless there is a special agreement to that effect.<sup>212</sup> It has been held without much plausible reason that when this extra

<sup>211</sup> *West. U. Tel. Co. v. Matthews*, 107 Ky. 663, 55 S. W. 427; *West. U. Tel. Co. v. Swearingen*, 95 Tex. 420, 67 S. W. 767, reversing (Tex. Civ. App.) 65 S. W. 1080; *West. U. Tel. Co. v. Taylor*, 3 Tex. Civ. App. 310, 22 S. W. 532; *West. U. Tel. Co. v. Harvey*, 67 Kan. 729, 74 Pac. 250; *West. U. Tel. Co. v. Matthews*, 113 Ky. 188, 67 S. W. 849, 24 Ky. Law Rep. 3; *West. U. Tel. Co. v. Scott*, 87 S. W. 289, 27 Ky. Law Rep. 975; *West. U. Tel. Co. v. McCaul*, 115 Tenn. 99, 90 S. W. 856; *McCaul v. West. U. Tel. Co.*, 114 Tenn. 661, 88 S. W. 325; *West. U. Tel. Co. v. Byrd*, 34 Tex. Civ. App. 594, 79 S. W. 40; *West. U. Tel. Co. v. Christensen* (Tex. Civ. App.) 78 S. W. 744; *Stewart v. West. U. Tel. Co.* (Tex. Civ. App.) 158 S. W. 1034. It has been held that, in the absence of an arrangement for extra compensation, a telegram addressed to a particular town need not be delivered to the addressee's residence if he lives a number of miles from the town. *King v. West. U. Tel. Co.*, 89 Ark. 402, 117 S. W. 521; *West. U. Tel. Co. v. Harvey*, 67 Kan. 729, 74 Pac. 250; *West. U. Tel. Co. v. Matthews*, 107 Ky. 663, 55 S. W. 427; *West. U. Tel. Co. v. Cross*, 116 Ky. 5, 74 S. W. 1098, 76 S. W. 162.

<sup>212</sup> *West. U. Tel. Co. v. Robinson*, 97 Tenn. 638, 37 S. W. 545, 34 L. R. A. 431; *West. U. Tel. Co. v. Matthews*, 113 Ky. 188, 67 S. W. 849, 24 Ky. Law Rep. 3; *West. U. Tel. Co. v. Carter*, 24 Tex. Civ. App. 80, 58 S. W. 198; *West. U. Tel. Co. v. Snell*, 3 Ala. App. 263, 56 South. 854. See, also, *West. U. Tel. Co. v. McIlvoy*, 107 Ky. 633, 54 S. W. 428, 21 Ky. Law Rep. 1393; *Gainey v. West. U. Tel. Co.*, 136 N. C. 261, 48 S. E. 653. A special contract to this effect is within the apparent scope of authority of company's agents, and which is obligatory upon the company. *West. U. Tel. Co. v. Matthews*, *supra*.

In *West. U. Tel. Co. v. Archer*, 96 Ark. 213, 131 S. W. 702, Ann. Cas. 1912B, 593, it is stated that a telegraph company is bound to carry out such a contract, even though the expense incurred in delivering the message may be greater than the consideration received by it. The company may become bound to deliver by the sender's offer to pay or guarantee the extra charges, *West. U. Tel. Co. v. Snell*, 3 Ala. App. 263, 56 South. 854; *West. U. Tel. Co. v. Drake*, 13 Tex. Civ. App. 572, 36 S. W. 786; *West. U. Tel. Co. v. Warren* (Tex. Civ. App.) 36 S. W. 314; or where the agents agree to collect the extra charges from the addressee, *Roche v. West. U. Tel. Co.*, 70 S. W. 39, 24 Ky. Law Rep. 845; *West. U. Tel. Co. v. Teague*, 8 Tex. Civ. App. 444, 27 S. W. 958; *West. U. Tel. Co. v. O'Keefe* (Tex. Civ. App.) 29 S. W. 1137; or to deliver without extra compensation. See *West. U. Tel. Co. v. Burns*, 164 Ala. 252, 51 South. 373; *West. U. Tel. Co. v. Davis*, 30 Tex. Civ. App. 590, 71 S. W. 313; *Reynolds v. West. U. Tel. Co.*, 81 Mo. App. 223; *Cumberland Tel.*, etc., *Co. v. Maxberry*, 134 Ky. 642, 121 S. W. 447, a telephone company is not bound to exercise greater diligence in delivering a telephone message beyond the free delivery limits than that to be exercised in delivering a message within the ordinary delivery limits.

*Mailing message in absence of contract.*—The mailing of the message in absence of contract to the addressee has been held sufficient. *King v. West. U. Tel. Co.*, 89 Ark. 402, 117 S. W. 521. But, on the other hand, it has been held that, where the addressee lives beyond the free delivery limits, the mailing of the telegram at the terminal office is insufficient in the absence of notice to the sender. *Sturtevant v. West. U. Tel. Co.*, 109 Me. 479, 84 Atl. 998. Under other views it seems that the receiving office is bound to mail the message where one of the company's rules requires the mailing of such messages in case the sending office is unable to collect, or in case a reply is not received promptly by the receiving office. *Keeting v. West. U. Tel.*

charge is refused to be paid by either sender or the addressee, the company would not be under any obligations to deliver the message, even when it would not necessarily be put to any additional expense. Thus, where the agent at the receiving office notifies the addressee by mail, and also asks that the extra charges be guaranteed by him, the agent is not liable for refusing to give the message to a neighbor who offers to deliver it without charge.<sup>213</sup> If the charges for transmission have not been paid, the agent would clearly have the right to refuse to deliver the message to this party; but if there is nothing except the extra charge for delivery left unpaid, and the company is put to no extra expense in making such delivery, as in the cited case, and the manner of delivery is acceptable to the addressee, we see no reason why the agent should not make such delivery.<sup>214</sup> While the company will be under no obligations to deliver a message to a party who lives several miles from the receiving office without first being compensated, yet this is no reason why it may not use diligence in attempting to deliver the message to him while temporarily within the free delivery limits.<sup>215</sup>

**§ 304. Same continued—may waive right.**—If the addressee lives beyond the free delivery limits, and this fact is known by the company's operator at the time the message is received, it may, nevertheless, become liable for a failure to deliver, when it has

Co., 167 Mo. App. 601, 152 S. W. 95; *Lyles v. West. U. Tel. Co.*, 84 S. C. 1, 65 S. E. 832, 137 Am. St. Rep. 829, Id., 77 S. C. 174, 57 S. E. 725, 12 L. R. A. (N. S.) 534; *West. U. Tel. Co. v. Douglass* (Tex. Civ. App.) 124 S. W. 488; *Hinson v. West. U. Tel. Co.*, 91 S. C. 338, 74 S. E. 752, Ann. Cas. 1914A, 114, holding that a direction by the sender that the telegram be mailed to the addressee who lived on a rural route constituted the post office his agent to receive and transmit. To same effect, see *Garner v. West. U. Tel. Co.*, 100 S. C. 302, 84 S. E. 829, the addressing of a message to addressee "R. F. D. 1." is a direction to the company to mail telegram for delivery.

In *Lyles v. West. U. Tel. Co.*, supra, it was held that a telegraph company may agree to deliver by telephone a message addressed to a person living beyond the free delivery limits.

<sup>213</sup> *West. U. Tel. Co. v. Swearingen*, 95 Tex. 420, 67 S. W. 767.

<sup>214</sup> See *West. U. Tel. Co. v. Alford*, 110 Ark. 379, 161 S. W. 1027, 50 L. R. A. (N. S.) 94.

<sup>215</sup> *Rosser v. West. U. Tel. Co.*, 130 N. C. 251, 41 S. E. 378; *West. U. Tel. Co. v. Benson*, 159 Ala. 254, 48 South. 712; *Arkansas, etc., R. Co. v. Stroude*, 82 Ark. 117, 100 S. W. 760; *West. U. Tel. Co. v. Davis*, 30 Tex. Civ. App. 590, 71 S. W. 313; *West. U. Tel. Co. v. Vance* (Tex. Civ. App.) 151 S. W. 904. The company must use due diligence to ascertain whether the addressee is within the free delivery limits, and the mere fact that the addressee, who lives within such limits, is temporarily beyond the limits, will not justify the company in relaxing its diligence in making further effort to deliver the telegram; nor does the fact that the addressee resides beyond the free delivery limits excuse nondelivery of the telegram if, by the exercise of ordinary diligence, it can be delivered to the addressee within such limits. *West.*



waived its right to collect for the extra charge.<sup>216</sup> What is necessary to constitute a waiver is a question of fact, and where the company has been accustomed to accept messages addressed to certain parties living beyond this free delivery limit for a long time, it will be presumed that it has waived its rights.<sup>217</sup> In those jurisdictions which hold that a company is under no obligation to deliver a message to an addressee living beyond the free delivery limit, without the prepayment of the extra charge, it is generally the custom for the operator at the receiving office to notify the sender of the fact that the sendee lives beyond these limits, and the amount of the extra charge necessary to be paid;<sup>218</sup> and, on a failure to do this, the company will be liable for nondelivery.<sup>219</sup> But if the sender cannot be found, after reasonable search, in order that he may be informed of this fact, the company will then have discharged its duty and will not be liable for the nondelivery. Whatever the custom may be with respect to the delivery of messages beyond the free delivery limit, and the manner of collecting the extra compensation, the regulations requiring prepayment of special charges will be strictly construed against the company.<sup>220</sup>

U. Tel. Co. v. Benson, *supra*; Arkansas, etc., R. Co. v. Stroude, *supra*; West. U. Tel. Co. v. McMullin, 98 Ark. 347, 135 S. W. 909; West. U. Tel. Co. v. Daniels, 15 Ky. Law Rep. 813; West. U. Tel. Co. v. Merrill, 144 Ala. 618, 39 South. 121, 113 Am. St. Rep. 66.

<sup>216</sup> Whittemore v. West. U. Tel. Co. (C. C.) 71 Fed. 651; West. U. Tel. Co. v. Matthews, 67 S. W. 849, 24 Ky. Law Rep. 3; West. U. Tel. Co. v. Robinson, 97 Tenn. 638, 37 S. W. 545, 34 L. R. A. 431n; West. U. Tel. Co. v. Teague, 8 Tex. Civ. App. 444, 27 S. W. 958; West. U. Tel. Co. v. Hargrove, 14 Tex. Civ. App. 79, 36 S. W. 1077; West. U. Tel. Co. v. Sweetman, 19 Tex. Civ. App. 435, 47 S. W. 676; West. U. Tel. Co. v. Davis, 30 Tex. Civ. App. 590, 71 S. W. 313; Lyles v. West. U. Tel. Co., 77 S. C. 174, 57 S. E. 725, 12 L. R. A. (N. S.) 534, may agree to deliver.

<sup>217</sup> West. U. Tel. Co. v. Womack, 9 Tex. Civ. App. 607, 29 S. W. 932; West. U. Tel. Co. v. Robinson, 97 Tenn. 638, 37 S. W. 545, 34 L. R. A. 431n; West. U. Tel. Co. v. Cain (Tex. Civ. App.) 40 S. W. 624; West. U. Tel. Co. v. Davis, 24 Tex. Civ. App. 427, 59 S. W. 46; Klopff v. West. U. Tel. Co., 100 Tex. 540, 101 S. W. 1072, 123 Am. St. Rep. 831, 10 L. R. A. (N. S.) 498, reversing (Tex. Civ. App.) 97 S. W. 829, in which it was said: "The evidence tends to show a general custom of the defendant to make deliveries throughout the territory in which plaintiff and his wife resided; and this defined the extent of its undertaking, when, upon payment of its customary charges for like services, it accepted and transmitted the messages." Compare West. U. Tel. Co. v. Wilson (Tex. Civ. App.) 152 S. W. 1169.

<sup>218</sup> See cases in note 208.

<sup>219</sup> Evans v. West. U. Tel. Co. (Tex. Civ. App.) 56 S. W. 609; West. U. Tel. Co. v. Pierce (Tex. Civ. App.) 70 S. W. 360. Where such notice is not given, it would be evidence of negligence. Hendricks v. West. U. Tel. Co., 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658; Bright v. West. U. Tel. Co., 132 N. C. 317, 43 S. E. 841; Bryan v. West. U. Tel. Co., 133 N. C. 603, 45 S. E. 938.

<sup>220</sup> See note 220 on following page.

§ 305. **No delivery limit fixed.**—If there is no free delivery limit fixed, either by the company or by statute, it is presumed that the company will deliver all messages to parties who live within a reasonable distance of the company's office. It is not to be understood, when these message blanks contain a stipulation that messages will be delivered free within the established free delivery limits of the terminal office and that for a greater distance a special charge will be made to cover the cost of such delivery, that this prescribes or fixes a free delivery limit, but that it gives the company the right to make a limit;<sup>221</sup> and until such is made it is presumed that the company will deliver to all who live within a reasonable distance from the terminal office. What is a reasonable distance is a question for the jury, and must be determined by a consideration of the surrounding circumstances.<sup>222</sup>

§ 306. **Must use due diligence to deliver.**—The company must exercise due diligence and effort to find the addressee of a message and deliver same to him.<sup>223</sup> We may say that there is even a greater amount of diligence required on the part of a telegraph company in making an effort to find the addressee and deliver the message to him than to be exercised in its transmission. For, if there is an immediate effort to transmit, and the company is unable on account of some unavoidable hindrance to do so, the sender may be notified

<sup>220</sup> West. U. Tel. Co. v. Moore, 12 Ind. App. 136, 39 N. E. 874, 54 Am. St. Rep. 515.

<sup>221</sup> West. U. Tel. Co. v. Davis, 24 Tex. Civ. App. 427, 59 S. W. 46; West. U. Tel. Co. v. Robinson, 97 Tenn. 638, 37 S. W. 545, 34 L. R. A. 431; West. U. Tel. Co. v. Cain (Tex. Civ. App.) 40 S. W. 624. See West. U. Tel. Co. v. Webb, 98 Ark. 87, 135 S. W. 366, rules prescribing free delivery limits are for benefit of company, and may be waived.

<sup>222</sup> West. U. Tel. Co. v. Russell (Tex. Civ. App.) 31 S. W. 698.

<sup>223</sup> Pope v. West. U. Tel. Co., 9 Ill. App. 283; Bliss v. Baltimore, etc., Tel. Co., 30 Mo. App. 103; Julian v. West. U. Tel. Co., 98 Ind. 327; Harkness v. West. U. Tel. Co., 73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672; West. U. Tel. Co. v. Gougar, 84 Ind. 176; West. U. Tel. Co. v. Moore, 12 Ind. App. 136, 39 N. E. 874, 54 Am. St. Rep. 515; Manville v. West. U. Tel. Co., 37 Iowa, 214, 18 Am. Rep. 8; Mackay v. West. U. Tel. Co., 16 Nev. 222; West. U. Tel. Co. v. Fatman, 73 Ga. 285, 54 Am. Rep. 877; West. U. Tel. Co. v. Krichbaum, 145 Ala. 409, 41 South. 16; Hendershot v. West. U. Tel. Co., 106 Iowa, 529, 76 N. W. 828, 68 Am. St. Rep. 313; Lyne v. West. U. Tel. Co., 123 N. C. 129, 31 S. E. 350; West. U. Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772; West. U. Tel. Co. v. O'Fiel, 47 Tex. Civ. App. 40, 104 S. W. 406; West. U. Tel. Co. v. Waller, 37 Tex. Civ. App. 515, 84 S. W. 695; West. U. Tel. Co. v. James, 31 Tex. Civ. App. 503, 73 S. W. 79; Miller v. West. U. Tel. Co., 159 N. C. 501, 75 S. E. 795; West. U. Tel. Co. v. Bibb, 136 Ky. 817, 125 S. W. 257, 27 L. R. A. (N. S.) 502; West. U. Tel. Co. v. Price, 137 Ky. 758, 126 S. W. 1100, 29 L. R. A. (N. S.) 836; Klopff v. West. U. Tel. Co., 100 Tex. 540, 101 S. W. 1072, 123 Am. St. Rep. 831, 10 L. R. A. (N. S.) 498, reversing (Tex. Civ. App.) 97 S. W. 829.

in time to pursue another course if possible. But when the message has been transmitted to the operator at the terminal office, it will be so far beyond his reach as to prevent him from ascertaining the condition of affairs. It is then not incumbent on him to find out whether or not the company is exercising diligence in delivering the message; <sup>224</sup> or even whether it has delivered it at all. It is presumed that the company is exercising diligence in the transmission and delivery of its messages, and the sender, for this reason, would likely be laboring under the belief that the message had been delivered promptly and accomplished the desired results. Reasonable diligence exercised in the finding of the sendee and a promptness to deliver same to him is a part of the contract of transmission, and a failure to do either is no transmission.<sup>225</sup>

§ 307. **Same continued—illustrations.**—It is not enough to attempt a delivery at the office or place of business of the person addressed; <sup>226</sup> especially when he, as well as his place of residence,

<sup>224</sup> West. U. Tel. Co. v. Chamblee, 122 Ala. 428, 25 South. 232, 82 Am. St. Rep. 89.

<sup>225</sup> West. U. Tel. Co. v. Gougar, 84 Ind. 176.

<sup>226</sup> Pope v. West. U. Tel. Co., 9 Ill. App. 283; or merely to inquire at his home or his place of business, Post. Tel. Cable Co. v. Pratt, 85 S. W. 225, 27 Ky. Law Rep. 430; West. U. Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772; Klopff v. West. U. Tel. Co., 100 Tex. 540, 101 S. W. 1072, 123 Am. St. Rep. 831, 10 L. R. A. (N. S.) 498, reversing (Tex. Civ. App.) 97 S. W. 825; or at a given local address, West. U. Tel. Co. v. Waller, 37 Tex. Civ. App. 515, 84 S. W. 695; West. U. Tel. Co. v. De Jarles, 8 Tex. Civ. App. 109, 27 S. W. 792; or at his office only, Hendershot v. West. U. Tel. Co., 106 Iowa. 529, 76 N. W. 828, 68 Am. St. Rep. 313. The city directory should, if necessary, be consulted. Martin v. West. U. Tel. Co., 81 S. C. 432, 62 S. E. 833; Klopff v. West. U. Tel. Co., 100 Tex. 540, 101 S. W. 1072, 123 Am. St. Rep. 831, 10 L. R. A. (N. S.) 498, reversing (Tex. Civ. App.) 97 S. W. 829; West. U. Tel. Co. v. Elliot, 131 Ky. 340, 115 S. W. 228, 22 L. R. A. (N. S.) 761; West. U. Tel. Co. v. Newhouse, 6 Ind. App. 422, 33 N. E. 800; West. U. Tel. Co. v. Cain (Tex. Civ. App.) 40 S. W. 624; Martin v. Sunset Tel. & Tel. Co., 18 Wash. 260, 51 Pac. 376. A *prima facie* case of negligence is shown where an erroneous street address is given on the message and the sendee's name and correct address appeared in the city directory, which was not consulted, and no effort made to discover the sendee. Woods v. West. U. Tel. Co., *supra*; West. U. Tel. Co. v. Holley, 55 Tex. Civ. App. 432, 119 S. W. 888; West. U. Tel. Co. v. Price, 137 Ky. 758, 126 S. W. 1100, 29 L. R. A. (N. S.) 836, after office hours should telephone message if addressee has phone; West. U. Tel. Co. v. Gilstrap, 77 Kan. 191, 94 Pac. 122, exemplary damages allowed.

Inquiry, perhaps, should be made at the post office, Woods v. West. U. Tel. Co., 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581; Lyne v. West. U. Tel. Co., 123 N. C. 129, 31 S. E. 350; but need not make house to house search, West. U. Tel. Co. v. Cox (Tex. Civ. App.) 74 S. W. 922; or every business or public place, West. U. Tel. Co. v. Cox (Tex. Civ. App.) 74 S. W. 922.

*Illustrations of due diligence.*—See Key v. West. U. Tel. Co., 76 S. C. 301, 56 S. E. 963; West. U. Tel. Co. v. Cross, 116 Ky. 5, 74 S. W. 1098, 76 S. W.



is well known in the town where the message is received.<sup>227</sup> Failing in the attempt to deliver a message after business hours or on Sunday will not excuse a failure to deliver;<sup>228</sup> and where it was said that "the unsuccessful attempts of the company's agent to deliver said message at the business house of Arthur Peter & Co., the addressee, either on Saturday night after the close of business hours, or on Sunday where there are not or should not be any business hours, certainly affords no reasonable excuse for the nondelivery of, or for want of an effort to deliver, the said message during business hours of the succeeding Monday." A company failed to exercise due diligence in delivering a message, where it was given to a messenger, who took it to the addressee's place of business and was there told that the latter was five miles in the country, but that a person was going out there and would carry it, and the message was taken back to the office, and no further attempt made to deliver it, though the house of the addressee was about one-half mile from the terminal station in a town where there were no prescribed free delivery limits.<sup>229</sup>

§ 308. **Diligence exercised—evidence—burden of proof.**—When a telegraph company fails to deliver a message to the party addressed, or when it is delivered, but not immediately, the question which necessarily presents itself is whether or not it is a question of fact to be decided by a jury, or a question of law for the court? If the evidence in the case is so very clear as to show to any reasonable and fair-minded man that the company was not negligent in making a reasonable effort to deliver the message sent, or if it is an undisputed fact, it is a question for the court.<sup>230</sup> But if the evi-

162; *Hargrave v. West. U. Tel. Co.* (Tex. Civ. App.) 60 S. W. 687; *West. U. Tel. Co. v. Burgess* (Tex. Civ. App.) 43 S. W. 1033; *Deslottes v. Baltimore, etc., Tel. Co.*, 40 La. Ann. 183, 3 South. 566; *West. U. Tel. Co. v. Smith*, 93 Ga. 635, 21 S. E. 166, question for jury to determine whether due diligence was exercised. Cases holding that due diligence was not exercised: *West. U. Tel. Co. v. McKibben*, 114 Ind. 511, 14 N. E. 894; *West. U. Tel. Co. v. Carter* (Tex. Civ. App.) 20 S. W. 834; *West. U. Tel. Co. v. Ferguson*, 157 Ind. 37, 60 N. E. 679; *West. U. Tel. Co. v. James*, 31 Tex. Civ. App. 503, 73 S. W. 79; *West. U. Tel. Co. v. Lewis*, 89 Ark. 375, 116 S. W. 894; *Gulf, etc., R. Co. v. Wilson*, 69 Tex. 739, 7 S. W. 653; *West. U. Tel. Co. v. Manker*, 145 Ala. 418, 41 South. 850; *Martin v. West. U. Tel. Co.*, 81 S. C. 432, 62 S. E. 833; *Sherrill v. West. U. Tel. Co.*, 116 N. C. 655, 21 S. E. 429; *Bolton v. West. U. Tel. Co.*, 76 S. C. 529, 57 S. E. 543; *West. U. Tel. Co. v. Patrick*, 92 Ga. 607, 18 S. E. 980, 44 Am. St. Rep. 90.

<sup>227</sup> *West. U. Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728, note.

<sup>228</sup> *West. U. Tel. Co. v. Lindley*, 62 Ind. 371.

<sup>229</sup> *West. U. Tel. Co. v. Russell*, 31 S. W. 698. See, also, *Sherrill v. West. U. Tel. Co.*, 116 N. C. 655, 21 S. E. 429.

<sup>230</sup> *Deslottes v. Baltimore, etc., Tel. Co.*, 40 La. Ann. 183, 3 South. 566;

dence on this point is conflicting, it is a question of fact.<sup>231</sup> In order to ascertain the fact as to whether a telegraph company has been negligent in delivering a message promptly, for which it would be liable for all damages arising therefrom, all the facts pertaining to the case must be considered. No two cases arise with the same state of facts and the facts, necessary to be considered, are not always the same. The burden of proof to show that the company exercised due diligence in the delivery of the message is on the company.<sup>232</sup> Thus the fact that the person addressed was not at the office and could not be found so that the message could be delivered to him is a matter of defense which must be shown by the company;<sup>233</sup> and any information received by the messenger at the office of the addressee as to the whereabouts is admissible to show that he was not at the time at the place to which the message was sent.<sup>234</sup>

§ 309. **Failure to designate with accuracy the address.**—The sender is presumed to know the name of the party to whom he desires the message to be sent, where he resides, and that he has written this accurately and correctly on the telegram.<sup>235</sup> The com-

Milliken v. West. U. Tel. Co., 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281; West. U. Tel. Co. v. McKibben, 114 Ind. 511, 14 N. E. 894; West. U. Tel. Co. v. Lindley, 62 Ind. 371; West. U. Tel. Co. v. Trissal, 98 Ind. 566; Cordell v. West. U. Tel. Co., 149 N. C. 402, 63 S. E. 71, 22 L. R. A. (N. S.) 540.

When a company receives a message for delivery and it fails to do so, it becomes *prima facie* liable. Woods v. West. U. Tel. Co., 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581; Fowler v. West. U. Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211; Cogdell v. West. U. Tel. Co., 135 N. C. 431, 47 S. E. 490; Hendricks v. West. U. Tel. Co., 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658; Miller v. West. U. Tel. Co., 159 N. C. 501, 75 S. E. 795. But this may be rebutted. West. U. Tel. Co. v. Elliott, 131 Ky. 340, 115 S. W. 228, 22 L. R. A. (N. S.) 761; Fowler v. West. U. Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211.

<sup>231</sup> West. U. Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728 note; Reynolds v. West. U. Tel. Co., 81 Mo. App. 223; Klopff v. West. U. Tel. Co., 100 Tex. 540, 101 S. W. 1072, 123 Am. St. Rep. 831, 10 L. R. A. (N. S.) 498; West. U. Tel. Co. v. Hankins, 50 Tex. Civ. App. 513, 110 S. W. 539; Brumfield v. West. U. Tel. Co., 97 Iowa, 693, 66 N. W. 898. See, also, § 321, et seq.

<sup>232</sup> West. U. Tel. Co. v. Scircle, 103 Ind. 227, 2 N. E. 604; Harkness v. West. U. Tel. Co., 73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672, delay of three days in delivery; Cogdell v. West. U. Tel. Co., 135 N. C. 431, 47 S. E. 490; West. U. Tel. Co. v. Smith, 88 Tex. 9, 28 S. W. 931, 30 S. W. 549; Potter v. West. U. Tel. Co., 138 Iowa, 406, 116 N. W. 130, burden is upon defendant.

<sup>233</sup> West. U. Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728, note.

<sup>234</sup> Id.

<sup>235</sup> Cordell v. West. U. Tel. Co., 149 N. C. 402, 63 S. E. 71, 22 L. R. A. (N. S.) 540, quoting author.

pany's duty is only to transmit and deliver to the person whose name is given, at his address. So, if the company, after having assumed the duty to transmit a message, sends it to the person at the place designated and same is accepted by the person claiming to be the addressee, or an authorized agent of his, it will have discharged its duty, notwithstanding the fact that it was delivered to the wrong person. This may be caused by the contributory negligence of the sender,<sup>236</sup> by not giving the name and address of the sendee with sufficient accuracy.<sup>237</sup> Thus, if the sender should fail to designate with accurate definiteness the name of the addressee or his place of abode, and the message is delivered to the place where the real addressee resides or does business, to a person claiming to be the party addressed, the company would have discharged its duty.<sup>238</sup> If the sender fails upon request to make the name of the addressee more definite, or to give the street and number of the latter, where the place is a town of several thousand people, he will be guilty of such contributory negligence as to preclude him from recovering for the failure of the company to deliver the message.<sup>239</sup> But should the sender's name, place of business or residence be improperly or insufficiently given, it would still be the duty of the company to exercise diligent effort to find and deliver the message to the proper party at the proper place if it has any information as to who the addressee likely is.<sup>240</sup> So it is not necessarily con-

<sup>236</sup> However, it must contribute to the failure to deliver it. *West. U. Tel. Co. v. Lewis*, 89 Ark. 375, 116 S. W. 894; *Arkansas, etc., R. Co. v. Stroude*, 82 Ark. 117, 100 S. W. 760; *Hise v. West. U. Tel. Co.*, 137 Iowa, 329, 113 N. W. 819; *West. U. Tel. Co. v. Rawls* (Tex. Civ. App.) 62 S. W. 136.

<sup>237</sup> *West. U. Tel. Co. v. Patrick*, 92 Ga. 607, 18 S. E. 980, 44 Am. St. Rep. 90, message addressed to "Colonel O. M. Bergstrom, 47 S. Pryor St.," and the addressee having no title or known by one; *West. U. Tel. Co. v. McDaniel*, 103 Ind. 294, 2 N. E. 709, message not stating Christian name or local street address; *Deslottes v. Baltimore, etc., Tel. Co.*, 40 La. Ann. 183, 3 South. 566; *West. U. Tel. Co. v. Wofford*, 32 Tex. Civ. App. 427, 72 S. W. 620, 74 S. W. 943, although action brought by the sendee; *Hargrave v. West. U. Tel. Co.* (Tex. Civ. App.) 60 S. W. 687, "near" a certain mill, when a mile from the mill; *West. U. Tel. Co. v. Rawls* (Tex. Civ. App.) 62 S. W. 136, failure to prefix "Mrs." to name "L. W. Rawls." However, this has been questioned. *Cogdell v. West. U. Tel. Co.*, 135 N. C. 431, 47 S. E. 490.

<sup>238</sup> *Deslottes v. Baltimore, etc., Tel. Co.*, 40 La. Ann. 183, 3 South. 566.

<sup>239</sup> *West. U. Tel. Co. v. McDaniel*, 103 Ind. 294, 2 N. E. 709.

<sup>240</sup> A recovery not necessarily denied when message sent without local address, *West. U. Tel. Co. v. Ford*, 77 Ark. 531, 92 S. W. 528; *West. U. Tel. Co. v. Lewis*, 89 Ark. 375, 116 S. W. 894; *West. U. Tel. Co. v. McKibben*, 114 Ind. 511, 14 N. E. 894; *West. U. Tel. Co. v. Bowen* (Tex. Civ. App.) 76 S. W. 613, reversed, on other grounds, in 97 Tex. 621, 81 S. W. 27; or was indefinite, *West. U. Tel. Co. v. Birchfield*, 15 Tex. Civ. App. 426, 39 S. W. 1002; or erroneous, *Woods v. West. U. Tel. Co.*, 148 N. C. 1, 61 S. E. 653.



tributory negligence to send a message without a definite local address,<sup>241</sup> particularly where the sender gives the best address that he knows or can with reasonable diligence ascertain.<sup>242</sup> If the cause for failing to deliver was due to the negligence of the company in making an error in transmitting the message,<sup>243</sup> or by intentionally altering it,<sup>244</sup> the company will be liable; furthermore, where the message is written by the agent at the request of the sender, the company may be liable for an error of such agent in spelling the name of the place to which the message is addressed.<sup>245</sup>

§ 310. **Penalty imposed for failure to deliver.**—There are statutes in most of the states which impose a penalty on telegraph companies for a failure to promptly transmit and deliver messages intrusted to them, and this penalty may be recovered without alleging or proving any actual damages.<sup>246</sup> But in other cases, unless the plaintiff proves special injury or actual damage, he can recover nominal damages only.<sup>247</sup>

§ 311. **Duty to preserve secrecy of message.**—It is the duty of a telegraph company to abstain from using or divulging the contents of messages intrusted to them for transmission. There is a similarity between correspondence by mail and communications by wire, with respect to the rights of the receiver of the letter and the tele-

128 Am. St. Rep. 581; *Hise v. West. U. Tel. Co.*, 137 Iowa, 329, 113 N. W. 819; *West. U. Tel. Co. v. Cain* (Tex. Civ. App.) 40 S. W. 624. But such errors will furnish evidence whether due care and diligence in making the delivery have been exercised. *West. U. Tel. Co. v. Patrick*, 92 Ga. 607, 18 S. E. 980, 44 Am. St. Rep. 90; *West. U. Tel. Co. v. Ford*, 77 Ark. 531, 92 S. W. 528; *Cason v. West. U. Tel. Co.*, 77 S. C. 157, 57 S. E. 722.

*Message addressed to married women.*—See *Martin v. West. U. Tel. Co.*, 81 S. C. 432, 62 S. E. 833; *West. U. Tel. Co. v. Ford*, 77 Ark. 531, 92 S. W. 528; *Hurlburt v. West. U. Tel. Co.*, 123 Iowa, 295, 98 N. W. 794; *Bailey v. West. U. Tel. Co.*, 150 N. C. 316, 63 S. E. 1044.

*Error in name of sendee.*—See *West. U. Tel. Co. v. Holley*, 55 Tex. Civ. App. 432, 119 S. W. 888; *Cogdell v. West. U. Tel. Co.*, 135 N. C. 431, 47 S. E. 490; *Miller v. West. U. Tel. Co.*, 167 N. C. 315, 83 S. E. 482.

<sup>241</sup> *West. U. Tel. Co. v. Lewis*, 89 Ark. 375, 116 S. W. 894.

<sup>242</sup> *West. U. Tel. Co. v. Bowen* (Tex. Civ. App.) 76 S. W. 613, reversed on other grounds in 97 Tex. 621, 81 S. W. 271.

<sup>243</sup> *Postal Tel. Cable Co. v. Sunset Const. Co.*, 102 Tex. 148, 114 S. W. 98, reversing (Tex. Civ. App.) 109 S. W. 265; *Hise v. West. U. Tel. Co.*, 137 Iowa, 329, 113 N. W. 819; *Hedrick v. West. U. Tel. Co.*, 167 N. C. 234, 83 S. E. 358.

<sup>244</sup> *Elsev v. Post. Tel. Co.*, 15 Daly, 58, 3 N. Y. Supp. 117.

<sup>245</sup> *West. U. Tel. Co. v. Hankins*, 50 Tex. Civ. App. 513, 110 S. W. 539. See § 327. See, also, *Miller v. West. U. Tel. Co.*, 167 N. C. 315, 83 S. E. 482.

<sup>246</sup> *Little Rock, etc., Tel. Co. v. Davis*, 41 Ark. 79; *West. U. Tel. Co. v. Buchanan*, 35 Ind. 429, 9 Am. Rep. 744.

<sup>247</sup> *Little Rock, etc., Tel. Co. v. Davis*, 41 Ark. 79; *Cutts v. West. U. Tel. Co.*, 71 Wis. 46, 36 N. W. 627.

graph company over the message. The weight of authority is that the receiver of a letter has only a right in its tangible property or the paper on which it is written; that the literary qualities or property therein belongs to the writer; and that it can be used by the former only as a means of carrying out the purposes for which it was written. From this doctrine it follows as a general rule that the receiver has no right to publish the letter without the consent of the writer, and such publication will be enjoined by a court of equity.<sup>248</sup> The grounds on which the right of injunction is granted for such matters is that to permit a receiver of a letter to use it for other purposes than that for which it was written, or to permit him to have the right to divulge its contents, would be a breach of bad faith and would tend to create public disturbances and breaches of the peace.<sup>249</sup> In the application of this principle to telegraph companies in the transmission of messages, it is very important to bear in mind that the company must necessarily be informed of the contents of a message in order that it may be able to transmit it, but that this is the only reason why it should obtain this information. It can obtain no interest either in the tangible property of the telegram, as the receiver of a letter obtains in the letter, nor any interest whatever in it as a literary product. The receiver of a letter may use its contents for the purposes for which it was intended to be used, and may derive profit thereby; but the telegraph company can use the contents or knowledge of the telegram only as a means of correctly transmitting and delivering it, and it would hardly be possible that a telegram would be tendered to them for transmission, out of which they could derive further profit than that acquired for its service. While there is a striking similarity existing between these two parties over letters and telegrams, respectively, while in their possession, yet it seems that the interest acquired by the latter is not so great as that of the former. So, if the former can be enjoined from using the letter for other purposes than that for which it was intended to be used, there is no reason why a telegraph company may not be enjoined from using or divulging the contents of the telegram. The duty imposed on telegraph companies in this respect is even greater than that of the receiver of a letter; for the latter has the control over the tangible property of the letter and its contents sent directly in its original form from the writer, and, being a principal in the correspondence, has surely more liberties with the letter than the former over the

<sup>248</sup> Smith, Per. Prop. 92.

<sup>249</sup> Smith, Per. Prop. 92; Gray on Tel. § 25.

messages intrusted to its care. It follows, therefore that if a telegraph company makes any use or disclosure of its message other than is necessary in the ordinary course of its business, it will be liable.<sup>250</sup> Involved in every contract for the transmission of a telegraphic dispatch is an obligation on the part of the company to keep its contents secret from the world, and for a breach of which it will be liable for all actual damages arising directly therefrom,<sup>251</sup> and should it be done in a willful or reckless manner, it should be held liable for punitive damages.<sup>252</sup> The company is not liable, however, for a disclosure of a message in court in pursuance to a writ of subpoena *duces tecum*.<sup>253</sup>

§ 312. Same continued—imposed by statute.—In some states there are statutes which impose the duty, either upon telegraph companies or upon their operators, to abstain from disclosing the contents of a message intrusted to their care, and for a willful violation of which the wrongdoer is subjected to punishment.<sup>254</sup> These are penal statutes and must, therefore, be strictly construed. So, if the statutes provide that the transmitting operator shall be punished for a violation of the statute he, and not the company, nor the receiving operator or messenger, shall be punished for the wrong. In other words, if the statute imposes this duty only on the transmitting operator, and the contents of the message are will-

<sup>250</sup> *Cocke v. West. U. Tel. Co.*, 84 Miss. 380, 36 South. 392; *Woods v. Miller*, 55 Iowa, 168, 7 N. W. 484, 39 Am. Rep. 170; *Barnes v. Postal Tel. Cable Co.*, 156 N. C. 150, 72 S. E. 78; *Hellams v. West. U. Tel. Co.*, 70 S. C. 83, 49 S. E. 12; *Barnes v. West. U. Tel. Co.*, (C. C.) 120 Fed. 550.

*Plaintiff must come in with clean hands.*—In *West. U. Tel. Co. v. McLaurin* (Miss.) 66 South. 739, L. R. A. 1915C. 487, the court held that the telegraph company violated its public duty when it disclosed the contents of the message to persons other than the addressee, but holding that when it appears that the plaintiff's right of recovery is based upon his own wrong, the court will bring the case to an end and disregard the wrongs committed by defendant.

<sup>251</sup> Exemplary damages are not recoverable merely for divulging the contents of a telegram, *Cocke v. West. U. Tel. Co.*, supra.

<sup>252</sup> *Cocke v. West. U. Tel. Co.*, supra. See, also, *Matter of Renville*, 46 App. Div. 37, 61 N. Y. Supp. 549; *Hellams v. West. U. Tel. Co.*, 70 S. C. 83, 49 S. E. 12.

<sup>253</sup> *Woods v. Miller*, 55 Iowa, 168, 7 N. W. 484, 39 Am. Rep. 170.

<sup>254</sup> See *Arkansas*, etc., *R. Co. v. Stroude*, 82 Ark. 117, 100 S. W. 760; *Matter of Renville*, 46 App. Div. 37, 61 N. Y. Supp. 549.

For the protection of radio communications, Congress enacted a law making it a crime for any one connected with a wireless company to divulge the contents of a wireless message. "An Act to Regulate Radio Communication," approved August 13, 1912, 37 Stat. 302, c. 287 (Comp. St. 1913, §§ 10100-10109).

*Liability for wrongfully opening a telegram.*—See *Deighton v. Hover*, 58 Wash. 12, 107 Pac. 853, 137 Am. St. Rep. 1035.



fully divulged at the other end of the line, either by the receiving operator or messenger boy, the first-named operator would not be guilty of a wrong, nor would the company, unless its servant was acting at that time within the scope of his authority. But should the wrong be committed by the company's employé while acting within his apparent authority, the company will be liable for such wrong as any other principal would be for the wrongs of his agent, under similar circumstances.

§ 313. **Same continued—applicable to telephone companies.**—It is the duty of telephone employés to abstain from divulging or using any of the contents of any communication carried on over their wires, and for a violation of which they will be liable in damages. The strictness of this rule should be very stringently observed, since the operators of these companies are placed in a position to ascertain all the business transactions about which the communications are made, and could, for this reason, injure the communicants very seriously in their business affairs.

§ 314. **Messages "in care of" common carriers.**—Common carriers, as such, are under no obligation to deliver messages to their passengers. So, if a message is delivered to one of their employés, addressed in care of the common carrier, for one of the passengers on board, they will not be liable for a failure to deliver the message, unless it is the custom or practice for such messages to be delivered; and then it seems that the company would be liable.<sup>255</sup> Arrangements could be made to this effect by special agreement, and under such circumstances, the carrier would be duty bound to make such delivery. If, however, the message is addressed to one of the employés of the carrier and is sent in care of the latter, designating the particular carrier, a delivery to the latter will be sufficient delivery; and it would be the duty of the latter to make a delivery to the party addressed if practicable. But if the message is addressed to one of the employés of another carrier, as that of a sleeping car company, and sent in care of the common carrier of passengers, or railroad company, the latter would not be under any obligation to deliver the message, unless special arrangements have been made to that effect.

§ 315. **Same continued—telephone.**—It is not the duty of telephone companies to deliver messages; <sup>256</sup> but, where the agent of the

<sup>255</sup> *Davies v. Eastern Steamboat Company*, 94 Me. 379, 47 Atl. 896, 53 L. R. A. 239, where the telegram was delivered to the captain of a steam-

<sup>256</sup> *Southwestern Tel., etc., Co. v. Flood*, 51 Tex. Civ. App. 340, 111 S. W. 1064; *Southwestern Tel., etc., Co. v. Gotcher*, 93 Tex. 114, 53 S. W. 686.

company has the apparent authority to receive messages for transmission and delivery, the company will be liable for damages in the negligent performance of the undertaking.<sup>257</sup> Thus, where it is agreed, through the knowledge of the company, between a party, who pays the charges for transmission and an extra charge for the delivery, and the agent at one of the termini of the company's line that the latter will receive and deliver a message two miles from the office of the company, and the agent negligently delays in delivering same for eight hours after the message is received, and damages arise thereby, the company will be liable.<sup>258</sup> And it will be no ground for defense that the agent believed that the sendee would not be benefited or would not be enabled to comply with the wishes of the message by an earlier and more prompt delivery of same.<sup>259</sup> It is no duty of the agent to speculate as to the necessity of a prompt delivery of the message, but he should use due diligence in making a prompt delivery.<sup>260</sup> In order for the sendee to recover damages, under such circumstances, he must prove that he could and would have complied with the apparent wishes of the message.<sup>261</sup>

§ 316. **Message for person—make reasonable search.**—As it is presumed that parties desiring to converse over telephone lines are put in direct communication with each other, and that it is not under the same duty to deliver the messages as it is for telegraph companies to deliver telegrams, unless it apparently assume the duty, yet in order to place the parties in communication with each other it is often necessary to search for the party called. For instance, suppose a call is put in for a certain person, who may or may not be a subscriber, and it is necessary, in order to get the

boat; *Lefler v. West. U. Tel. Co.*, 131 N. C. 355, 42 S. E. 819, 59 L. R. A. 477; *West. U. Tel. Co. v. Shaw*, 40 Tex. Civ. App. 277, 90 S. W. 58. See *West. U. Tel. Co. v. Smith*, 164 Ky. 270, 175 S. W. 375.

<sup>257</sup> In many cases telephone companies contract to send messages in the nature of telegrams, and when such is the case, they are under the same obligations and subject to the same liabilities as telegraph companies, and are bound by the same rules. See notes to *West. U. Tel. Co. v. Cooper*, 10 Am. St. Rep. 778; *West. U. Tel. Co. v. Luck*, 66 Am. St. Rep. 873. See *Cumberland Tel., etc., Co. v. Atherton*, 122 Ky. 154, 91 S. W. 257, 28 Ky. Law Rep. 1100. See, also, *State v. Tel. Co.*, 85 Wash. 29, 147 Pac. 885, meaning of "transmission without delay" over telephone.

<sup>258</sup> *Cumberland Tel. Co. v. Brown*, 104 Tenn. 56, 55 S. W. 155, 50 L. R. A. 277, 78 Am. St. Rep. 906; *Southwestern, etc., Tel. Co. v. Dale* (Tex. Civ. App.) 27 S. W. 1059.

<sup>259</sup> *Cumberland Tel., etc., Co. v. Brown*, 104 Tenn. 56, 55 S. W. 155, 78 Am. St. Rep. 906, 50 L. R. A. 277.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

party, to send out and notify him of the call. The question which presents itself is, Is it the duty of the company to send out for the party called? It seems to us that, if the party wanted is within a reasonable distance of the company's exchange, it is the duty of the latter to make reasonable efforts to reach him; surely it is if extra charges have been collected for such services.<sup>262</sup> Many times such calls are made for parties who are entire strangers in the town, to which doubtless, there are no other means of reaching him—as by telegram. To say that the company is not under some obligations to the public to make an effort to apprise him of the call would be nothing less than to release it from performing one of its public duties. Although it is rather difficult, in this instance, to lay down any principle of law, as a standard of measurement, in determining what would be a reasonable distance, within which search should be made, yet each case should be taken and considered somewhat on its own merits. By the construction of an Indiana statute, it has been held that it is the duty of telephone companies, in that state, to notify a person living within a reasonable distance of the receiving station that he is wanted.<sup>263</sup> It does not seem that it should be necessary for the existence of such a statute, in order to impose on the company the duty of notifying a person who lives within a reasonable distance of the receiving office; but the question to be decided is, What is a reasonable distance from the receiving office to where the party wanted lives? It is very evident that the company is not under the same obligations it otherwise would be if extra charges had been collected for performing this service. So, while it may be seen that this is one of the duties of these companies, yet it is one not to be so closely observed as those for which they are directly compensated.

§ 317. Same continued—when compensated.—The preceding sections have reference particularly to calls made where no extra

<sup>262</sup> *McLeod v. Pacific Tel. Co.*, 52 Or. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. (N. S.) 810, 18 L. R. A. (N. S.) 954, 16 Ann. Cas. 1239; *Southwestern Tel., etc., Co. v. Owens* (Tex. Civ. App.) 116 S. W. 89; *Southwestern Tel., etc., Co. v. McCoy* (Tex. Civ. App.) 114 S. W. 387; *Southwestern Tel., etc., Co. v. Flood*, 51 Tex. Civ. App. 340, 111 S. W. 1064; *Southwestern Tel., etc., Co. v. Taylor*, 26 Tex. Civ. App. 79, 63 S. W. 1076. In *Wiggs v. Southwestern Tel., etc., Co.* (Tex. Civ. App.) 110 S. W. 179, in an action for mental suffering for failure promptly to call plaintiff to listen to a telephone message from her father concerning the serious illness of her brother, a recovery was denied upon the ground that the negligence of the telephone company in failing promptly to call plaintiff was not the proximate cause of the injury.

<sup>263</sup> *Central Union Tel. Co. v. Swoveland*, 14 Ind. App. 341, 42 N. E. 1035.



charges have been collected for delivery. If the company has been compensated additionally for its services in getting the party called to the telephone, it will be under the same obligation to discharge this duty as is imposed on telegraph companies for delivering telegrams, under like circumstances.<sup>264</sup> A greater per cent. of the telephone exchanges are in country towns, and the revenues derived from this kind of services are not always sufficient to justify the company in keeping a messenger boy. But wherever, at such places, a call has been put in for a certain party and extra charges have been collected for such services, it is the duty of the company to make a reasonable effort to find the party called,<sup>265</sup> and should some one be engaged or employed by the agent of the company to perform such services, it will be just as liable for the negligence of such person in the discharge of such services, as if he was a permanent employé whose duties were of this particular nature. To hold otherwise would relieve these companies of one of their public functions, and furnish them a means of avoiding many of their liabilities. So it will be seen, under such circumstances, that it is not only the duty of the company to exercise a reasonable degree of care in the selection of its messengers, but it must also exercise the same care in seeing that the messenger properly discharged his duty in making a reasonable search for the party called.

**§ 318. Long-distance telephone—disconnected at intermediate points.**—A long-distance telephone company, holding itself out to furnish connections beyond the termini of its lines, is under obligations to the public to perform such duty; and, on a failure to secure such connections, through the negligence of its agents, at the terminus of its lines whereby damages are incurred, the company will be liable for such damages.<sup>266</sup> When the company holds itself out to perform such duty, it is incumbent on it to discharge that duty to the best of its ability. In other words, it is part of the contract continuously offered to the public, at all times, and when any applicant accepts the benefits arising therefrom, by compensating the company for such services, the company must carry out its part of the contract, and if a failure to do so is caused by its servants negligently failing to furnish the proper connection with

<sup>264</sup> See notes to *West. U. Tel. Co. v. Cooper*, 10 Am. St. Rep. 778; *West. U. Tel. Co. v. Luck*, 66 Am. St. Rep. 873.

<sup>265</sup> *McLeod v. Pacific Tel. Co.*, 52 Or. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. (N. S.) 810, 18 L. R. A. (N. S.) 954, 16 Ann. Cas. 1239.

<sup>266</sup> *Southwestern Tel., etc., Co. v. Taylor*, 26 Tex. Civ. App. 79, 63 S. W. 1076. See § 451.

other lines, over which the distant communicant is finally to be reached, and damages arise therefrom, the company will be liable.<sup>267</sup>

<sup>267</sup> *Smith v. West. U. Tel. Co.*, 84 Tex. 359, 19 S. W. 441, 31 Am. St. Rep. 59. In this case the defendant was the connecting company over whose lines the message was to reach its destination, and it was held therein that it was under obligations to make a prompt and correct delivery of the telegram, regardless of the contract made with the initial line with the sender.

## CHAPTER XIII

## NEGLIGENCE

- § 319. Negligence in transmission—in general.
- 320. Prima facie negligence.
- 321. Same—illustrations.
- 322. Presumption may be rebutted.
- 323. Nonpayment of charges—no defense—regulation.
- 324. Contributory negligence.
- 325. Messages must be legible.
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- 327. Operator writing message for sender—his agent.
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- 330. Injured party—should minimize loss.
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- 333. Misinterpreting message—addressee.
- 334. Should read carefully—sendee.

§ 319. Negligence in transmission—in general.—Telegraph companies, having placed themselves before the public to assume public duties, must make suitable preparations to perform those duties as befitting an employment of this or of a similar nature. In order to do this, they should have the best and most suitable machinery and facilities, and the most skilled and experienced workmen;<sup>1</sup> and after being supplied as above required, they must not be guilty of carelessness in the performance of their work, but must exercise due care in the transmission and delivery of all messages intrusted to them. On a failure to exercise due and reasonable care in the transmission of messages,<sup>2</sup> and on a failure to use due diligence in finding and promptly delivering<sup>3</sup> them to the parties addressed, whereby injury is incurred, they will be liable for all damages arising therefrom.<sup>4</sup> It is not an easy matter to determine what is due care in a business of this nature, but the better holding is that due care is such care as should be exercised by a responsible man of ordinary understanding and ability under similar circumstances, or such as a prudent man of ordinary mind and understanding would or should exercise under similar circumstances. There have been a few courts which have held that there were different degrees of care to be exercised by these companies in the transmission and delivery of messages, or, in other words, that

<sup>1</sup> See § 270.

<sup>2</sup> See § 284 et seq.

<sup>3</sup> See § 288 et seq.

<sup>4</sup> See chapters XX, XXI, XXII, XXIII, XXV.



there were different degrees of negligence as a result of the want of care;<sup>5</sup> as that of "due and reasonable care," "ordinary care and vigilance," "reasonable and proper care," "reasonable degree of care and diligence," "care and diligence adequate to the business which they undertake," "with skill, with care, and with attention," "a high degree of responsibility," "great care," or "gross negligence."<sup>6</sup> But it seems that all these expressions are expressive of one and the same term, that of due care considered under the pending circumstances. For instance, it may be necessary that a greater degree of care should be exercised in one instance than in another, in the transmission and delivery of the message; as, where the message is transmitted during a storm, it seems that a higher degree of care should be exercised, than if it were sent during a calm. This is only due care affected by surrounding conditions which should be considered in determining the want of care. The degree of care to be exercised in the transmission of messages has already been fully discussed.<sup>7</sup>

§ 320. **Prima facie negligence.**—Where a telegraph company fails to transmit a message correctly,<sup>8</sup> it is *prima facie* evidence of the company's negligence.<sup>9</sup> So, in an action brought to recover damages for the erroneous transmission of a telegraphic message,<sup>10</sup> proof by the plaintiff of the contract, which may be implied by the delivery of the message to be transmitted, and its acceptance by

<sup>5</sup> Coit v. West. U. Tel. Co., 130 Cal. 657, 63 Pac. 83, 80 Am. St. Rep. 153, 53 L. R. A. 678.

<sup>6</sup> Fowler v. West. U. Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211; Breese v. U. S. Tel. Co., 48 N. Y. 141, 8 Am. Rep. 526; Leonard v. New York, etc., Tel. Co., 41 N. Y. 571, 1 Am. Rep. 446; Baldwin v. U. S. Tel. Co., 45 N. Y. 751, 6 Am. Rep. 165; De Rutte v. New York, etc., Tel. Co., 1 Daly (N. Y.) 547; New York, etc., Tel. Co. v. Dryburg, 35 Pa. 298, 78 Am. Dec. 338; West. U. Tel. Co. v. Graham, 1 Colo. 230, 9 Am. Rep. 136; Sweatland v. Illinois, etc., Tel. Co., 27 Iowa, 433, 1 Am. St. Rep. 285; West. U. Tel. Co. v. Neill, 57 Tex. 283, 44 Am. Rep. 589; Wash., etc., Tel. Co. v. Hobson, 15 Grat. (Va.) 122; Pinckney v. Tel. Co., 19 S. C. 71, 45 Am. Rep. 765; Smithson v. U. S. Tel. Co., 29 Md. 167; Little Rock, etc., Tel. Co. v. Davis, 41 Ark. 79; Strong v. West. U. Tel. Co., 18 Idaho, 389, 109 Pac. 910, 30 L. R. A. (N. S.) 409, Ann. Cas. 1912A, 55.

<sup>7</sup> See § 285.

<sup>8</sup> See § 285.

<sup>9</sup> Strong v. West. U. Tel. Co., 18 Idaho, 389, 109 Pac. 910, Ann. Cas. 1912A, 55, 30 L. R. A. (N. S.) 409; Kirby v. West. U. Tel. Co., 77 S. C. 404, 58 S. E. 10, 122 Am. St. Rep. 580; Woods v. West. U. Tel. Co., 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581; Baker v. West. U. Tel. Co., 84 S. C. 477, 66 S. E. 182, 137 Am. St. Rep. 848; Shepard v. West. U. Tel. Co., 143 N. C. 244, 55 S. E. 704, 118 Am. St. Rep. 796; West. U. Tel. Co. v. Merrill, 144 Ala. 618, 38 South. 121, 113 Am. St. Rep. 66. See note 113 Am. St. Rep. 986. But see Roberts v. West. U. Tel. Co., 73 S. C. 520, 53 S. E. 985, 114 Am. St. Rep. 100. See § 509.

<sup>10</sup> See chapter XX.

the defendant's agents,<sup>11</sup> and of the breach, makes out a *prima facie* case; and the plaintiff need not go further and show any negligence or omission of the defendant.<sup>12</sup> If the failure was not the result of negligence, the means of showing this fact is almost invariably within the exclusive possession of the company. To require the sender to prove the negligence, after showing the mistake, would be to require in many cases an impossibility, not infrequently resulting in enabling the company to evade a just liability.<sup>13</sup> Although a *prima facie* case may be made out, thereby casting the burden of proof upon the company to exonerate itself of negligence,<sup>14</sup> yet this presumption may be overcome by other evidence adduced by the company.<sup>15</sup>

§ 321. **Same—illustrations.**—If there is proof to the effect of an unreasonable delay in the delivery<sup>16</sup> or a failure to deliver,<sup>17</sup> there is a *prima facie* case of negligence made out,<sup>18</sup> and the burden is cast upon the company to exonerate itself of such.<sup>19</sup> And where

<sup>11</sup> Strong v. West. U. Tel. Co., 18 Idaho, 389, 109 Pac. 910, Ann. Cas. 1912A, 55, 30 L. R. A. (N. S.) 409.

<sup>12</sup> Pearsall v. West. U. Tel. Co., 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662; West. U. Tel. Co. v. Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744; Reed v. West. U. Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492; West. U. Tel. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480; Tyler v. West. U. Tel. Co., 60 Ill. 421, 14 Am. Rep. 38; Smith v. West. U. Tel. Co., 57 Mo. App. 259; Telegraph Co. v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500; Bartlett v. West. U. Tel. Co., 62 Me. 209, 16 Am. Rep. 437; West. U. Tel. Co. v. Carew, 15 Mich. 525; Fowler v. West. U. Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211; Strong v. West. U. Tel. Co., 18 Idaho, 389, 109 Pac. 910, 30 L. R. A. (N. S.) 409, Ann. Cas. 1912A, 55. See § 509.

<sup>13</sup> West. U. Tel. Co. v. Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744.

<sup>14</sup> See chapter IX. See, also, Hendricks v. West. U. Tel. Co., 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658; McPeck v. West. U. Tel. Co., 107 Iowa, 356, 78 N. W. 63, 43 L. R. A. 214, 70 Am. St. Rep. 205; Fowler v. West. U. Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211; Harkness v. West. U. Tel. Co., 73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672; Strong v. West. U. Tel. Co., 18 Idaho, 389, 109 Pac. 910, Ann. Cas. 1912A, 55, 30 L. R. A. (N. S.) 409. See § 509.

<sup>15</sup> See § 322. Shepard v. West. U. Tel. Co., 143 N. C. 244, 55 S. E. 704, 118 Am. St. Rep. 796.

<sup>16</sup> See chapter XII.

<sup>17</sup> See chapter XII.

<sup>18</sup> See §§ 320, 509.

<sup>19</sup> See note 14, *supra*, for cases cited. See § 509. See, also:

*Arkansas*.—Little Rock, etc., Tel. Co. v. Davis, 41 Ark. 79.

*Indiana*.—West. U. Tel. Co. v. Scircle, 103 Ind. 227, 2 N. E. 604; West. U. Tel. Co. v. Ward, 23 Ind. 377, 85 Am. Dec. 462.

*Iowa*.—Harkness v. West. U. Tel. Co., 73 Iowa, 190, 5 Am. St. Rep. 672, 34 N. W. 811.

*Kansas*.—West. U. Tel. Co. v. Crall, 38 Kan. 679, 5 Am. St. Rep. 795, 17 Pac. 309.

there is a material error,<sup>20</sup> or where there have been several errors made in the transmission of a telegram, it is presumed that the company has been guilty of negligence, and the facts must be shown to be otherwise or it will be liable.<sup>21</sup> Thus, where there were three errors made in the transmission of a message containing nine words, the same being sent on a fair day,<sup>22</sup> or an error in the name of an addressee or sender made in the course of transmission, creates a presumption of negligence.<sup>23</sup> It makes no difference whether the error was or was not made on a connecting

*Kentucky*.—West. U. Tel. Co. v. McIlvoy, 107 Ky. 633, 55 S. W. 428; West. U. Tel. Co. v. Fisher, 107 Ky. 513, 54 S. W. 830.

*Maine*.—Bartlett v. West. U. Tel. Co., 62 Me. 209, 16 Am. Rep. 447; Fowler v. West. U. Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 216.

*Maryland*.—U. S. Tel. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519.

*North Carolina*.—Sherrill v. West. U. Tel. Co., 116 N. C. 655, 21 S. E. 429; Id., 117 N. C. 352, 23 S. E. 277; Rosser v. West. U. Tel. Co., 130 N. C. 251, 41 S. E. 378. Compare Thompson v. West. U. Tel. Co., 106 N. C. 549, 11 S. E. 269.

*Pennsylvania*.—United States Tel. Co. v. Wenger, 55 Pa. 262, 93 Am. Dec. 751.

*Texas*.—West. U. Tel. Co. v. Smith (Tex. Civ. App.) 46 S. W. 659; Id., 88 Tex. 9, 28 S. W. 931, 30 S. W. 549; West. U. Tel. Co. v. Carter, 2 Tex. Civ. App. 624, 21 S. W. 688; West. U. Tel. Co. v. Bouchell, 28 Tex. Civ. App. 23, 67 S. W. 159; West. U. Tel. Co. v. Boots, 10 Tex. Civ. App. 540, 31 S. W. 825. Compare West. U. Tel. Co. v. Bennett, 1 Tex. Civ. App. 558, 21 S. W. 699.

<sup>20</sup> West. U. Tel. Co. v. Crall, 38 Kan. 679, 5 Am. St. Rep. 799, 17 Pac. 309; Harkness v. West. U. Tel. Co., 73 Iowa, 190, 5 Am. St. Rep. 672, 34 N. W. 811. See, also, § 509.

<sup>21</sup> *Arkansas*.—West. U. Tel. Co. v. Short, 53 Ark. 434, 9 L. R. A. 744, 14 S. W. 649.

*Illinois*.—Tyler v. West. U. Tel. Co., 60 Ill. 421, 14 Am. Rep. 38.

*Indiana*.—West. U. Tel. Co. v. Meek, 49 Ind. 53.

*Iowa*.—Turner v. Hawkeye Tel. Co., 41 Iowa, 458, 20 Am. Rep. 605.

*Louisiana*.—La Grange v. Southwestern Tel. Co., 25 La. Ann. 383.

*Maine*.—Ayer v. West. U. Tel. Co., 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353.

*Missouri*.—Reed v. West. U. Tel. Co., 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609; Lee v. West. U. Tel. Co., 51 Mo. App. 375.

*New York*.—Rittenhouse v. Independent Line of Tel., 44 N. Y. 263, 4 Am. Rep. 673; Pearsall v. West. U. Tel. Co., 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662, affirming 44 Hun (N. Y.) 532, criticizing Breese v. United States Tel. Co., 48 N. Y. 132, 8 Am. Rep. 526.

*Ohio*.—West. U. Tel. Co. v. Griswold, 37 Ohio St. 303, 41 Am. Rep. 500.

*Pennsylvania*.—New York, etc., Printing Tel. Co. v. Dryburg, 35 Pa. 298, 78 Am. Dec. 338.

*Texas*.—West. U. Tel. Co. v. Harper, 15 Tex. Civ. App. 37, 39 S. W. 599; West. U. Tel. Co. v. Odom, 21 Tex. Civ. App. 537, 52 S. W. 632; West. U. Tel. Co. v. Hines, 22 Tex. Civ. App. 315, 54 S. W. 627, provided there was no stipulation for repeating; West. U. Tel. Co. v. Boots, 10 Tex. Civ. App. 540, 31 S. W. 825. See, also, § 509.

<sup>22</sup> West. U. Tel. Co. v. Crall, 38 Kan. 679, 17 Pac. 309, 5 Am. St. Rep. 795.

<sup>23</sup> West. U. Tel. Co. v. Ragland (Tex. Civ. App.) 61 S. W. 421; West. U. Tel. Co. v. Boots, 10 Tex. Civ. App. 540, 31 S. W. 825; West. U. Tel. Co. v. Norris, 25 Tex. Civ. App. 43, 60 S. W. 982; West. U. Tel. Co. v. Reeves, 8 Tex. Civ. App.



line.<sup>24</sup> Thus, in the case of *La Grange v. Southern Telephone Company*, the defendant contended that it was not the first carrier and that plaintiff had failed to prove that the error had occurred on its line, and showed an express provision in its printed blanks that it would not be liable for errors occurring on connecting lines. It was held that the burden of proof was, nevertheless, on the company to show that the error did not occur on its line, since such proof was easily within its power.<sup>25</sup>

§ 322. **Presumption may be rebutted.**—When there has been proof adduced which shows a presumption of negligence on the part of these companies, it is not to be understood that this presumption is conclusive, but that it may be rebutted by evidence which will exonerate the company of negligence.<sup>26</sup> When this is done there is a shifting of the *onus* from one party to the other, but it is only necessary for the party on whom the burden has last been shifted to prove the falsity of the other's assertion as to the statement which caused the shifting of the *onus*. There must be sufficient evidence shown, however, to rebut the presumption of negligence. Thus it has been held that these companies are not relieved from liability for an erroneous transmission merely, by showing that their lines were in good order, that approved instruments were used, and that faithful and competent servants were employed, if the particular act complained of shows a negligent performance of their duty to transmit.<sup>27</sup> Whether or not the company has been guilty of negligence—unless the act which creates the injury is negligence per se—is generally a question for the jury, and it will be an error for the court to take the case from the jury if the facts are conflicting, however strong it may appear that the company has been guilty of negligence.<sup>28</sup>

§ 323. **Non-payment of charges—no defense—regulation.**—When a telegraph company undertakes to transmit and deliver a

37, 27 S. W. 318. Compare *West. U. Tel. Co. v. Elliott*, 7 Tex. Civ. App. 482, 27 S. W. 219. See, also, § 284 et seq.

<sup>24</sup> See §§ 404, 454, et seq.

<sup>25</sup> *La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383.

<sup>26</sup> *Pinckney v. West. U. Tel. Co.*, 19 S. C. 71, 45 Am. Rep. 765; *West. U. Tel. Co. v. Elliott*, 131 Ky. 340, 115 S. W. 228, 22 L. R. A. (N. S.) 761; *White v. West. U. Tel. Co. (C. C.)* 14 Fed. 710; *West. U. Tel. Co. v. Brown* (Tex. Civ. App.) 75 S. W. 359; *Hoaglin v. West. U. Tel. Co.*, 161 N. C. 390, 77 S. E. 417. See, also, § 509.

<sup>27</sup> *Hunter v. West. U. Tel. Co.*, 130 N. C. 602, 41 S. E. 796; *Fowler v. West. U. Tel. Co.*, 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211; *West. U. Tel. Co. v. Meek*, 49 Ind. 53; *West. U. Tel. Co. v. Scirele*, 103 Ind. 227, 2 N. E. 604. Compare *Smith v. West. U. Tel. Co.*, 57 Mo. App. 259.

<sup>28</sup> *White v. West. U. Tel. Co. (C. C.)* 14 Fed. 710; *West. U. Tel. Co. v. Brown* (Tex. Civ. App.) 75 S. W. 359.

message without first demanding a prepayment of the charges for its services, it cannot set up, as a defense to an action brought against it for injuries alleged to have been caused by its negligent acts, the fact that the charges have not been paid.<sup>29</sup> When this duty is assumed without prepayment of compensation, the company must perform the duty regardless of this fact.<sup>30</sup> But it has been held by some courts that if there is not a prepayment of the extra charge for delivering the message beyond the free delivery limits, the company would not be liable for a delivery or a negligent delay in its delivery, and that the burden was on the injured party to show that the sendee lived within the free delivery limits.<sup>31</sup>

**§ 324. Contributory negligence.**—Where an action is brought against a telegraph company, on the ground of its having been guilty of negligence in the transmission and delivery of a message, the principle of the law of contributory negligence may be applied. Therefore, if these companies are guilty of negligence, either in the transmission or delivery of messages intrusted to their care, but the plaintiff on the other hand has failed to exercise ordinary care with respect to his duties toward the company in this particular instance, and which is a proximate cause of the injury or which combines or contributes to it—and without which the injury would not have been inflicted—they will not be liable.<sup>32</sup> A telegraph company may be guilty of negligence without any failure on the part of the plaintiff to exercise ordinary care in these particulars; but there cannot be contributory negligence on the part of the plaintiff, unless the company is guilty of negligence; and, in order for the latter to be excused from its negligence, it must be shown that the plaintiff has contributed to the injury.<sup>33</sup> It is not necessary to show that the plaintiff's contributory negligence was the direct

<sup>29</sup> See § 279 et seq.

<sup>30</sup> *West. U. Tel. Co. v. Meek*, 49 Ind. 53; *Milliken v. West. U. Tel. Co.*, 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281, reversing 53 N. Y. Super. Ct. 111. See, also, § 279 et seq.

<sup>31</sup> *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23; *Kendall v. West. U. Tel. Co.*, 56 Mo. App. 192; *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; *Resse v. West. U. Tel. Co.*, 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583. See, also, § 302 et seq.

<sup>32</sup> *Manly Mfg. Co. v. West. U. Tel. Co.*, 105 Ga. 235, 31 S. E. 156; *West. U. Tel. Co. v. Gullledge*, 84 Ark. 501, 106 S. W. 957; *West. U. Tel. Co. v. Wright*, 18 Ill. App. 337; *Hart v. Direct U. S. Cable Co.*, 86 N. Y. 633; *Bowyer v. West. U. Tel. Co.*, 130 Iowa, 324, 106 N. W. 748, 5 L. R. A. (N. S.) 984; *Hocutt v. West. U. Tel. Co.*, 147 N. C. 186, 60 S. E. 980; *West. U. Tel. Co. v. Harper*, 15

<sup>33</sup> *West. U. Tel. Co. v. Rawls* (Tex. Civ. App.) 62 S. W. 136. See *St. Louis Southwestern, etc., v. Parks*, 40 Tex. Civ. App. 480, 90 S. W. 343. See, also, § 309.

or sole cause of the injury, but if it is shown that it proximately contributed to the cause of the loss it will be sufficient to relieve the company from responsibility.<sup>34</sup> It must, however, be shown that it was a proximate cause. Thus, where the company accepts a message for transmission and undertakes to deliver it about 9 o'clock at night the fact that the sender of the telegram might have filed it earlier in the evening so that it could have reached plaintiff, to whom it was addressed, in time to prevent the injury complained of, does not make plaintiff guilty of contributory negligence.<sup>35</sup>

§ 325. **Messages must be legible.**—Telegrams should be written legibly; and should a mistake in the transmission or delivery occur on account of a failure to clearly write them out, the negligence will be that of the sender, and will, therefore, prevent him from recovering.<sup>36</sup> Thus, where the sender, intending to order by telegram the sale of "two thousand" cases, wrote what more nearly resembled "ten thousand" cases, and sent the message to the telegram office by a boy, and the operator transmitted the dispatch "ten thousand," and, in accordance with the regulations of the company, added in the parentheses the figures "10,000," which was not in the written message, in an action by the addressee against the company for damages sustained by reason of the sale of ten thousand instead of two thousand cases, it was held that the cause of the loss was the negligence of the sender, and there could be no recovery.<sup>37</sup> But if the sender's error is harmless, it

Tex. Civ. App. 37, 39 S. W. 599; *Nusbaum v. West. U. Tel. Co.*, 17 Phila. (Pa.) 340; *Barnes v. Tel. Cable Co.*, 156 N. C. 150, 72 S. E. 78. See *West. U. Tel. Co. v. Matthews*, 24 Ky. Law Rep. 3, 67 S. W. 849; *West. U. Tel. Co. v. Hoffman*, 80 Tex. 420, 15 S. W. 1048, 26 Am. St. Rep. 759. See, also, § 309.

<sup>34</sup> *West. U. Tel. Co. v. Rawls* (Tex. Civ. App.) 62 S. W. 136. See, also, *Cogdell v. West. U. Tel. Co.*, 135 N. C. 431, 47 S. E. 490. See § 309. See *West. U. Tel. Co. v. Lewis*, 89 Ark. 375, 116 S. W. 894; *Arkansas, etc., R. Co. v. Stroude*, 82 Ark. 117, 100 S. W. 760; *Hise v. West. U. Tel. Co.*, 137 Iowa, 329, 113 N. W. 819.

<sup>35</sup> See cases in preceding note.

<sup>36</sup> *West. U. Tel. Co. v. McDaniel*, 103 Ind. 294, 2 N. E. 709; *West. U. Tel. Co. v. Patrick*, 92 Ga. 607, 18 S. E. 980, 44 Am. St. Rep. 90. See, also, *Deslortes v. Baltimore, etc., Tel. Co.*, 40 La. Ann. 183, 3 South. 566; *West. U. Tel. Co. v. Wofford*, 32 Tex. Civ. App. 427, 72 S. W. 620, 74 S. W. 943.

<sup>37</sup> *Koons v. West. U. Tel. Co.*, 102 Pa. 164; *West. U. Tel. Co. v. Liddell*, 68 Miss. 1, 8 South. 510.

It will be seen that the cases cited in the preceding note and this one were actions brought by the sender and sendee respectively; but it has been questioned whether the contributory negligence of the sender can be used as a defense against the addressee in a suit by the latter. *Cogdell v. West. U. Tel. Co.*, 135 N. C. 431, 47 S. E. 490; *West. U. Tel. Co. v. McKibben*, 114 Ind. 511, 14 N. E. 894.



will be no defense;<sup>38</sup> as where the message notified plaintiff that his brother was sick at a certain place, when in fact he was not at that place but at another, and the addressee knew his brother was at the latter place, and would have gone there; the error, though made by the sender, is no defense.<sup>39</sup>

§ 326. **Same continued—address must be definite.**—The sender must exercise reasonable care in giving the address of the sendee with sufficient accuracy, and on a failure to do so he will be guilty of contributory negligence.<sup>40</sup> Thus, when a message is addressed to a certain person, who is not known by the company, in a certain street in the city, the company will have performed its duty when it has made a reasonable effort to deliver to the person at that place; and if there is no such person at that place, after having made diligent inquiry to find him there, the company will not be liable, but the loss which may have been incurred will be imputed to the negligence of the sender.<sup>41</sup> An address to "R. street" instead of "South R. street" bars recovery;<sup>42</sup> and where a message is sent to a place of 12,000 people and fails to designate the street and number of the address on request, the sender will be guilty of contributory negligence.<sup>43</sup> If there are two towns of the same name in the state, but the operator is informed of the one to which the message is desired to be sent, the company cannot avoid liability by setting up the fact that the address was indefinite.<sup>44</sup>

§ 327. **Operator writing message for sender—his agent.**—It has been generally held that, where an operator writes the message for the sender at the latter's request, he acts as agent for him and not for the company in this particular matter. His duties toward the company are to receive the messages and the charges for the same,

<sup>38</sup> See § 285.

<sup>39</sup> *Koons v. West. U. Tel. Co.*, 102 Pa. 164; *West. U. Tel. Co. v. Liddell*, 68 Miss. 1, 8 South. 510.

<sup>40</sup> See § 309; *West. U. Tel. Co. v. Patrick*, 92 Ga. 607, 18 S. E. 980, 44 Am. St. Rep. 90; *West. U. Tel. Co. v. McDaniel*, 103 Ind. 294, 2 N. E. 709; *West. U. Tel. Co. v. Rawls* (Tex. Civ. App.) 62 S. W. 136; *Hargrave v. West. U. Tel. Co.* (Tex. Civ. App.) 60 S. W. 687. See, also, *West. U. Tel. Co. v. Wofford*, 32 Tex. Civ. App. 427, 72 S. W. 620, 74 S. W. 943; *Deslottes v. Baltimore, etc., Tel. Co.*, 40 La. Ann. 183, 3 South. 566.

<sup>41</sup> *West. U. Tel. Co. v. Patrick*, 92 Ga. 607, 18 S. E. 980, 44 Am. St. Rep. 90; *West. U. Tel. Co. v. McDaniel*, 103 Ind. 294, 2 N. E. 709; *Hargrave v. West. U. Tel. Co.* (Tex. Civ. App.) 60 S. W. 687. Compare *Beasley v. West. U. Tel. Co.* (C. C.) 39 Fed. 181. See, also, *Lambert v. West. U. Tel. Co.* (Tex. Civ. App.) 45 S. W. 1034.

<sup>42</sup> *Deslottes v. Baltimore, etc., Tel. Co.*, 40 La. Ann. 183, 3 South. 566.

<sup>43</sup> *West. U. Tel. Co. v. McDaniel*, 103 Ind. 294, 2 N. E. 709.

<sup>44</sup> *West. U. Tel. Co. v. Parsons*, 72 S. W. 800, 24 Ky. Law Rep. 2008.

and then to transmit them; when he goes beyond this duty he does not act as the company's agent.<sup>45</sup> While this is the general holding, it seems there is, and ought to be, an apparent exception to the general rule.<sup>46</sup> Thus, if the message is received by the operator over a telephone line and written down by him, the operator then acts for the company,<sup>47</sup> especially if it has been the custom to so receive messages. Where the party desiring to send a message is unable to write on the account of ignorance, or because he cannot see how to write, or when otherwise unable to write, the company should not refuse to serve him for this purpose, but the scope of the operator's agency under such circumstances should, it seems, be enlarged so as to devolve upon him the duty to perform this service.<sup>48</sup>

**§ 328. Messages not stamped—contributory negligence.**—Where there is an act of Congress requiring all messages to be stamped, it is the duty of the sender to perform this duty and not that of the company.<sup>49</sup> So, if a telegraph company refuses to transmit a message because it has not been stamped, it will not be liable for such refusal, or for a penalty for a refusal to transmit such a message.<sup>50</sup> If, however, the sender is ignorant of such an act, it seems that the company should inform him of same and state this as a reason for refusing to accept the message. While it is an old maxim that ignorance of law excuses no one, yet the operator, having knowledge of such a law and knowing that the sender does not have this knowledge, should surely inform him of the reason for not accepting the message; and, in doing this, he necessarily must tell him of the law.

**§ 329. Delay in sending—no contributory negligence.**—A telegraph company cannot excuse itself from liability by claiming that the sender was guilty of contributory negligence in not delivering

<sup>45</sup> *West. U. Tel. Co. v. Edsall*, 63 Tex. 668; *West. U. Tel. Co. v. Foster*, 64 Tex. 220, 53 Am. Rep. 754; *Gulf, etc., R. Co. v. Geer*, 5 Tex. Civ. App. 349, 24 S. W. 86. Compare *Carland v. West. U. Tel. Co.*, 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280.

<sup>46</sup> *West. U. Tel. Co. v. Hankins*, 50 Tex. Civ. App. 513, 110 S. W. 539. See § 309.

<sup>47</sup> *Carland v. West. U. Tel. Co.*, 118 Mich. 369, 74 Am. St. Rep. 394, 43 L. R. A. 280, 76 N. W. 762.

<sup>48</sup> *Carland v. West. U. Tel. Co.*, 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280; *Cordell v. West. U. Tel. Co.*, 149 N. C. 402, 63 S. E. 71, 22 L. R. A. (N. S.) 540.

<sup>49</sup> *West. U. Tel. Co. v. Henley*, 157 Ind. 90, 60 N. E. 682; *Gray v. West. U. Tel. Co.*, 85 Mo. App. 123; *West. U. Tel. Co. v. Waters*, 139 Ala. 652, 36 South. 773; *West. U. Tel. Co. v. Young*, 138 Ala. 240, 36 South. 374; *Kirk v. West. U. Tel. Co.* (C. C.) 90 Fed. 809.

<sup>50</sup> *Id.*

the message earlier to the company, instead of waiting until the last minute.<sup>51</sup> In determining this question, the fact must be considered as to whether or not the negligence of the company was the proximate cause of the loss; since, if it is not, the company will not be liable.<sup>52</sup> The company may be guilty of negligence, but if it is shown that the sender failed to exercise reasonable care in this particular matter, wherein the company is guilty of negligence—or, in other words, where the sender is guilty of contributory negligence—he cannot recover.<sup>53</sup>

§ 330. **Injured party—should minimize loss.**—When a telegraph company has been guilty of negligence in the transmission and delivery of its messages, whereby the plaintiff has been injured or has suffered loss, it is incumbent upon the latter to minimize the loss, if he can do so at a trifling expense or with reasonable exertion.<sup>54</sup> This is a principle of law which has been upheld by almost all the courts,<sup>55</sup> and which has been supported by the public interest and sound morality.<sup>56</sup> If the injured party fails to exercise reasonable

<sup>51</sup> *Pope v. West. U. Tel. Co.*, 14 Ill. App. 531; *West. U. Tel. Co. v. Bruner* (Tex.) 19 S. W. 149.

<sup>52</sup> See § 324.

<sup>53</sup> *West. U. Tel. Co. v. Housewright*, 5 Tex. Civ. App. 1, 23 S. W. 824. See § 324.

<sup>54</sup> *Miller v. Mariners' Church*, 7 Greenl. (Me.) 51, 20 Am. Dec. 341; *Postal Tel. Cable Co. v. Schaefer*, 110 Ky. 907, 62 S. W. 1119, 23 Ky. Law Rep. 344; *West. U. Tel. Co. v. Reid*, 83 Ga. 401, 10 S. E. 919; *Jones v. West. U. Tel. Co.*, 75 S. C. 208, 55 S. E. 318; *West. U. Tel. Co. v. Jeanes*, 88 Tex. 230, 31 S. W. 186; *West. U. Tel. Co. v. Witt*, 110 S. W. 889, 33 Ky. Law Rep. 685. It is not incumbent upon the plaintiff to enter into litigation to rescind a contract which had already been entered into before the company's negligence had been discovered. *Reed v. West. U. Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492; *Hasbrouck v. West. U. Tel. Co.*, 107 Iowa, 160, 77 N. W. 1034, 70 Am. St. Rep. 181. See *Maddux v. West. U. Tel. Co.*, 92 Kan. 619, 141 Pac. 585.

<sup>55</sup> *Alabama*.—*Daughtery v. American Union Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435; *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844; *West. U. Tel. Co. v. Crawford*, 110 Ala. 460, 20 South. 111; *West. U. Tel. Co. v. Chamblee*, 122 Ala. 428, 25 South. 232, 82 Am. St. Rep. 89.

*Arkansas*.—*Brewster v. West. U. Tel. Co.*, 65 Ark. 537, 47 S. W. 560.

*California*.—*Germain Fruit Co. v. West. U. Tel. Co.*, 137 Cal. 598, 70 Pac. 658, 59 L. R. A. 575.

*District of Columbia*.—*Fererro v. West. U. Tel. Co.*, 9 App. D. C. 455, 35 L. R. A. 548.

*Florida*.—*McMillan v. West. U. Tel. Co.*, 60 Fla. 131, 53 South. 329, 29 L. R. A. (N. S.) 891.

*Georgia*.—*West. U. Tel. Co. v. Reid*, 83 Ga. 401, 10 S. E. 919. See, also, *West. U. Tel. Co. v. Bailey*, 115 Ga. 725, 42 S. E. 89, 61 L. R. A. 933; *Haber, etc., Hat Co. v. Southern Bell Tel., etc., Co.*, 118 Ga. 874, 45 S. E. 696.

*Illinois*.—*West. U. Tel. Co. v. Hart*, 62 Ill. App. 120; *West. U. Tel. Co.*

<sup>56</sup> *Hamilton v. McPherson*, 28 N. Y. 72, 84 Am. Dec. 330.



diligence to make the loss as light as possible, he can only recover such damages as actually arise from the negligent act of the company, and not such as may have been minimized by a reasonable exertion on his part. It is not presumed that he knows of the company's negligence, but if he is informed of this fact, either directly or by circumstances which would lead him to inquire for such information, it is his duty to make the loss as light as possible, if he can do so at a small expense or by reasonable exertion. Thus, where a telegraph company fails to transmit a message in which the plaintiff directs his agent to make a sale of certain property, it is the duty of the plaintiff, on discovering this fact, to use reasonable diligence in repeating the order to sell.<sup>57</sup> But what his duty would be in any case depends upon the circumstances in the particular case at issue. The criterion is always what a reasonably prudent

*v. North Packing, etc., Co.*, 188 Ill. 366, 58 N. E. 958, 52 L. R. A. 274, affirming 89 Ill. App. 301; *Smith v. West. U. Tel. Co.*, 154 Ill. App. 499.

*Indiana*.—*West. U. Tel. Co. v. Briscoe*, 18 Ind. App. 22, 47 N. E. 478.

*Iowa*.—*Hasbrouck v. West. U. Tel. Co.*, 107 Iowa, 160, 77 N. W. 1034, 70 Am. St. Rep. 181.

*Kansas*.—*Maddux v. West. U. Tel. Co.*, 92 Kan. 619, 141 Pac. 585.

*Kentucky*.—*West. U. Tel. Co. v. Matthews*, 113 Ky. 188, 67 S. W. 849, 24 Ky. Law Rep. 3; *Postal Tel. Cable Co. v. Schaefer*, 110 Ky. 907, 62 S. W. 1119, 23 Ky. Law Rep. 344.

*Mississippi*.—*Shingleur v. West. U. Tel. Co.*, 72 Miss. 1030, 18 South. 425, 48 Am. St. Rep. 604, 30 L. R. A. 444.

*Missouri*.—*Reynolds v. West. U. Tel. Co.*, 81 Mo. App. 223; *Miller v. West. U. Tel. Co.*, 157 Mo. App. 580, 138 S. W. 887.

*New York*.—*Leonard v. N. Y., etc., Electro Magnetic Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *Rittenhouse v. Independent Tel. Line*, 44 N. Y. 263, 4 Am. Rep. 673.

*North Carolina*.—*Cranford v. West. U. Tel. Co.*, 138 N. C. 162, 50 S. E. 585; *Hocutt v. West. U. Tel. Co.*, 147 N. C. 186, 60 S. E. 980.

*Ohio*.—*Postal Tel. Cable Co. v. Akron Cereal Co.*, 23 Ohio Cir. Ct. R. 516.

*South Carolina*.—*Key v. West. U. Tel. Co.*, 76 S. C. 301, 56 S. E. 962; *Cason v. West. U. Tel. Co.*, 77 S. C. 157, 57 S. E. 722; *Jones v. West. U. Tel. Co.*, 75 S. C. 208, 55 S. E. 318; *Willis v. West. U. Tel. Co.*, 69 S. C. 531, 48 S. E. 538, 104 Am. St. Rep. 828, 2 Ann. Cas. 52; *Mitchiner v. West. U. Tel. Co.*, 75 S. C. 182, 55 S. E. 222.

*Tennessee*.—*Marr v. West. U. Tel. Co.*, 85 Tenn. 550, 3 S. W. 496; *Pepper v. West. U. Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699; *West. U. Tel. Co. v. Mellon*, 96 Tenn. 66, 33 S. W. 725.

*Texas*.—*Womack v. West. U. Tel. Co.*, 58 Tex. 176, 44 Am. Rep. 614; *West. U. Tel. Co. v. Jeanes*, 88 Tex. 230, 31 S. W. 186; *Mitchell v. West. U. Tel. Co.*, 23 Tex. Civ. App. 445, 56 S. W. 439; *West. U. Tel. Co. v. Hearne*, 7 Tex. Civ. App. 67, 26 S. W. 478. See, also, *West. U. Tel. Co. v. Salter* (Tex. Civ. App.) 95 S. W. 549.

*Virginia*.—*Washington, etc., Tel. Co. v. Hobson*, 15 Grat. (Va.) 122.

*United States*.—*West. U. Tel. Co. v. Baker*, 140 Fed. 315, 72 C. C. A. 87.

<sup>57</sup> *Daughtery v. American Union Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435; *Leonard v. Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *True v. Int. Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *N. Y. & W. Pr. Tel. Co. v. Dryburg*, 35 Pa. 298, 78

man would have done under similar circumstances,<sup>58</sup> and it is always incumbent upon the company to show that this duty has not been performed.<sup>59</sup>

§ 331. **Presumed to perform contract.**—Telegraph companies contract with their patrons for a valuable consideration to exercise reasonable care in transmitting and delivering correctly and promptly all messages accepted by them, and it is presumed that they are carrying out their part of the contract.<sup>60</sup> Therefore it is not the duty of the sender to anticipate in this respect negligence of the company, nor is it his duty to exercise diligence to ascertain by inquiry from the company or otherwise as to whether or not the sendee has received the message correctly;<sup>61</sup> but it seems, that if such a fact has come to his knowledge from a responsible source, it is his duty to inquire into the truth of such information. For instance, if it is clear on the face of an answer to a telegram that there is a mistake in the original, and on account of which loss may be incurred, it is the duty of the sender to inquire into the mistake in order that he may minimize the loss;<sup>62</sup> but if the loss has been incurred and there is no means by which it may be made lighter, it is not his duty to notify the company of the error made in the message.<sup>63</sup>

§ 332. **Should resort to other means when necessary.**—When a sender ascertains the fact that the company has been guilty of negligence, he should resort to other available means of communication, if he thinks it would be impossible for the former to accom-

Am. Dec. 338; U. S. Tel. Co. v. Wenger, 55 Pa. 262, 93 Am. Dec. 751; W. & N. O. Tel. Co. v. Hobson, 15 Grat. (56 Va.) 122; West. U. Tel. Co. v. Ward, 23 Ind. 377, 85 Am. Dec. 462; Tyler v. West. U. Tel. Co., 60 Ill. 421, 14 Am. Rep. 38; West. U. Tel. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 280.

<sup>58</sup> West. U. Tel. Co. v. Lydon, 82 Tex. 364, 18 S. W. 701; West. U. Tel. Co. v. Bryson, 25 Tex. Civ. App. 74, 61 S. W. 548; West. U. Tel. Co. v. Cain (Tex. Civ. App.) 40 S. W. 624; Southwestern, etc., Tel. Co. v. Taylor, 26 Tex. Civ. App. 79, 63 S. W. 1076; West. U. Tel. Co. v. Matthews, 113 Ky. 188, 67 S. W. 849; West. U. Tel. Co. v. Lavender (Tex. Civ. App.) 40 S. W. 1035; West. U. Tel. Co. v. Johnson, 16 Tex. Civ. App. 546, 41 S. W. 367; Gulf, etc., R. Co. v. Loonie, 82 Tex. 323, 18 S. W. 221, 27 Am. St. Rep. 891.

<sup>59</sup> Costigan v. Mohawk & Hudson R. Co., 2 Denio (N. Y.) 609, 43 Am. Dec. 758.

<sup>60</sup> See note to Chicago, etc., R. Co. v. Wilson, 116 Am. St. Rep. 108.

<sup>61</sup> West. U. Tel. Co. v. Chamblee, 122 Ala. 428, 25 South. 234, 82 Am. St. Rep. 89.

<sup>62</sup> Hasbrouck v. West. U. Tel. Co., 107 Iowa, 160, 77 N. W. 1034, 70 Am. St. Rep. 185; Beymer v. McBride, 37 Iowa, 114; Greenleaf on Evidence, § 261.

<sup>63</sup> Rittenhouse v. Independent Line of Telegraph, 1 Daly (N. Y.) 474, Id., 44 N. Y. 263, 4 Am. Rep. 673.

plish the purpose by a reapplication to it;<sup>64</sup> but if the party to whom the message is addressed is the plaintiff and the injured party, the company cannot set up the fact as a ground of defense that the sender failed to resort to these means.<sup>65</sup> If the sender cannot prevent the entire loss, but only lessen it, he will not be prevented from recovering all the loss, but only such as he might have prevented by reasonable exertions.<sup>66</sup>

§ 333. **Misinterpreting message—addressee.**—If the message as received by the addressee is intelligible and not doubtful in its terms, he may act according to its intents; and should he have misinterpreted its meaning on account of an error made by the company, the sender cannot be defeated by the defense of contributory negligence on the part of the sendee.<sup>67</sup> Thus, where a message was sent by a client to his attorney to attach a certain creditor for “seven hundred and ninety dollars,” and when the message read as received “even hundred and ninety dollars,” it was held that the attorney was not guilty of contributory negligence in interpreting the message as meaning “one hundred and ninety dollars.”<sup>68</sup> But if there is anything in the message itself which would lead him to believe that an error had been made, or if there are any circumstances connected with it which, with reasonable prudence, would lead him to suspect that an error had been made, he will be guilty of contributory negligence if he fail to inquire into such information when the opportunity is afforded.<sup>69</sup> If, however, on suspecting an error he requests the operator to wire to the relay station to verify the message, and the same is done, he will have discharged his duty and will not be guilty of any negligence.<sup>70</sup> When the message is ambiguous, but still the sendee acts on it, guessing at its intended

<sup>64</sup> *Southwestern Tel., etc., Co. v. Gotcher*, 93 Tex. 114, 53 S. W. 686. But see *West. U. Tel. Co. v. Wisdom*, 85 Tex. 261, 20 S. W. 56, 34 Am. St. Rep. 805; *Willis v. West. U. Tel. Co.*, 69 S. C. 531, 48 S. E. 538, 104 Am. St. Rep. 828, 2 Ann. Cas. 52.

<sup>65</sup> *West. U. Tel. Co. v. Wisdom*, 85 Tex. 261, 20 S. W. 56, 34 Am. St. Rep. 805.

<sup>66</sup> *Mitchell v. West. U. Tel. Co.*, 12 Tex. Civ. App. 262, 33 S. W. 1016.

<sup>67</sup> *West. U. Tel. Co. v. Beals*, 56 Neb. 415, 76 N. W. 903, 71 Am. St. Rep. 682; *Tobin v. West. U. Tel. Co.*, 146 Pa. 375, 20 Atl. 324, 28 Am. St. Rep. 802; *Hasbrouck v. West. U. Tel. Co.*, 107 Iowa, 160, 70 Am. St. Rep. 181, 77 N. W. 1034.

<sup>68</sup> *West. U. Tel. Co. v. Beals*, 56 Neb. 415, 76 N. W. 903, 71 Am. St. Rep. 682.

<sup>69</sup> *West. U. Tel. Co. v. Adair*, 115 Ala. 441, 22 South. 73; *Manly Mfg. Co. v. West. U. Tel. Co.*, 105 Ga. 235, 31 S. E. 156; *West. U. Tel. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *West. U. Tel. Co. v. Harper*, 15 Tex. Civ. App. 37, 39 S. W. 599.

<sup>70</sup> *Efird v. West. U. Tel. Co.*, 132 N. C. 267, 43 S. E. 825.



meaning, he will be responsible for all losses occurring from his incorrect guessing. The company cannot even be held liable for his wrongful guessing;<sup>71</sup> and where the message is intelligible and unambiguous, it is a question of fact as to whether the sendee was misled in its meaning.<sup>72</sup> The nature of the telegram and the circumstances surrounding the sendee's position with respect to the business about which it was sent, should be considered by a jury in determining this question.<sup>73</sup> For, if he has had other communications respecting this business, or if he is familiar with it, his interpretation should be considered more carefully.

§ 334. **Should read carefully—sendee.**—It is the duty of the sendee of a telegram to read it carefully before acting thereon; and should he fail to do so, whereby loss is incurred which might have been avoided, or at any rate could have been minimized, had the message been considered with more care he, and not the company, must suffer for such negligence.<sup>74</sup> It is very true that telegraph companies may be guilty of negligence in transmitting messages, but if the same is received, apparently intelligible, the sendee may safely act according to its terms; yet if there is any ambiguity in the message which could be easily observed by an ordinarily prudent business man by careful reading, the negligence of the company will be excused on account of the contributory negligence of the sendee.<sup>75</sup> And again these companies cannot be held liable for a loss caused by the sendee acting on a misinterpreted or vague message.<sup>76</sup> These companies endeavor to teach their patrons that brevity of their messages is the mainspring of the former's existence; it is better for the patron, in that it lessens his expenses; and it is to the interest of the companies, in that it enables them to do more work in a shorter time. But while this is the case, it is not

<sup>71</sup> *Hart v. Direct U. S. Cable Co.*, 86 N. Y. 633; *De Rutt v. New York, etc., Electric Magnetic Tel. Co.*, 1 Daly (N. Y.) 547; *West. U. Tel. Co. v. Neill*, 57 Tex. 292, 44 Am. Rep. 589.

<sup>72</sup> *Manly Mfg. Co. v. West. U. Tel. Co.*, 105 Ga. 235, 31 S. E. 156; *Hasbrouck v. West. U. Tel. Co.*, 107 Iowa, 160, 70 Am. St. Rep. 181, 77 N. W. 1034.

<sup>73</sup> *Id.*

<sup>74</sup> *West. U. Tel. Co. v. Harper*, 15 Tex. Civ. App. 37, 39 S. W. 599.

<sup>75</sup> *Hart v. Direct U. S. Cable Co.*, 86 N. Y. 633; *Manly Mfg. Co. v. West. U. Tel. Co.*, 105 Ga. 235, 31 S. E. 156; *Nusbaum v. West. U. Tel. Co.*, 17 Phila. (Pa.) 340.

<sup>76</sup> *Davis v. West. U. Tel. Co.*, 46 W. Va. 48, 32 S. E. 1026. See *Hart v. Direct U. S. Cable Co.*, 86 N. Y. 633; *Manly Mfg. Co. v. West. U. Tel. Co.*, 105 Ga. 235, 31 S. E. 156; *Nusbaum v. West. U. Tel. Co.*, 17 Phila. (Pa.) 340; *West. U. Tel. Co. v. Wright*, 18 Ill. App. 337; *West. U. Tel. Co. v. Harper*, 15 Tex. Civ. App. 37, 39 S. W. 599.

to be understood that they have obligated themselves to write the message for the sender, nor to tell him how it should be written. This fact is attempted to be impressed on all who do business with them and it is presumed that they know of this when they apply for service. The company, then, can only transmit such messages as may be presented to it for transmission, and, if they are vague in any wise, it is not the duty of the company to inform either the sender or addressee of its vagueness, since it may appear to the former as being vague when it would not so appear to either of the other parties. But, if it is vague to the sendee, he should use reasonable exertions to find out its meaning, and, on failure to do so, whereby injury has been incurred, he will be charged with contributory negligence.<sup>77</sup>

<sup>77</sup> See *West. U. Tel. Co. v. Wright*, 18 Ill. App. 337; *West. U. Tel. Co. v. Harper*, 15 Tex. Civ. App. 37, 39 S. W. 599.

## CHAPTER XIV

## LIABILITIES AS AFFECTED BY RULES AND REGULATIONS

- § 335. Right to make reasonable regulations—in general.
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- 354. Telephone companies—enforcement of tolls.
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§ 335. Right to make reasonable regulations—in general.—It gives us pleasure to discuss, at some length, the right of telegraph, telephone, and electric companies to make reasonable regulations for the purpose of conveniently performing their duties toward the public and the effect they have upon their rights and liabilities. It is an unquestionable fact that these companies have the same right as any other corporation or private individual, to prescribe, adopt and enforce all reasonable rules and regulations for the purpose of conveniently discharging their duties.<sup>1</sup> In fact,

<sup>1</sup> West. U. Tel. Co. v. McGuire, 104 Ind. 130, 2 N. E. 201, 54 Am. Rep. 293; Stamey v. West. U. Tel. Co., 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95; West. U. Tel. Co. v. Harding, 103 Ind. 505, 3 N. E. 172; Roche v. West. U. Tel. Co., 70 S. W. 39, 24 Ky. Law Rep. 845; McDaniel v. Faubush Tel. Co., 106 S. W. 825, 32 Ky. Law Rep. 572; Pugh v. City, etc., Tel. Ass'n, 8 Ohio Dec. (Reprint) 644; Birney v. N. Y., etc., Tel. Co., 18 Md. 341. 81 Am. Dec. 607; West. U. Tel. Co. v. McMillan (Tex. Civ. App.) 30 S. W. 298; West. U. Tel. Co. v. Neel, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847; Davis v. West. U. Tel. Co., 46 W. Va. 48, 32 S. E. 1026; Hewlett v. West. U. Tel. Co. (C. C.) 28 Fed. 181; True v. International Tel. Co., 60 Me. 9, 11 Am. Rep. 156; Bartlett v. West. U. Tel. Co., 62 Me. 209, 16 Am. Rep. 437; West. U. Tel. Co. v. Jones, 95 Ind. 228, 48 Am. Rep. 713; West. U. Tel. Co. v. Bu-



it would be impossible for them to carry on their business with any amount of safety, either to themselves or to those with whom they may deal without clothing themselves with these rights, with which all must comply. It may be said that it is one of their inherent rights, by means of which they may perform and carry out the objects for which they were incorporated. There is a limit, however, to the extent to which they may exercise these rights. They, being institutions having a legal entity and thereby assuming public functions, cannot prescribe and enforce a rule which would release them from liability for any act of negligence of their servants or employes;<sup>2</sup> nor would any of their regulations be binding which would infringe upon public policy, or be in conflict with the general principles of the common law; and yet they may limit to a certain extent their common-law liability.<sup>3</sup> It has long been a controverted fact as to whether or not they could enforce a rule against one of their patrons who had no knowledge of the existence of such a rule; but a number of these rules which we are specially discussing are to be found in full on the blank forms furnished to their customers, and on which messages are required to be written. When the fact of the knowledge of these particular rules is in question, it is presumed that the patron has knowledge of and gives his assent to them when he signs the telegram. He will be bound by any other rule or regulation of which he has knowledge, or of which he is presumed to have knowledge, and to which he has directly or indirectly assented.<sup>4</sup>

chanan, 35 Ind. 429, 9 Am. Rep. 744; *Huffman v. Marcy Mut. Tel. Co.*, 143 Iowa, 590, 121 N. W. 1033, 23 L. R. A. (N. S.) 1010; *Smith v. Southwestern U. Tel. Co.* (Ark.) 158 S. W. 975; *Woodley v. Carolina Tel., etc., Co.*, 163 N. C. 284, 79 S. E. 598, Ann. Cas. 1914D, 116; *State v. West. U. Tel. Co.*, 172 Ind. 20, 87 N. E. 641; *Campbell v. West. U. Tel. Co.*, 74 S. C. 300, 54 S. E. 571; *West. U. Tel. Co. v. Bibb*, 136 Ky. 817, 125 S. W. 257, 29 L. R. A. (N. S.) 502, Sunday closing; *Twin Valley Tel. Co. v. Mitchell*, 27 Okl. 388, 113 Pac. 914, 38 L. R. A. (N. S.) 235, Ann. Cas. 1912C, 582; *Halsted v. Postal Tel. Cable Co.*, 193 N. Y. 293, 85 N. E. 1078, 19 L. R. A. (N. S.) 1021, 127 Am. St. Rep. 952; *Tisner v. New York Edison Co.*, 170 App. Div. 647, 156 N. Y. Supp. 28, P. U. R. 1916A, 949.

<sup>2</sup> *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *Hibbard v. West. U. Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 775; *Bartlett v. West. U. Tel. Co.*, 62 Me. 209, 16 Am. Rep. 437; *Tyler v. West. U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *Id.*, 74 Ill. 168, 24 Am. Rep. 279. But see, contra, *Grinnell v. West. U. Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485; *Becker v. West. U. Tel. Co.*, 11 Neb. 87, 38 Am. Rep. 356, 7 N. W. 868.

<sup>3</sup> *True v. International, etc., Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *West. U. Tel. Co. v. Bibb*, 136 Ky. 817, 125 S. W. 257, 29 L. R. A. (N. S.) 502.

<sup>4</sup> *Id.*

§ 336. **Must be reasonable.**—The rules and regulations adopted by these companies must be reasonable<sup>5</sup> and not such as would relieve them of the obligations which the law<sup>6</sup> and public policy imposes.<sup>7</sup> Telegraph and telephone companies have become the most important factors in the commercial world, by means of which the most important business transactions are being consummated and with far greater celerity than by any other means or device known. They, having placed themselves before the people as public servants,<sup>8</sup> always ready and willing to be the means or instruments of performing with reasonable diligence and care<sup>9</sup> and within the shortest possible time all such business as may be intrusted to them,<sup>10</sup> should for this reason provide themselves with proper instruments and skilled operators.<sup>11</sup> The public may, and does, regulate many other affairs respecting the manner in which they shall construct and manage their business;<sup>12</sup> but it is not within its power to say who shall operate and control the management of telegraph or telephone instruments;<sup>13</sup> and yet it may prohibit these companies from enforcing regulations which tend to relieve them from liabilities caused by negligent acts of such operators.<sup>14</sup> With respect to who shall operate the instruments in transmitting messages, the sender is wholly and entirely at the mercy of the telegraph company. And, further, messages which are to be sent on telegraph lines are, as a general rule, prepared and delivered to the company on very short notice, and it becomes

<sup>5</sup> *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *Bartlett v. West. U. Tel. Co.*, 62 Me. 209, 16 Am. Rep. 437; *Atlantic, etc., Tel. Co. v. West. U. Tel. Co.*, 4 Daly (N. Y.) 527; *Gillis v. West. U. Tel. Co.*, 61 Vt. 461, 17 Atl. 736, 15 Am. St. Rep. 917, 4 L. R. A. 611; *West. U. Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715. The test of reasonableness of the rule is whether it is fairly and generally beneficial to the company and its customers. *Hewlett v. West. U. Tel. Co.* (C. C.) 28 Fed. 181.

<sup>6</sup> *West. U. Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715; *Atlantic, etc., Tel. Co. v. West. U. Tel. Co.*, 4 Daly (N. Y.) 527.

<sup>7</sup> *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226; *West. U. Tel. Co. v. Griswold*, 37 Ohio St. 313, 41 Am. Rep. 500; *West. U. Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715; *Gillis v. West. U. Tel. Co.*, 61 Vt. 461, 17 Atl. 736, 15 Am. St. Rep. 917, 4 L. R. A. 611, note; *West. U. Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480; *Seaton Mtn., etc., Co. v. Idaho Springs Investment Co.*, 49 Colo. 122, 111 Pac. 834, 33 L. R. A. (N. S.) 1078, a rule of a company organized to supply electric light and steam heat to the inhabitants of a municipality that steam for heat will be supplied only to persons taking electricity from the company is unreasonable. See *State ex rel. v. Butte Electric, etc., Co.*, 43 Mont. 118, 115 Pac. 44; *Snell v. Clinton Elec. Light Co.*, 196 Ill. 626, 63 N. E. 1082, 89 Am. St. Rep. 341, 58 L. R. A. 284.

<sup>8</sup> See chapter II.

<sup>9</sup> See chapter XII.

<sup>10</sup> See chapter XII.

<sup>11</sup> See chapter XI.

<sup>12</sup> See chapters IV, V.

<sup>13</sup> See § 211 et seq.

<sup>14</sup> See chapter XIII.

the most earnest desire of the sender that they be immediately transmitted and promptly delivered;<sup>15</sup> for in them much may be at stake, and so a failure to make haste and diligent effort to deliver them at their destination might mean financial ruin, or even a greater loss, to either the sender or he to whom the message is addressed. Then, to say that telegraph companies may relieve themselves from all or any of these responsibilities, when the public is at the mercy of them in this respect, and at a time when it perhaps would not be in a condition to refuse openly to assent to such rules and regulations, would be unjust and therefore against public policy.<sup>16</sup> The effect of these regulations, with respect to these companies attempting to enforce them against any particular individual who may apply to the former for their services, is not limited to such person; but they also affect the public, and are therefore against public policy, because they take from the public a part of the security it otherwise would have.<sup>17</sup>

§ 337. **Must be reasonably applied.**—These rules and regulations must not only be reasonable, generally, but they must be such as can be reasonably applied, under the special circumstances of any particular case, and while they may ordinarily be reasonable, yet they may operate unreasonably in a particular case; so, in such a case, they will not be enforced.<sup>18</sup> As was very ably said by an eminent court, while discussing this point: "Reasonable regulations of public corporations like these must be reasonably applied, and a rule which is generally fair may, under special circumstances, become oppressive and unreasonable as applied in the particular case; and so these corporations must exercise ordinary prudent discretion in relaxing their regulations."<sup>19</sup> This is ably illustrated by Judge Hammond, in a case arising out of the unreasonableness of a regulation requiring a prepayment of the charges for an answer to a telegram, sent by a poor person, who notified the company of his destitute circumstances. In a case of this nature, the court held that this rule should be relaxed and not enforced as where the sender were able to prepay for the answer.<sup>20</sup>

<sup>15</sup> See chapter XII.

<sup>16</sup> *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *West. U. Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715; *Gillis v. West. U. Tel. Co.*, 61 Vt. 461, 17 Atl. 736, 15 Am. St. Rep. 917, 4 L. R. A. 611; *West. U. Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480.

<sup>17</sup> *Telegraph Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500; *Gillis v. West. U. Tel. Co.*, 61 Vt. 461, 17 Atl. 736, 15 Am. St. Rep. 917, 4 L. R. A. 611; *West. U. Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480.

<sup>18</sup> *Hewlett v. West. U. Tel. Co. (C. C.)* 28 Fed. 181; *Twin Valley Tel. Co. v. Mitchell*, 27 Okl. 388, 113 Pac. 914, 38 L. R. A. (N. S.) 235, Ann. Cas. 1912C, 582.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*



§ 338. **Same continued—reasonableness—who should decide.** After considering the fact that these companies may prescribe, adopt and enforce all necessary rules and regulations for the convenient performance of their duties, and that the same to be binding must be reasonable, the question which necessarily follows is, Who must determine the reasonableness of these rules and regulations? These companies, surely, cannot say that they are or that they are not reasonable;<sup>21</sup> then it should be decided either by the court or by a jury, or by both. Some courts have held that it was a question of fact to be decided by a jury.<sup>22</sup> But it seems that this should be a question of law for the court to decide, if any fixed and permanent regulations are to be established; and the better authorities are in accord with this holding, for the reason that a jury in one case may hold a certain rule reasonable, while another jury in another case might hold the same rule unreasonable.<sup>23</sup> The circumstances in no two cases are always similar throughout. And so, where the facts pertaining to the rule in question are in dispute, some courts hold that the question of the reasonableness of the rule is a matter for the jury under proper instructions from the court, as a mixed question of law and fact, and that it is never a question for the court except when the facts are undisputed.<sup>24</sup> We are inclined to believe that the latter holding is the correct one. That is, when the reasonableness of the rule depends, in the particular instance, upon disputed facts, it is a mixed question of law and fact; but if the facts are not disputed, it is clear, both upon principle and according to the weight of authority, that the question is one of law for the court.<sup>25</sup>

§ 339. **Distinction between by-laws and rules and regulations or resolutions.**—In this country there is clearly a distinction be-

<sup>21</sup> *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 160.

<sup>22</sup> *State v. Overton*, 24 N. J. Law, 435, 61 Am. Dec. 671; *Ayres v. Morris, etc.*, R. Co., 29 N. J. Law, 393, 80 Am. Dec. 215; *State v. Chovin*, 7 Iowa, 204; *Texas, etc., R. Co. v. Adams*, 78 Tex. 372, 14 S. W. 666, 22 Am. St. Rep. 56; *Prather v. Railway Co.*, 80 Ga. 427, 9 S. E. 530, 12 Am. St. Rep. 263; *Heimann v. West. U. Tel. Co.*, 57 Wis. 562, 16 N. W. 32; *Box v. Postal Tel. Cable Co.*, 91 C. C. A. 172, 165 Fed. 138, 28 L. R. A. (N. S.) 566.

<sup>23</sup> *Com. v. Power*, 7 Mete. (Mass.) 596, 41 Am. Dec. 465; *Pittsburgh & R. Co. v. Lyon*, 123 Pa. 140, 16 Atl. 607, 10 Am. St. Rep. 517, 2 L. R. A. 489; *West. U. Tel. Co. v. Gillis*, 89 Ark. 483, 117 S. W. 749, 131 Am. St. Rep. 115.

<sup>24</sup> *Id.*

<sup>25</sup> *St. Louis, etc., R. Co. v. Hardy*, 55 Ark. 134, 17 S. W. 711; *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 17 N. E. 89, 9 Am. St. Rep. 661; *Louisville, etc., R. Co. v. Fleming*, 14 Lea (Tenn.) 128; *Wolsey v. Railroad Co.*, 33 Ohio St. 227; *Hoffbauer v. Railway Co.*, 52 Iowa. 342, 3 N. W. 121, 35 Am. Rep. 278; *Shepard v. Gold, etc., Tel. Co.*, 38 Hun (N. Y.) 338; *Smith v. Gold, etc., Tel. Co.*, 42 Hun (N. Y.) 454.

tween the by-laws of the company—which are adopted for the purpose of regulating and controlling the business affairs of the company with its servants and employés, and which can only be adopted by the stockholders or by the directors, when this right is delegated to them—and the rules and regulations which are adopted, generally, by some officer or servant of the company to be enforced against all who apply to it for services, for the purpose of convenience and safety, both to the company and its patrons. A by-law is adopted, specially, for the internal management of the company, and can only be enforced against the company and its employés, and those who transact business with the former, with notice of such. The rules and regulations, on the other hand, are adopted, more especially for the external management of the company, and can be enforced, when reasonable, against all who do business with it.<sup>26</sup> These rules and regulations are not to be understood as meaning the same thing as resolutions passed by the company, in that the latter is merely an act of temporary enforcement against some particular object or person. They are adopted not to be enforceable against the public, generally, at all times, but are passed at some of the directors' meetings as a temporary enforcement against some particular person or thing.<sup>27</sup>

§ 340. **Same continued—particular regulations.**—Should the telegraph company adopt a rule providing for all messages to be delivered to it in writing, the same would be reasonable;<sup>28</sup> and, should the company refuse to accept the message for this reason, it would not be liable for any injury caused by the message not being transmitted.<sup>29</sup> However, if the company were to accept the message, and be paid for its transmission, or if it had been in the habit of receiving oral messages,<sup>30</sup> or messages over the telephone,<sup>31</sup> for transmission, and refuse to transmit, it would be liable for any injury arising thereby.<sup>32</sup> The message should be fully and

<sup>26</sup> *State v. Overton*, 24 N. J. Law, 435, 61 Am. Dec. 671; *Ayres v. Morris*, etc., R. Co., 29 N. J. Law, 393, 80 Am. Dec. 215; *Com. v. Power*, 7 Metc. (Mass.) 596, 41 Am. Dec. 465; *Pugh v. City*, etc., Tel. Ass'n, 8 Ohio Dec. (Reprint) 644; *Gardner v. Providence Tel. Co.*, 23 R. I. 262, 49 Atl. 1004; *Smith v. Southwestern U. Tel. Co.*, 109 Ark. 35, 158 S. W. 975.

<sup>27</sup> 10 Cyc. p. 350.

<sup>28</sup> *People v. West. U. Tel. Co.*, 166 Ill. 15, 46 N. E. 731, 36 L. R. A. 637. See *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23. See, also, § 276.

<sup>29</sup> *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 South. 415, 30 Am. St. Rep. 23; *Cumberland Tel. Co. v. Sanders*, 83 Miss. 357, 35 South. 653.

<sup>30</sup> See §§ 276, 277.

<sup>31</sup> *Tex., etc., Tel. Co. v. Seiders*, 9 Tex. Civ. App. 431, 29 S. W. 258. See, also, §§ 276, 277.

<sup>32</sup> *West. U. Tel. Co. v. Dozier*, 67 Miss. 288, 7 South. 325. See § 277.

clearly written,<sup>33</sup> without the use of numerals, when delivered to the company, and in the language prevailing at the place where the contract is made; since the company has no right to change the message,<sup>34</sup> so as to make it clearer, and that, too, at the request of the sender.<sup>35</sup> A telegraph company may require that the messages shall not only be written legibly<sup>36</sup> but that they shall not contain any immoral or indecent language,<sup>37</sup> nor be such as would subject the company to an action of libel or to a criminal prosecution.<sup>38</sup> If the message relates to any gambling contract, the company may refuse to accept it for transmission;<sup>39</sup> and any rule adopted by such company whereby it is prescribed that such messages shall not be accepted is reasonable.<sup>40</sup> But a company acts upon its peril when it refuses to accept such messages, and should it be mistaken or misjudge the tenor or purposes of the messages,<sup>41</sup> it will be held responsible to the injured party for any damages sustained by reason of a refusal to accept them.<sup>42</sup> Every message should have the signature of the sender,<sup>43</sup> yet it has been held that a company could not enforce a rule that all messages tendered for transmission shall bear the autograph signature of the sender, unless a power of attorney from him is produced.<sup>44</sup> This holding, however, was in a case in which the message was tendered by a connecting line,<sup>45</sup> and in view of the fact that these companies are often liable for forged messages, it may be well to question whether it may not enforce such regulation.<sup>46</sup>

§ 341. Information as to meaning of message—cannot demand. Where a message is ambiguous on its face, a telegraph company cannot demand of the sender that it be informed of the nature and purport of the message.<sup>47</sup> It cannot, therefore, enforce a reg-

<sup>33</sup> *Primrose v. West. U. Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883. See §§ 276, 277.

<sup>34</sup> *Pegram v. West. U. Tel. Co.*, 100 N. C. 28, 6 S. E. 770, 6 Am. St. Rep. 557.

<sup>35</sup> *West. U. Tel. Co. v. Foster*, 64 Tex. 220, 53 Am. Rep. 754.

<sup>36</sup> See § 325.

<sup>37</sup> *West. U. Tel. Co. v. Ferguson*, 57 Ind. 495; *Archambault v. Great Northwestern Tel. Co.*, 14 Quebec, 8.

<sup>38</sup> See § 258 et seq.

<sup>39</sup> See § 258.

<sup>40</sup> See § 273.

<sup>41</sup> See § 258.

<sup>42</sup> *Smith v. West. U. Tel. Co.*, 84 Ky. 664, 2 S. W. 483.

<sup>43</sup> See § 277. See, also, *Cordell v. West. U. Tel. Co.*, 149 N. C. 402, 63 S. E. 71, 22 L. R. A. (N. S.) 540.

<sup>44</sup> *Atlantic, etc., Tel. Co. v. West. U. Tel. Co.*, 4 Daly (N. Y.) 527.

<sup>45</sup> *Id.*

<sup>46</sup> *West. U. Tel. Co. v. Ferguson*, 57 Ind. 495.

<sup>47</sup> See § 406 et seq.



ulation which provides that the patrons shall inform its operators of the true meaning of every message tendered it for transmission.<sup>48</sup> The messages must be clearly and legibly written out, and this is all that is necessary in order for the operator to be able to transmit it in the language in which it is tendered. It is not necessary for him to know the meaning of the message to be able to transmit it correctly. "A regulation of this description would simply seek to pry into, without cause, the private affairs of those who wish to employ the company, and, in its tendency to check the unreserved communication of intelligence by telegraph, would be peculiarly inconsonant with public policy."<sup>49</sup> If the company should be subjected to a civil action, or to a criminal prosecution, for transmitting certain messages, and if it should be in doubt as to whether or not a certain particular message tendered for transmission would subject it to one of these actions, and as the company could not demand information of the meaning, the doubt should be construed in favor of the company, since to hold otherwise, would often place these companies in an embarrassing attitude.<sup>50</sup> So no rule laid down by the company can be so stringent and enforceable, as that the parties could be compelled to divulge the meaning of such message; this being the case, the company should receive the benefit of every ambiguous telegram. The company may have this right against the sender of a meaningless telegram, where he fails to inform its agent of its meaning. And if the company is guilty of negligence in the transmission and delivery of such a message, whereby injury has been incurred, the injured party could only recover nominal damages.<sup>51</sup> So, it might be better on the part of the sender to voluntarily give such information, even when he cannot be compelled by the company to do so.

§ 342. **Delivery at company's office—reasonable.**—A telegraph company may provide in its regulations that all messages shall be delivered at one of its transmitting offices.<sup>52</sup> According to such regulation, a delivery to one of the company's messengers is not a delivery to the company, unless it has been the custom of the latter to consider this as a proper delivery.<sup>53</sup> In such cases the

<sup>48</sup> *West. U. Tel. Co. v. Ferguson*, 57 Ind. 495, approved in *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95.

<sup>49</sup> *Gray on Tel.* p. 24.

<sup>50</sup> See § 431 et seq.

<sup>51</sup> See § 280.

<sup>52</sup> *Stamey v. West. U. Tel. Co.*, 92 Ga. 613, 44 Am. St. Rep. 95, 18 S. E. 1008. See § 277.

<sup>53</sup> See § 278.

messenger acts as agent for the sender in that particular matter, and not for the company.<sup>54</sup> The company, doubtless, is better posted about the working order of its lines and its ability to transmit messages intrusted to it, and the sender, on the other hand, is of course, better informed as to the contents of the message; should there be any ambiguity on the face of the message, the latter could, if he were at the transmitting office, make clear the ambiguities, and thereby aid and assist the operator materially in making a correct transmission. If the company could be forced to accept the message as given to its messenger, it could not, of course, have him present to explain the meaning of the message; and yet it would be under obligation to transmit it in its ambiguous state.<sup>55</sup>

§ 343. **Prepayment of charge—reasonable regulation.**—A regulation of these companies which provides that the sender shall prepay all the charges for transmitting and delivering messages is reasonable and enforceable.<sup>56</sup> In this respect these companies are similar to common carriers of passengers, in that each may exact of its patrons a prepayment of a reasonable compensation for the service which they hold themselves out to the public as ready and willing to perform. These are the considerations they obligate themselves to accept, in lieu of their respective public duties assumed. Like all other contracts, this consideration may be either a subsequent<sup>57</sup> or a precedent<sup>58</sup> condition to the performance of such contract; and whether or not the condition is either precedent or subsequent depends, as in other contracts, upon the custom of the companies or upon the expressed agreement to that effect.<sup>59</sup>

<sup>54</sup> West. U. Tel. Co. v. Ferguson, 57 Ind. 495.

<sup>55</sup> See § 278.

<sup>56</sup> Langley v. West. U. Tel. Co., 88 Ga. 777, 15 S. E. 291; Harkness v. West. U. Tel. Co., 73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672; Smith v. West. U. Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126. See, also, § 279; West. U. Tel. Co. v. Archer, 96 Ark. 213, 131 S. W. 702, Ann. Cas. 1912B, 593; State v. West. U. Tel. Co., 172 Ind. 20, 87 N. E. 641; Campbell v. West. U. Tel. Co., 74 S. C. 300, 54 S. E. 571.

<sup>57</sup> See § 279.

<sup>58</sup> The company may waive this privilege and be bound thereby; thus where it undertakes to serve a deadhead, West. U. Tel. Co. v. Snodgrass, 94 Tex. 284, 60 S. W. 308, 86 Am. St. Rep. 851, or to collect, at other end of line, West. U. Tel. Co. v. Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; West. U. Tel. Co. v. Cunningham, 99 Ala. 314, 14 South. 579; Cogdell v. West. U. Tel. Co., 135 N. C. 431, 47 S. E. 490; or extends credit to the sender, West. U. Tel. Co. v. Cunningham, 99 Ala. 314, 14 South. 579.

<sup>59</sup> May waive rule. West. U. Tel. Co. v. Henley, 157 Ind. 90, 60 N. E. 682; West. U. Tel. Co. v. Cunningham, 99 Ala. 314, 14 South. 579.

The consideration of a contract for the transmission of a telegram is generally made with respect to the company's rules and regulations to that effect.<sup>60</sup> An expressed stipulation which provides that this consideration shall be a condition precedent to the performance of its duty—and all who apply to such companies for services are presumed to have notice of such a condition—must be complied with, before the company can be forced to accept the message for transmission.<sup>61</sup> The main ground on which this reason is founded is that they may be instrumental in preventing these companies from suffering a probable loss. When parties to a telegram are so much interested in a business affair as to seek the aid of a telegraph company—which is not interested in the results of the message—to assist them in consummating their business arrangements, it is more reasonable for the company to demand a payment of the charges for its assistance before the same is rendered; furthermore, it is easier to collect then, than it would be after the services have been rendered and after the interested parties have accomplished their desired purposes. In other words, if the sender has a hesitancy in prepaying the company for its services rendered in transmitting a telegram—and in the performance of which the former, doubtless, is much more interested, than the latter—surely he will have a much greater hesitancy in paying for same after the purposes of the telegram have been accomplished and possibly, too, at his loss.

§ 344. **Extra charges for delivering beyond free delivery limit—not always reasonable.**—It has been held by some courts that a rule of a telegraph company which required an extra deposit by the sender, or a guaranty of same, to pay for the delivery when the addressee lived beyond the free delivery limit, was reasonable, whether or not the sender knew of the addressee's residence with respect to the distance from the central office of the company.<sup>62</sup> We agree with these authorities that this is a reasonable rule and that the company may exact of the sender an extra deposit for

<sup>60</sup> *West. U. Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; *West. U. Tel. Co. v. Cunningham*, 99 Ala. 314, 14 South. 579; *West. U. Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; *West. U. Tel. Co. v. Henley*, 157 Ind. 90, 60 N. E. 682; *Macpherson v. West. U. Tel. Co.*, 52 N. Y. Super. Ct. 232; *West. U. Tel. Co. v. Liddell*, 68 Miss. 1, 8 South. 510; *Cogdell v. West. U. Tel. Co.*, 135 N. C. 431, 47 S. E. 490; *West. U. Tel. Co. v. Snodgrass*, 94 Tex. 284, 60 S. W. 308, 86 Am. St. Rep. 851.

<sup>61</sup> See *Pugh v. City, etc., Tel. Ass'n*, 8 Ohio Dec. (Reprint) 644; *Gardner v. Providence Tel. Co.*, 23 R. I. 262, 49 Atl. 1004.

<sup>62</sup> *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148.



this extra service; provided the sender knew that the addressee lived beyond the free delivery limit.<sup>63</sup>

§ 345. **Deposit for answer—not always reasonable.**—As a general rule, a regulation, which imposes the duty upon a transient person to deposit a sufficient amount of money with the company to pay for as many as ten words in answer to his telegram, is reasonable; <sup>64</sup> yet there may be some few exceptions to the rule. The reason of the rule, in one case, was based on the ground that it was a matter of social etiquette, due by the sender to the addressee, that the former pay for the answer to his telegram.<sup>65</sup> While this courtesy should be extended to the addressee, especially when these telegrams are concerning the business of the sender, yet this is no reason why these companies should, by their regulations, enforce the laws of social etiquette.<sup>66</sup> Almost the same reason given for holding that the company may exact of the sender a prepayment of the charges for transmitting the original message <sup>67</sup> may be applicable here. The natural inference is that, where the original telegram demands an answer to the business matter about which it

<sup>63</sup> See § 302 et seq.

"Such a regulation as we are now considering would, as it seems to us, be harsh, inequitable, and unnecessary. When the patron pays to the company the amount which he believes, in good faith, covers the entire charge for the service, and the company receives it and the message, he has a right to expect that the company will carry the message to the person addressed, if within the statutory delivery limits, and present it for delivery. If there be then an additional sum due, the company may require its payment before it surrenders the message to the sendee, if it prefers to do so rather than rely solely upon the sender for its payment. The company will thus be furnished ample protection, and the expectations and purposes of the sender of the message will not be disappointed. This course seems to us to afford a much fairer and more equitable solution of the problem as to what is the duty of the company than to hold that it may stop the message half way upon its course, and thus really render to the sender no service, after receiving from him what both thought to be the full price therefor. We apprehend that, if such a course were followed, there would be few instances where the sendee would refuse to receive the message, and pay the delivery charge, if proper. If he did, a notification to the sender would, in the most of those few instances, bring the money from him. If, however, the company might occasionally lose a delivery charge, the loss to it would be trifling and inconsiderable when compared with the possible loss and inconvenience to the public and patrons who have relied in good faith upon their delivery of the message." *West. U. Tel. Co. v. Moore*, 12 Ind. App. 136, 39 N. E. 874, 54 Am. St. Rep. 519; *West. U. Tel. Co. v. Archer*, 96 Ark. 213, 131 S. W. 702, Ann. Cas. 1912B, 593; *State v. West. U. Tel. Co.*, 172 Ind. 20, 87 N. E. 641.

<sup>64</sup> *West. U. Tel. Co. v. McGuire*, 104 Ind. 130, 2 N. E. 201, 54 Am. Rep. 296; *Hewlett v. West. U. Tel. Co. (C. C.)* 28 Fed. 181.

<sup>65</sup> *West. U. Tel. Co. v. McGuire*, 104 Ind. 130, 54 Am. Rep. 296, 2 N. E. 201.

<sup>66</sup> *Hewlett v. West. U. Tel. Co. (C. C.)* 28 Fed. 181.

<sup>67</sup> See § 279.

relates, it is of more interest to the sender than it is to the addressee, a transient man with the likelihood of being at another place when the answer is received and at a place where it could not conveniently be delivered, the company would probably lose the charges for the answer, and for this reason the company may enforce this regulation. But suppose the transient person desires that the answer be sent to another place,<sup>68</sup> or over another line; or suppose he is a tramp or a person in destitute circumstances, which acts are made known to the company's operator. Is it then presumed that these regulations, under such circumstances, would be reasonable? Most assuredly they would not. In the first instance, it would be an act of courtesy which the company would owe its patron;<sup>69</sup> in the second, it would be something in the nature of an act of charity, which the company, however being a person only in the contemplation of law, owes to the poor and wayfaring;<sup>70</sup> and, in either instance, the operator should not refuse the request of such persons.

§ 346. **May waive prepayment.**—While a company may enforce the rule prescribing a prepayment of the charges,<sup>71</sup> yet if it accepts a message without a prepayment, and without notifying the sender of such rule, it is, nevertheless, under obligations to the former to transmit and deliver the message;<sup>72</sup> and on a failure so to do, the company cannot use this as a defense in an action against it for a negligent transmission.<sup>73</sup> And should a company accept a message for transmission with the understanding that the charges would be afterwards paid, it is compelled to send the message, notwithstanding that it has a rule prescribing a prepayment of the charges, and one which the operator could not in anywise disregard.<sup>74</sup> The court held, in a case in which the sender was an employé of the company, that it was duty bound to transmit his message and was liable for a failure to so do, even though the company offered to show that the service of the company was gratuitously tendered.<sup>75</sup> The

<sup>68</sup> See § 299.

<sup>69</sup> See *West. U. Tel. Co. v. McGuire*, 104 Ind. 130, 54 Am. Rep. 296, 2 N. E. 201.

<sup>70</sup> *Hewlett v. West. U. Tel. Co. (C. C.)* 28 Fed. 181.

<sup>71</sup> See § 279.

<sup>72</sup> *West. U. Tel. Co. v. Cunningham*, 99 Ala. 314, 14 South. 579. See, also, §§ 279, 304.

<sup>73</sup> *West. U. Tel. Co. v. Cunningham*, 99 Ala. 314, 14 South. 579.

<sup>74</sup> *West. U. Tel. Co. v. Snodgrass*, 94 Tex. 284, 60 S. W. 308, 86 Am. St. Rep. 851. See §§ 279, 290, 304.

<sup>75</sup> *West. U. Tel. Co. v. Snodgrass*, 94 Tex. 284, 60 S. W. 308, 86 Am. St. Rep. 851. See, also, *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675; *Gray v. Merriam*, 148 Ill. 179, 35 N. E. 810, 39 Am. St. Rep. 172, 32 L. R. A.

ground on which these rights are based is that it has waived all rights it may have had.<sup>76</sup>

§ 347. Regulation of office hours.—Telegraph and telephone companies have the right to make reasonable regulations as to the time during which their offices shall be open for the dispatch of business.<sup>77</sup> As a general thing, such rule will be as convenient and beneficial to the public as to the companies. While it might incommode some persons, at some particular time, to enforce such a regulation, yet as a general convenience to the public it would be better for the rule to be imposed, since not to do so would necessitate the company increasing its working force, and thereby increase the expenses for carrying on the business—which would have to be borne indirectly by the public. As was ably said on this subject: "It may be to the interest of some individual, upon a particular occasion, or even at all times, that every office of a telegraph company should be kept open at all hours, and that the working force should be sufficient to receive and deliver a dispatch without a moment's delay. So also it may be to the interest of a very few that an office should be kept at some point on the line where an office could not be maintained in any way without a loss to the company. If in the first instance the company should be required to keep the necessary servants to keep its business going at all hours, it would result in the necessity of closing many offices or in the imposition of additional charges upon its customers in general, in order to recoup the loss incident to their being maintained. So, on the other hand, if they should be required to keep offices wherever it might result to the convenience of a few persons, additional bur-

769, note; *Hibernia Bldg. Ass'n v. McGrath*, 154 Pa. 296, 26 Atl. 377, 35 Am. St. Rep. 828.

<sup>76</sup> *West. U. Tel. Co. v. Cunningham*, 99 Ala. 314, 14 South. 579.

<sup>77</sup> *West. U. Tel. Co. v. Van Cleave*, 107 Ky. 464, 54 S. W. 827, 22 Ky. Law Rep. 53, 92 Am. St. Rep. 366; *West. U. Tel. Co. v. Harding*, 103 Ind. 505, 3 N. E. 172; *Roche v. West. U. Tel. Co.*, 70 S. W. 39, 24 Ky. Law Rep. 845; *Sweet v. Postal Tel., etc., Co.*, 22 R. I. 344, 47 Atl. 881, 53 L. R. A. 732; *Suttle v. West. U. Tel. Co.*, 148 N. C. 480, 62 S. E. 593, 128 Am. St. Rep. 631; *West. U. Tel. Co. v. Neel*, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847; *West. U. Tel. Co. v. Wingate*, 6 Tex. Civ. App. 394, 25 S. W. 439; *Davis v. West. U. Tel. Co.*, 46 W. Va. 48, 32 S. E. 1026; *West. U. Tel. Co. v. Gillis*, 89 Ark. 483, 117 S. W. 749, 131 Am. St. Rep. 115; *Id.*, 97 Ark. 226, 133 S. W. 833; *Given v. West. U. Tel. Co. (C. C.)* 24 Fed. 119; *West. U. Tel. Co. v. Georgia Cotton Co.*, 94 Ga. 444, 21 S. E. 835; *Bateman v. West. U. Tel. Co.*, 97 Ga. 338, 22 S. E. 920; *Birney v. N. Y., etc., Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607; *West. U. Tel. Co. v. Gibson (Tex. Civ. App.)* 53 S. W. 712; *Womack v. West. U. Tel. Co.*, 58 Tex. 176, 44 Am. Rep. 614; *Twin Valley Tel. Co. v. Mitchell*, 27 Okl. 388, 113 Pac. 914, 38 L. R. A. (N. S.) 235, Ann. Cas. 1912C, 582.

*Telephone*.—See § 301. See, also, *Taylor v. West. U. Tel. Co.*, 181 Mo. App. 288, 168 S. W. 895.



dens upon the general public would in like manner result.<sup>78</sup> It being conceded that these companies may enforce these regulations, they will not be liable for any injury caused by a failure to deliver a message received by their operators at a time when the office at the other end of the line is closed;<sup>79</sup> but if this latter office should receive the message after the closing hours, and when the messengers have retired from services, the company could not set this regulation up as a defense to an action brought against it for a failure to deliver, if the message showed on its face the necessity of an immediate delivery.<sup>80</sup> Thus, where a message is received after office hours, requesting the sendee to meet a corpse at the place to which it

<sup>78</sup> West. U. Tel. Co. v. Neel, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847.

<sup>79</sup> West. U. Tel. Co. v. Van Cleave, 107 Ky. 464, 54 S. W. 827, 22 Ky. Law Rep. 53; 92 Am. St. Rep. 366; West. U. Tel. Co. v. Harding, 103 Ind. 505, 3 N. E. 172; Davis v. West. U. Tel. Co., 66 S. W. 17, 23 Ky. Law Rep. 1758; Smith v. West. U. Tel. Co., 77 S. C. 378, 58 S. E. 6, 12 Ann. Cas. 654; Sweet v. Postal Tel., etc., Co., 22 R. I. 344, 47 Atl. 881, 53 L. R. A. 732; Bonner v. West. U. Tel. Co., 71 S. C. 303, 51 S. E. 117; Starkey v. West. U. Tel. Co., 53 Tex. Civ. App. 333, 115 S. W. 853; West. U. Tel. Co. v. Neel, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847; West. U. Tel. Co. v. Rawls (Tex. Civ. App.) 62 S. W. 136; West. U. Tel. Co. v. May, 8 Tex. Civ. App. 176, 27 S. W. 760; Davis v. West. U. Tel. Co., 46 W. Va. 48, 32 S. E. 1026; West. U. Tel. Co. v. Wingate, 6 Tex. Civ. App. 394, 25 S. W. 439; West. U. Tel. Co. v. Gillis, 97 Ark. 226, 133 S. W. 833; Cates v. West. U. Tel. Co., 151 N. C. 497, 66 S. E. 592, 24 L. R. A. (N. S.) 1286; West. U. Tel. Co. v. Turley, 108 Ark. 92, 156 S. W. 836; West. U. Tel. Co. v. Jackson, 163 Ala. 9, 50 South. 316; Roberts v. West. U. Tel. Co., 73 S. C. 520, 53 S. E. 985, 114 Am. St. Rep. 100; Bolton v. West. U. Tel. Co., 76 S. C. 529, 57 S. E. 543; West. U. Tel. Co. v. McCormico, 27 Tex. Civ. App. 610, 66 S. W. 592; Starkey v. West. U. Tel. Co., 53 Tex. Civ. App. 333, 115 S. W. 853; Harrison v. West. U. Tel. Co., 71 S. C. 386, 51 S. E. 119; Smith v. West. U. Tel. Co., 77 S. C. 378, 58 S. E. 6, 12 Ann. Cas. 654; Mitchiner v. West. U. Tel. Co., 75 S. C. 182, 55 S. E. 222. But see Dowdy v. West. U. Tel. Co., 124 N. C. 522, 32 S. E. 802; Brown v. West. U. Tel. Co., 6 Utah, 219, 21 Pac. 988.

*Receiving operator at point of destination not agent of company.*—Sweet v. Postal Tel., etc., Co., 22 R. I. 344, 47 Atl. 881, 53 L. R. A. 732; Harrison v. West. U. Tel. Co., 71 S. C. 386, 51 S. E. 119; West. U. Tel. Co. v. Rawls (Tex. Civ. App.) 62 S. W. 136. Rule applicable where operator is also the agent of the railroad company, and the office is kept open for the receiving and transmission of dispatches, but after messengers go off duty. Davis v. West. U. Tel. Co., 66 S. W. 17, 23 Ky. Law Rep. 1758; West. U. Tel. Co. v. Crider, 107 Ky. 600, 54 S. W. 963, 21 Ky. Law Rep. 1336; Roberts v. West. U. Tel. Co., 73 S. C. 520, 53 S. E. 985, 114 Am. St. Rep. 100; Sweet v. Postal Tel., etc., Co., 22 R. I. 344, 47 Atl. 881, 53 L. R. A. 732; Harrison v. West. U. Tel. Co., 71 S. C. 386, 51 S. E. 119; West. U. Tel. Co. v. McCormico, 27 Tex. Civ. App. 610, 66 S. W. 592; Bonner v. West. U. Tel. Co., 71 S. C. 303, 51 S. E. 117. But see Dowdy v. West. U. Tel. Co., 124 N. C. 522, 32 S. E. 802.

<sup>80</sup> Dowdy v. West. U. Tel. Co., 124 N. C. 522, 32 S. E. 802; Brown v. West. U. Tel. Co., 6 Utah, 219, 21 Pac. 988; West. U. Tel. Co. v. Merrill, 144 Ala. 618, 39 South. 121, 113 Am. St. Rep. 66; West. U. Tel. Co. v. Hill, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058; West. U. Tel. Co. v. Love Banks, 73 Ark. 205, 83 S. W. 949, 3 Ann. Cas. 712; Bright v. West. U. Tel.

is to be shipped and at the place to which the message is addressed at a time prior to the opening of the latter office, it is the duty of the company to deliver the message.<sup>81</sup>

§ 348. **Same continued—statutory penalty for delay—hours not the same.**—In some states there are statutes which impose a penalty on these companies for a failure to promptly transmit and deliver a message,<sup>82</sup> but it is understood that this penalty cannot be enforced unless the message is delivered to the company during office hours; and this means the office hours at each end of the line, provided they are reasonable.<sup>83</sup> It may be, therefore, inferred from this statement that the office hours of all the company's offices are not the same, and it is this fact which we intend to impart. If it were required that the office hours should be the same, this of itself would destroy the fundamental reason for the enforcement of such a rule;<sup>84</sup> since the business of some of the offices is much greater than that of others, and it would, therefore, be necessary, under such a condition of affairs, for these particular offices to be kept open longer than others. Most often, in cities, it is necessary that they be required to be kept open all the time. So to require all of the offices to have the same hours would, as the reader will clearly see, destroy the reasonableness of the rule.<sup>85</sup>

§ 349. **Reasonableness of the rule.**—The rule establishing office hours must be reasonable,<sup>86</sup> and the reasonableness of this regulation with respect to any particular office, depends largely upon the locality of the office and the amount of business done at that place.<sup>87</sup> Ten hours a day has been held to be a reasonable time

Co., 132 N. C. 317, 43 S. E. 841; *Carter v. West. U. Tel. Co.*, 141 N. C. 374, 54 S. E. 274; *Edwards v. West. U. Tel. Co.*, 147 N. C. 126, 60 S. E. 900; *Box v. Postal Tel. Cable Co.*, 91 C. C. A. 172, 165 Fed. 138, 28 L. R. A. (N. S.) 566; *West. U. Tel. Co. v. Johnsey*, 49 Tex. Civ. App. 487, 109 S. W. 251; *West. U. Tel. Co. v. Price*, 137 Ky. 758, 126 S. W. 1100, 29 L. R. A. (N. S.) 836, holding should telephone addressee; *West. U. Tel. Co. v. Hearn*, 110 Ark. 176, 161 S. W. 1025, Ann. Cas. 1915D, 378.

<sup>81</sup> *West. U. Tel. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843.

<sup>82</sup> See chapter XXV.

<sup>83</sup> *West. U. Tel. Co. v. Harding*, 103 Ind. 505, 3 N. E. 172; *Taylor v. West. U. Tel. Co.*, 181 Mo. App. 288, 168 S. W. 895.

<sup>84</sup> *Sweet v. Postal Tel., etc., Co.*, 22 R. I. 344, 47 Atl. 881, 53 L. R. A. 732; *West. U. Tel. Co. v. Harding*, 103 Ind. 505, 3 N. E. 172.

<sup>85</sup> *West. U. Tel. Co. v. Harding*, 103 Ind. 505, 3 N. E. 172.

<sup>86</sup> *West. U. Tel. Co. v. Crider*, 107 Ky. 600, 54 S. W. 963, 21 Ky. Law Rep. 1336; *West. U. Tel. Co. v. Ford*, 77 Ark. 531, 92 S. W. 528; *West. U. Tel. Co. v. Gibson* (Tex. Civ. App.) 53 S. W. 712; *Brown v. West. U. Tel. Co.*, 6 Utah, 219, 21 Pac. 988.

<sup>87</sup> *Tel. Co. v. Crider*, 107 Ky. 600, 54 S. W. 963, 21 Ky. Law Rep. 1336; *West. U. Tel. Co. v. Bryson*, 25 Tex. Civ. App. 74, 61 S. W. 548; *West. U.*

during which to keep the office open in a town of only a few thousand people;<sup>88</sup> and when the business of a town is not sufficiently large to justify the employment of a special messenger, a regulation that telegrams received after seven o'clock in the evening will not be delivered until the next morning, is reasonable.<sup>89</sup> The burden is on the company to show that the office hours are reasonable;<sup>90</sup> and while it has been held that the reasonableness of the time was a question for the court, yet, the sounder holding is that it is a mixed question of law and fact.<sup>91</sup> The time, where there have been no definite hours fixed, may be made with reference to the quantity of business of that particular office;<sup>92</sup> and it is a question for the jury as to what the office hours were. So evidence is admissible to show what hours had usually been observed at the office in question.<sup>93</sup>

§ 350. **Same continued—waiver of regulations.**—While a telegraph company may fix its office hours,<sup>94</sup> and is not liable for a failure to deliver a message which has been received after this time,<sup>95</sup> yet if it continues to hold open for business after the usual time for closing, it cannot set this up as a defense to an action of negligence claimed to have been committed in the transmission and delivery of a message.<sup>96</sup> A general principle of the law of agency is that the principal is liable for all acts of the agent done within the actual or apparent scope of his duties. It is within the apparent scope of

*Tel. Co. v. Rawls* (Tex. Civ. App.) 62 S. W. 136; *Brown v. West. U. Tel. Co.*, 6 Utah, 219, 21 Pac. 988; *Davis v. West. U. Tel. Co.*, 46 W. Va. 48, 32 S. E. 1026; *Helmann v. West. U. Tel. Co.*, 57 Wis. 562, 16 N. W. 32; *Twin Valley Tel. Co. v. Mitchell*, 27 Okl. 388, 113 Pac. 914, Ann. Cas. 1912C, 582, 38 L. R. A. (N. S.) 235, telephone.

<sup>88</sup> *West. U. Tel. Co. v. Gibson* (Tex. Civ. App.) 53 S. W. 712; *Twin Valley Tel. Co. v. Mitchell*, 27 Okl. 388, 113 Pac. 914, 38 L. R. A. (N. S.) 235, Ann. Cas. 1912C, 582.

<sup>89</sup> *Davis v. West. U. Tel. Co.*, 66 S. W. 17, 23 Ky. Law Rep. 1758; *West. U. Tel. Co. v. Steenbergen*, 107 Ky. 469, 54 S. W. 829; *West. U. Tel. Co. v. Crider*, 107 Ky. 600, 54 S. W. 963.

<sup>90</sup> *West. U. Tel. Co. v. Luck* (Tex. Civ. App.) 40 S. W. 753.

<sup>91</sup> See § 519 et seq. See, also, *Box v. Postal Tel. Cable Co.*, 91 C. C. A. 172, 165 Fed. 138, 28 L. R. A. (N. S.) 566.

<sup>92</sup> *West. U. Tel. Co. v. Van Cleave*, 107 Ky. 464, 54 S. W. 827, 92 Am. St. Rep. 366.

<sup>93</sup> *West. U. Tel. Co. v. Bryson*, 25 Tex. Civ. App. 74, 61 S. W. 548.

<sup>94</sup> See § 347.

<sup>95</sup> See §§ 281-289.

<sup>96</sup> *Suttle v. West. U. Tel. Co.*, 148 N. C. 480, 62 S. E. 593, 128 Am. St. Rep. 631; *Robertson v. Telephone Co.*, 95 S. C. 356, 78 S. E. 977; *West. U. Tel. Co. v. Hill*, 163 Ala. 81, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058. See *Carswell v. West. U. Tel. Co.*, 154 N. C. 112, 69 S. E. 782, 32 L. R. A. (N. S.) 611.



the operator's duties to extend the hours fixed for his office;<sup>97</sup> and any one doing business with the agent with the belief that he is acting within his apparent authority, may hold the company liable for any injury arising out of such act.<sup>98</sup> Thus it is within the apparent scope of the agent's authority to undertake the delivery of a message after office hours; and if he does so,<sup>99</sup> he is bound to exercise due diligence to make a prompt delivery.<sup>100</sup> These regulations are not waived where the operator in accepting a message expressly informs the sender that he does not know of the office hours of the office at the other end of the line, but will make an effort to deliver;<sup>101</sup> such an acceptance does not amount to a special undertaking to transmit without reference to office hours prevailing at the latter office.<sup>102</sup> So a mere agreement of the agent to use his best efforts to effect an immediate transmission will not render the company liable where its receiving office is closed pursuant to established office hours.<sup>103</sup> The failure of the operator to observe the office hours, when habitual,<sup>104</sup> may be shown in evidence as indicating that no rule on the subject prevailed or was

<sup>97</sup> *West. U. Tel. Co. v. Cavin*, 30 Tex. Civ. App. 152, 70 S. W. 229; *McPeck v. West. U. Tel. Co.*, 107 Iowa, 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214; *Robertson v. Telephone Co.*, 95 S. C. 356, 78 S. E. 977.

<sup>98</sup> *Dowdy v. West. U. Tel. Co.*, 124 N. C. 522, 32 S. E. 802; *West. U. Tel. Co. v. Bryson*, 25 Tex. Civ. App. 74, 65 S. W. 548; *West. U. Tel. Co. v. Pierce* (Tex. Civ. App.) 70 S. W. 361.

<sup>99</sup> Expressly agreeing to deliver by a certain time, is bound thereby. *Suttle v. West. U. Tel. Co.*, 148 N. C. 480, 62 S. E. 593, 128 Am. St. Rep. 631; *McPeck v. West. U. Tel. Co.*, 107 Iowa, 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214; *Bright v. West. U. Tel. Co.*, 132 N. C. 317, 43 S. E. 841; *West. U. Tel. Co. v. Cavin*, 30 Tex. Civ. App. 152, 70 S. W. 229; *West. U. Tel. Co. v. Perry*, 30 Tex. Civ. App. 243, 70 S. W. 439.

Nothing appearing to the contrary, it is presumed that an agent intrusted with the duty of receiving messages has authority to bind the telegraph company as to time of sending them, even to the extent of disregarding the regulations as to hours of opening and closing the terminal office. *West. U. Tel. Co. v. Crumpton*, 138 Ala. 632, 36 South. 517; *West. U. Tel. Co. v. Merrill*, 144 Ala. 618, 39 South. 121, 113 Am. St. Rep. 66; *West. U. Tel. Co. v. Cavin*, 30 Tex. Civ. App. 152, 70 S. W. 229.

<sup>100</sup> *McPeck v. West. U. Tel. Co.*, 107 Iowa, 356, 70 Am. St. Rep. 205, 43 L. R. A. 214, 78 N. W. 63.

<sup>101</sup> See *West. U. Tel. Co. v. McConnico*, 27 Tex. Civ. App. 610, 66 S. W. 592; *West. U. Tel. Co. v. Neel*, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847.

<sup>102</sup> *Dowdy v. West. U. Tel. Co.*, 124 N. C. 522, 32 S. E. 802; *West. U. Tel. Co. v. Bryson*, 25 Tex. Civ. App. 74, 61 S. W. 548; *West. U. Tel. Co. v. Pierce* (Tex. Civ. App.) 70 S. W. 361.

<sup>103</sup> *McPeck v. West. U. Tel. Co.*, 107 Iowa, 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214.

<sup>104</sup> *Smith v. West. U. Tel. Co.*, 77 S. C. 378, 58 S. E. 6, 12 Ann. Cas. 654; *West. U. Tel. Co. v. Georgia Cotton Co.*, 94 Ga. 444, 21 S. E. 835; *Bonner v. West. U. Tel. Co.*, 71 S. C. 303, 51 S. E. 117.

enforced;<sup>105</sup> but proof merely of an occasional transmission or delivery after the office hours will not be sufficient to establish a waiver of the regulations.<sup>106</sup>

§ 351. **Employés need not be informed of other office hours.**—It is not the duty of the operators at any receiving office to know the hours of any other office of the company.<sup>107</sup> The immense number of these offices all over the United States, the frequent changes among them, and the time of closing seems to make this onerous and inconvenient to a degree which forbids it to be treated as a duty to its customers for neglect, and for which it should be held liable in damages. Furthermore, there is no more obligation to do this in regard to offices in the same state than in those four thousand miles away; since the communication is between them all and of equal importance.<sup>108</sup> And where the operator has habitually kept the office open after the established hours, this will not deprive the company of the benefit of the regulation.<sup>109</sup> It has been held, however that if the message has been accepted by the company at a time when the office at the other end was closed, it would nevertheless be liable for a failure to transmit and deliver

<sup>105</sup> *West. U. Tel. Co. v. Johnsey*, 49 Tex. Civ. App. 487, 109 S. W. 251; *Bright v. West. U. Tel. Co.*, 132 N. C. 317, 43 S. E. 841.

<sup>106</sup> *West. U. Tel. Co. v. Georgia Cotton Co.*, 94 Ga. 444, 21 S. E. 835; *Bonner v. West. U. Tel. Co.*, 71 S. C. 303, 51 S. E. 117; *West. U. Tel. Co. v. McConnico*, 27 Tex. Civ. App. 610, 66 S. W. 592; *Harrelson v. Telephone Co.*, 90 S. C. 132, 72 S. E. 882; *West. U. Tel. Co. v. Weeks* (Tex. Civ. App.) 128 S. W. 674. See, also, *West. U. Tel. Co. v. Crider*, 107 Ky. 600, 54 S. W. 963, 21 Ky. Law Rep. 1336. It is a question for the jury whether the company's violation of its established office hours has been habitual as to amount to a waiver thereof. *Smith v. West. U. Tel. Co.*, 77 S. C. 378, 58 S. E. 6, 12 Ann. Cas. 654.

<sup>107</sup> *Given v. West. U. Tel. Co. (C. C.)* 24 Fed. 119; *West. U. Tel. Co. v. Harding*, 103 Ind. 505, 3 N. E. 172; *Sweet v. Postal, etc., Tel. Co.*, 22 R. I. 344, 47 Atl. 881, 53 L. R. A. 732; *West. U. Tel. Co. v. Neel*, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847; *West. U. Tel. Co. v. McConnico*, 27 Tex. Civ. App. 610, 66 S. W. 592; *Stevenson v. Montreal Tel. Co.*, 16 N. C. Q. B. 559; *Thompson v. West. U. Tel. Co.*, 32 Mo. App. 197; *Bonner v. West. U. Tel. Co.*, 71 S. C. 303, 51 S. E. 117; *West. U. Tel. Co. v. Harvey*, 67 Kan. 729, 74 Pac. 250; *West. U. Tel. Co. v. Matthews*, 113 Ky. 188, 67 S. W. 849, 24 Ky. Law Rep. 3; *West. U. Tel. Co. v. Scott*, 87 S. W. 289, 27 Ky. Law Rep. 975; *West. U. Tel. Co. v. McCaul*, 115 Tenn. 99, 90 S. W. 856; *McCaul v. West. U. Tel. Co.*, 114 Tenn. 661, 88 S. W. 325; *West. U. Tel. Co. v. Swearingen*, 95 Tex. 420, 67 S. W. 767, reversing (Tex. Civ. App.) 65 S. W. 1080; *West. U. Tel. Co. v. Byrd*, 34 Tex. Civ. App. 594, 79 S. W. 40; *West. U. Tel. Co. v. Christensen* (Tex. Civ. App.) 78 S. W. 744; *Taylor v. West. U. Tel. Co.*, 181 Mo. App. 288, 168 S. W. 895.

<sup>108</sup> *Given v. West. U. Tel. Co. (C. C.)* 24 Fed. 119.

<sup>109</sup> *West. U. Tel. Co. v. Georgia Cotton Co.*, 94 Ga. 444, 21 S. E. 835. See other cases in note 79.

same;<sup>110</sup> but this was where the message showed on its face the importance of an immediate delivery.

§ 352. Office hours as affects company's duty—night message. Where a telegraph company has fixed certain hours within which all business transactions should be consummated, it is under no obligation to receive, for transmission, any message outside of such office hours;<sup>111</sup> but if it should receive a message at a time when the office at the other end of the line was closed, it may transmit the message within a reasonable time after the opening of the latter office.<sup>112</sup> Such state of facts very often happens where the message is received by the company after the terminal office has closed for the night, and it is invariably held that the message may be transmitted within a reasonable time after the office has opened on the following morning.<sup>113</sup> If, however, the office at the other end of the line is only open for the receiving of messages, and the general messenger boys have retired from service, the company will, nevertheless, be under obligations to deliver the message, if the sendee prepays extra charges for the delivery of a night message.<sup>114</sup> It is very often the case that the sender pays an extra charge to have the message delivered after the offices have closed, and when the company accepts the message with such an understanding, it is duty bound to make diligent and prompt delivery.<sup>115</sup> But a mere attempt to make immediate delivery, where there is no duty to deliver until the next morning, will not render the company liable for a failure to deliver;<sup>116</sup> and a verbal agreement between the agent and the sender that the message need not be delivered

<sup>110</sup> West. U. Tel. Co. v. Broesche, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843; West. U. Tel. Co. v. Bruner (Tex.) 19 S. W. 149; West. U. Tel. Co. v. Harris, 91 Ark. 602, 121 S. W. 1051, 24 L. R. A. (N. S.) 1283. See, also, note 80, for other cases.

<sup>111</sup> See § 347.

<sup>112</sup> See Bonner v. West. U. Tel. Co., 71 S. C. 303, 51 S. E. 117; Harrison v. West. U. Tel. Co., 71 S. C. 386, 51 S. E. 119; McCaul v. West. U. Tel. Co., 114 Tenn. 661, 88 S. W. 325; West. U. Tel. Co. v. Neel, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847; West. U. Tel. Co. v. De Jarles, 8 Tex. Civ. App. 109, 27 S. W. 792; West. U. Tel. Co. v. Bruner (Tex.) 19 S. W. 149; Cates v. West. U. Tel. Co., 151 N. C. 497, 66 S. E. 592, 24 L. R. A. (N. S.) 1286.

<sup>113</sup> West. U. Tel. Co. v. Van Cleave, 107 Ky. 464, 54 S. W. 827, 92 Am. St. Rep. 366. See other cases in notes 81 and 112, supra.

<sup>114</sup> West. U. Tel. Co. v. Perry, 30 Tex. Civ. App. 243, 70 S. W. 439; West. U. Tel. Co. v. Cavin, 30 Tex. Civ. App. 152, 70 S. W. 229; West. U. Tel. Co. v. Hill (Tex. Civ. App.) 26 S. W. 252.

<sup>115</sup> West. U. Tel. Co. v. Perry, 30 Tex. Civ. App. 243, 70 S. W. 439; West. U. Tel. Co. v. Cavin, 30 Tex. Civ. App. 152, 70 S. W. 229; West. U. Tel. Co. v. Hill (Tex. Civ. App.) 26 S. W. 252; West. U. Tel. Co. v. Van Cleave, 107 Ky. 464, 54 S. W. 827, 92 Am. St. Rep. 366.

<sup>116</sup> West. U. Tel. Co. v. Rawls (Tex. Civ. App.) 62 S. W. 136. See, also,



at night is binding.<sup>117</sup> Where a message summoning a physician has been received after the close of office hours the physical sufferings endured by the plaintiff during that time cannot be considered in determining the amount of damages to be awarded, even though the company negligently delays delivering the message after the office opened on the following morning.<sup>118</sup>

§ 353. **Knowledge of sender as to office hours.**—These companies, having the right to adopt and enforce regulations respecting office hours, may bind all who apply to them for service, even though they may not have knowledge of the office hours of the company. It is the duty of the sender, when he delivers a message to the company at an unusual hour, to inquire as to whether or not the message can then be sent; failing to do so, and the message is delayed by reason of its having been received after the closing hours of the office to which it is to be sent, the company will not be liable for any injuries arising thereby.<sup>119</sup> It has been held that it was not the duty of the operator to ascertain upon accepting a message, and inform the sender, whether the office hours at the point of destination are such that the message may be promptly transmitted.<sup>120</sup> But an operator taking an important message filed for immediate transmission to and delivery at an office which he knows,<sup>121</sup> or should know, will be closed when the message reaches it, so that it cannot be promptly delivered, must notify the sender of that fact, in order to give him the opportunity of adopting other means of communication, if available.<sup>122</sup>

West. U. Tel. Co. v. McConnico, 27 Tex. Civ. App. 610, 66 S. W. 592; West. U. Tel. Co. v. Neel, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847.

<sup>117</sup> West. U. Tel. Co. v. Wingate, 6 Tex. Civ. App. 394, 25 S. W. 439.

<sup>118</sup> West. U. Tel. Co. v. Merrill (Tex. Civ. App.) 22 S. W. 826; West. U. Tel. Co. v. Rosentreter, 80 Tex. 406, 16 S. W. 25. See cases in notes 79 and 80, *supra*, taking both views.

<sup>119</sup> See cases in note 107, *supra*. See § 301. *Given v. West. U. Tel. Co.* (C. C.) 24 Fed. 119, holding not necessary to inform employés of closing of other offices. To the same effect, see *West. U. Tel. Co. v. Georgia Cotton Co.*, 94 Ga. 444, 21 S. E. 835. See, also, *Bateman v. West. U. Tel. Co.*, 97 Ga. 338, 22 S. E. 920; *West. U. Tel. Co. v. Neel*, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847; *West. U. Tel. Co. v. May*, 8 Tex. Civ. App. 176, 27 S. W. 760. See, however, *West. U. Tel. Co. v. Bruner* (Tex. Civ. App.) 19 S. W. 149.

<sup>120</sup> *West. U. Tel. Co. v. Neel*, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847. But see *Bierhaus v. West. U. Tel. Co.*, 8 Ind. App. 246, 34 N. E. 581.

<sup>121</sup> *West. U. Tel. Co. v. Hill*, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058.

<sup>122</sup> *West. U. Tel. Co. v. Harris*, 91 Ark. 602, 121 S. W. 1051, 24 L. R. A. (N. S.) 1283; *Box v. Postal Tel. Cable Co.*, 91 C. C. A. 172, 165 Fed. 138, 28 L. R. A. (N. S.) 566; *West. U. Tel. Co. v. Hill*, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 618, 19 Ann. Cas. 1058; *Bolton v. West. U. Tel. Co.*, 76 S. C.

§ 354. **Telephone companies—enforcement of tolls.**—Telephone companies have the same right to adopt, prescribe and enforce all reasonable regulations for the convenience of their business as telegraph companies;<sup>123</sup> and that which has already been said of certain particular regulations of the latter is applicable to telephone companies.<sup>124</sup> Thus they may have reasonable office hours and are not under obligation to render service to any one outside of such hours.<sup>125</sup> There is this distinction, however, between these companies in this respect: The party calling does not have to pay the toll until the communicant has been summoned to the telephone; and, if he cannot be found, the former knows immediately that he cannot communicate with him. It is no duty of the company to make an effort to get the party called to the telephone after the office at his end of the line has closed.<sup>126</sup> They may enforce the payment of the rental; and on the failure of the subscriber to make such payment, his telephone may be removed from his premises, after giving timely notice to that effect.<sup>127</sup> The subscriber, it seems, cannot object to this act of the company on the ground that it has not given efficient service,<sup>128</sup> or that the company is indebted to him.<sup>129</sup> They may require the party calling, to go to the exchange office, and prepay the toll or that he deposit a sufficient amount at the toll station before any services shall be rendered.<sup>130</sup> We think that they could not enforce a regulation

529, 57 S. E. 543; *West. U. Tel. Co. v. Crumpton*, 138 Ala. 632, 36 South. 517; *Carter v. West. U. Tel. Co.*, 141 N. C. 374, 54 S. E. 274; *Edwards v. West. U. Tel. Co.*, 147 N. C. 126, 60 S. E. 900. See other cases collated to *Swan v. West. U. Tel. Co.*, 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153. But see *Carswell v. West. U. Tel. Co.*, 154 N. C. 112, 69 S. E. 782, 32 L. R. A. (N. S.) 611.

<sup>123</sup> *McDaniel v. Faubush Tel. Co.*, 106 S. W. 825, 32 Ky. Law Rep. 572; *People v. Hudson River Tel. Co.*, 19 Abb. N. C. (N. Y.) 466. *Pugh v. City, etc., Tel. Ass'n*, 8 Ohio Dec. (Rep.) 644; *Twin Valley Tel. Co. v. Mitchell*, 27 Okl. 388, 113 Pac. 914, Ann. Cas. 1912C, 582, 38 L. R. A. (N. S.) 235; *Buffalo County Tel. Co. v. Turner*, 82 Neb. 841, 118 N. W. 1064, 19 L. R. A. (N. S.) 693, 130 Am. St. Rep. 699.

<sup>124</sup> See § 256.

<sup>125</sup> *Twin Valley Tel. Co. v. Mitchell*, 27 Okl. 388, 113 Pac. 914, Ann. Cas. 1912C, 582, 38 L. R. A. (N. S.) 235.

<sup>126</sup> See § 316 et seq.

<sup>127</sup> See § 251 et seq.; *Woodley v. Carolina Tel., etc., Co.*, 163 N. C. 284, 79 S. E. 598, Ann. Cas. 1914D, 116; *Buffalo County Tel. Co. v. Turner*, 82 Neb. 841, 118 N. W. 1064, 19 L. R. A. (N. S.) 693, 130 Am. St. Rep. 699, requirement of rural telephone company to pay six months in advance.

<sup>128</sup> *Cumberland Tel. Co. v. Baker*, 85 Miss. 486, 37 South. 1012; *Buffalo County Tel. Co. v. Turner*, 82 Neb. 841, 118 N. W. 1064, 19 L. R. A. (N. S.) 693, 130 Am. St. Rep. 699. See, also, § 256 et seq.

<sup>129</sup> *Rushville Co-operative Tel. Co. v. Irvin*, 27 Ind. App. 62, 59 N. E. 327. See, also, § 251 et seq.

<sup>130</sup> See § 251 et seq.

whereby the subscriber is required to contract for a telephone for one year, before one is placed on his premises; but that they are under obligations to give him the same service, as any other subscriber, even though he may not desire the service so long.<sup>131</sup> It is a reasonable rule of these companies that so much extra toll shall be paid after the conversation has extended beyond the regular time allowed for conversations; and they may limit the length of time of conversation over long-distance telephones. As these companies are intended for general use, by persons of all classes, and for both sexes, those who use them may be required to conduct their conversation in a becoming manner, free from obscenity or profanity,<sup>132</sup> and for a violation of this requirement may be denied the further use of the telephone.<sup>133</sup> No regulation will be tolerated which prevents the public from having a fair and reasonable use of its telephones and exchanges, or denies to any one the rights secured to him by statute, or requires him to conduct his business with particular persons or agencies.<sup>134</sup> Thus a regulation is unreasonable and invalid if it prohibits subscribers from calling messengers otherwise than through the central office.<sup>135</sup>

**§ 355. May waive regulations.**—Rules and regulations of these companies which are merely for their convenience may be waived,<sup>136</sup> either expressly or by implication,<sup>137</sup> and whether or not they have been waived is a mixed question of law and fact.<sup>138</sup> It may be inferred that they have been waived, if the company has failed repeatedly to enforce such a rule.<sup>139</sup> Thus, as has been hereto-

<sup>131</sup> See chapter XI.

<sup>132</sup> See § 273 et seq.

<sup>133</sup> *Pugh v. City & S. Tel. Co.*, 9 Cen. L. B. 104, 27 Alb. Law J. 162. See, also, § 273 et seq.

<sup>134</sup> See chapter XI.

<sup>135</sup> *People v. Hudson River Tel. Co.*, 19 Abb. N. C. (N. Y.) 466, 10 N. Y. St. Rep. 282.

<sup>136</sup> *West. U. Tel. Co. v. Stevenson*, 128 Pa. 442, 18 Atl. 441, 5 L. R. A. 515, 15 Am. St. Rep. 687; *People v. West. U. Tel. Co.*, 166 Ill. 15, 46 N. E. 731, 36 L. R. A. 637; *Suttle v. West. U. Tel. Co.*, 148 N. C. 480, 62 S. E. 593, 128 Am. St. Rep. 631; *West. U. Tel. Co. v. Cunningham*, 99 Ala. 314, 14 South. 579; *McPeck v. West. U. Tel. Co.*, 107 Iowa, 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214.

<sup>137</sup> *Bright v. West. U. Tel. Co.*, 132 N. C. 317, 43 S. E. 841; *West. U. Tel. Co. v. Johnsey*, 49 Tex. Civ. App. 487, 109 S. W. 251; *West U. Tel. Co. v. Georgia Cotton Co.*, 94 Ga. 444, 21 S. E. 835; *Smith v. West. U. Tel. Co.*, 77 S. C. 378, 58 S. E. 6, 12 Ann. Cas. 654; *Bonner v. West. U. Tel. Co.*, 71 S. C. 303, 51 S. E. 117; *Alexander v. West. U. Tel. Co.*, 158 N. C. 473, 74 S. E. 449, 42 L. R. A. (N. S.) 407; *Stone & Co. v. Postal Tel. Cable Co.*, 35 R. I. 498, 87 Atl. 319, 46 L. R. A. (N. S.) 180.

<sup>138</sup> *Smith v. West. U. Tel. Co.*, 77 S. C. 378, 58 S. E. 6, 12 Ann. Cas. 654. See *Vinson v. Southern Bell Tel., etc., Co.*, 188 Ala. 292, 66 South. 100, L. R. A. 1915C, 450.

<sup>139</sup> *Bright v. West. U. Tel. Co.*, 132 N. C. 317, 43 S. E. 841; *West. U. Tel.*



fore said, they may enforce a rule prescribing reasonable office hours,<sup>140</sup> yet if they accept messages for transmission and delivery after the closing of the office, it will be presumed that they have waived the regulation.<sup>141</sup> They may require all messages tendered them to be in writing,<sup>142</sup> but if they receive such orally they cannot set up this rule as a defense to an action brought for negligently transmitting or delivering a message.<sup>143</sup> As, where the local office makes a practice of receiving for transmission messages telephoned to it, and it does not appear that the company had forbidden the practice, it seems that the operator, in writing out the message, must be deemed the company's agent to render it liable for an error made by him in transcribing,<sup>144</sup> or, if the operator has been in the habit of receiving messages, verbally through the messenger,<sup>145</sup> or messages have been conveyed to him by means of a speaking tube, it will be presumed that the company has waived the regulation.<sup>146</sup> So also if the company has failed to require prepayment of the charges,<sup>147</sup> or has deferred the collection of same until some subsequent time, or if the extra charge, which may be exacted of the sender for a delivery beyond the free delivery limits has not been deposited,<sup>148</sup> it will have waived its rights to enforce the regulation; and cannot, therefore, set up the fact of a non-compliance with the rule, as a defense to an action brought against it.<sup>149</sup> These companies may have the right to refuse certain messages tendered them for transmission,<sup>150</sup> but if the operator should accept such a message, knowing that the company would

Co. v. Johnsey, 49 Tex. Civ. App. 487, 109 S. W. 251; West U. Tel. Co. v. Georgia Cotton Co., 94 Ga. 444, 21 S. E. 835; Smith v. West. U. Tel. Co., 77 S. C. 378, 58 S. E. 6, 12 Ann. Cas. 654; Bonner v. West. U. Tel. Co., 71 S. C. 303, 51 S. E. 117; West. U. Tel. Co. v. Stevenson, 128 Pa. 442, 18 Atl. 441, 15 Am. St. Rep. 687, 5 L. R. A. 515.

<sup>140</sup> See § 347 et seq.

<sup>141</sup> See § 350.

<sup>142</sup> See § 276.

<sup>143</sup> See § 276 et seq.

<sup>144</sup> West. U. Tel. Co. v. Todd, 22 Ind. App. 701, 54 N. E. 446. See § 277.

<sup>145</sup> See § 278.

<sup>146</sup> West. U. Tel. Co. v. Stevenson, 128 Pa. 442, 18 Atl. 441, 15 Am. St. Rep. 687, 5 L. R. A. 515.

<sup>147</sup> West. U. Tel. Co. v. Cunningham, 99 Ala. 314, 14 South. 579. See § 279. See, also, § 251. See Vinson v. Southern Bell Tel., etc., Co., 188 Ala. 292, 66 South. 100, L. R. A. 1915C, 450, evidence of waiver of prepayment of toll.

<sup>148</sup> See § 302 et seq.

<sup>149</sup> West. U. Tel. Co. v. Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224, note. But see, Southwestern Tel. etc., Co. v. Sharp, 118 Ark. 541, 177 S. W. 25, L. R. A. 1915E, 323.

<sup>150</sup> See § 273 et seq.

refuse such, and negligently transmits or delivers it,<sup>151</sup> whereby damages have been incurred, the company nevertheless will be liable.<sup>152</sup>

<sup>151</sup> See chapter XIII.

<sup>152</sup> *Beasley v. West. U. Tel. Co.* (C. C.) 39 Fed. 181; *West. U. Tel. Co. v. Todd*, 22 Ind. App. 701, 54 N. E. 446; *Carland v. West. U. Tel. Co.*, 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280; *Tex. Tel. Co. v. Seiders*, 9 Tex. Civ. App. 431, 29 S. W. 258.

## CHAPTER XV

## DUTIES UNDER THE COMMON LAW.

§ 356. In general.

357. Act of God—not liable for—contract.

358. Same continued—express contract.

359. Same continued—burden of proof.

360. Public enemy.

361. Same continued—reason for rule.

362. Same continued—mobs, strikes, etc.

363. Same continued—strikes, not liable—must supply places.

364. Same continued—in cases of express contracts.

365. Connecting lines.

366. Negligence of the sender or sendee.

§ 356. In general.—Telegraph and telephone companies are not, strictly speaking, common carriers, and are not, therefore, held to such strict accountability as are the latter.<sup>1</sup> The public, however, is interested in their business, in that they are exercising a public function and must, to that extent, as has been seen, manage and control their business affairs.<sup>2</sup> The sources from which the public has obtained the power to exercise this control are now derived from statutes and the common law, and to these it is necessary to resort in order to ascertain such powers. Common carriers, under the common law, were held to the most strict accountability for their services to the public, and the question of negligence did not enter into the consideration of the courts in determining a loss incurred. In other words, they were held strictly liable as insurers, and were responsible for all losses incurred, except such as may have been caused by the act of God, or the public enemy. On account of these companies enlarging their lines of business and thereby holding themselves out to the public as willing to transport many and varied things which were not contemplated as subjects of transportation at the time the business was first begun—and many of which were of a peculiar perishable nature and otherwise more subject to loss or injury—the common-law rule has been somewhat relaxed and they are not now held liable for every loss as they formerly were. Telegraph companies are not insurers, but in every other respect they are held to the same liability for losses and injuries as are common carriers.<sup>3</sup>

<sup>1</sup> See chapter II.

<sup>2</sup> See chapter X.

<sup>3</sup> See chapter II. See, also, § 198 et seq.



They may, however, as will be seen hereafter, limit their common-law liabilities; and in most states there are statutes which, more or less, give them the power to exercise this right.<sup>4</sup>

§ 357. **Act of God—not liable for—contract.**—As may be seen, the common law holds that telegraph, telephone, and electric companies are not liable in those cases where the act of God has been the proximate cause of the loss or injury—and in this respect there is no diversity of opinion—but what are such causes as may be considered the act of God, and such as will be sufficient to relieve them for losses resulting therefrom, is not clearly defined by the courts; and this fact has brought about, to a certain extent, a diversity of opinion. It may be safely said, however, that if there is intervening any human agency which contributes in any manner to the production of the loss or injury, and without which the company would be exonerated, on the ground that the loss was caused by the act of God, it will be liable.<sup>5</sup> Thus, if the condition of the company's lines or instruments are such that they cannot be used—and such conditions were originally caused by the act of God—the company will, nevertheless, be liable for any loss thereby incurred,<sup>6</sup> if it is negligent, in any wise, in making a reasonable effort to repair, as speedily as possible, the defects.<sup>7</sup> It is fairly well settled that these companies will not be liable for losses caused by extraordinary tempest, storms or the like, unless their own negligence contributed to the production of the loss.<sup>8</sup> Thus it has been held that they are not liable for losses caused by severe windstorms,<sup>9</sup> or where the lines have been broken or oth-

<sup>4</sup> See § 371.

<sup>5</sup> See chapter IX. Compare *Friend v. Woods*, 6 Grat. (Va.) 189, 52 Am. Dec. 119; *New Brunswick, etc., Co. v. Tiers*, 24 N. J. Law, 697, 64 Am. Dec. 396; *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426; *Hill v. Sturgeon*, 28 Mo. 323; *Strouss v. Wabash, etc., R. Co. (C. C.)* 17 Fed. 209; *Graff v. Bloomer*, 9 Pa. 114; *Parker v. Flagg*, 26 Me. 181, 45 Am. Dec. 101; *Miller v. Steam Navigation Co.*, 10 N. Y. 431; *Hays v. Kennedy*, 41 Pa. 378, 80 Am. Dec. 627.

<sup>6</sup> See chapter IX.

<sup>7</sup> See chapter IX.

<sup>8</sup> See chapter IX. Compare *Nashville, etc., R. Co. v. King*, 6 Heisk. (Tenn.) 269; *Nashville, etc., R. Co. v. David*, 6 Heisk. (Tenn.) 261, 19 Am. Rep. 594; *Ballentine v. North Missouri, etc., R. Co.*, 40 Mo. 491, 93 Am. Dec. 315; *Wallace v. Clayton*, 42 Ga. 443; *Pearce v. The Thomas Newton (D. C.)* 41 Fed. 106; *Packard v. Taylor*, 35 Ark. 402, 37 Am. Rep. 37; *Bowman v. Teall*, 23 Wend. (N. Y.) 306, 35 Am. Dec. 562; *Harris v. Rand*, 4 N. H. 259, 17 Am. Dec. 421; *Slater v. South Carolina R. Co.*, 29 S. C. 96, 6 S. E. 936.

<sup>9</sup> See chapter IX. Compare *Blythe v. Denver, etc., R. Co.*, 15 Colo. 333, 25 Pac. 702, 11 L. R. A. 615, 22 Am. St. Rep. 403; *Insurance Co. v. Transportation Co.*, 12 Wall. 194, 20 L. Ed. 378; *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Insurance Co. v. Boon*, 95 U. S. 117, 24 L. Ed. 395.

erwise injured by sudden and unexpected freezes.<sup>10</sup> Where there have been losses caused by other atmospheric conditions, they will not be held liable therefor.

§ 358. **Same continued—express contract.**—Telegraph companies may, however, bind themselves in such way as to be under obligation to transmit and deliver a message, irrespective of any loss from which they might have otherwise been relieved by the fact that the proximate cause of the loss was the result of the act of God.<sup>11</sup> In other words, they may make an express contract to transmit the message, or risk all hazards in the attempt, but in order to hold them, under such an agreement, the terms of the contract must be very clear and expressive;<sup>12</sup> since, if there is any doubt as to the purport of the agreement, they will not be held liable.<sup>13</sup> They may, furthermore, enlarge their common-law liabilities;<sup>14</sup> but at the same time this additional undertaking may not be such as would hold them liable for losses caused by the act of God.<sup>15</sup> In other words, they may contract to insure a safe and correct transmission of messages intrusted to them; however, it would not be understood by such contract that they could be held liable for losses caused proximately from what is termed the act of God. Where there is an agreement entered into whereby they enlarge their common-law liabilities in either way, they may exact of the sender an additional compensation for the extra risk assumed.<sup>16</sup> It seems that it should be discretionary with the company as to whether it should assume the risk in either instance, since, if the undertaking should appear unsurmountable, caused by the varied climatic changes—and they are better able to determine these conditions of affairs than any other—they should not be forced to accept a message for transmission under such contract, but it should be left entirely to their own sound discretion.<sup>17</sup> For

<sup>10</sup> See chapter IX.

<sup>11</sup> *Milton v. Denver, etc., R. Co.*, 1 Colo. App. 307, 29 Pac. 22.

<sup>12</sup> Compare *Fitchburg, etc., R. Co. v. Hanna*, 6 Gray (Mass.) 539, 66 Am. Dec. 427; *Leonard v. Hendrickson*, 18 Pa. 40, 55 Am. Dec. 587.

<sup>13</sup> Compare *Neal v. Saunderson*, 2 Smedes & M. (Miss.) 572, 41 Am. Dec. 609; *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695.

<sup>14</sup> See cases in note 12, *supra*.

<sup>15</sup> See cases in note 13, *supra*.

<sup>16</sup> See cases in note 12, *supra*.

<sup>17</sup> Compare *Murphy Hardware Co. v. Southern R. Co.*, 150 N. C. 703, 64 S. E. 873, 22 L. R. A. (N. S.) 1200, 17 Ann. Cas. 481, a carrier may refuse to accept property for transportation as a result of a strike which prevents it forwarding the property should it be received. See *Garrison v. Southern R. Co.*, 150 N. C. 575, 64 S. E. 578; *Wampum Cotton Mills v. Carolina, etc., R. Co.*, 150 N. C. 612, 64 S. E. 588; *St. Louis, etc., R. Co. v. State*, 84 Ark. 150, 104 S. W.

the reason that they are public enterprises, discharging public duties,<sup>18</sup> and occasionally enlarging those duties, is no reason why undue advantage should be taken of them, and that additional, excessive and unnecessary burdens should be imposed upon them.

§ 359. **Same continued—burden of proof.**—Where a telegraph, telephone, or an electric company relies upon the defense of the act of God, it must prove affirmatively that the loss or injury complained of was proximately caused by the act of God.<sup>19</sup> There seems, however, to be a difference of opinion among the courts as to whether the company must supplement the evidence that the loss was the result of the act of God, by evidence to the effect that the loss was not the result of any negligence on its own part. Some of the courts hold that all that is necessary for the company to prove is, that the loss or injury arose from what is termed the act of God,<sup>20</sup> while other courts hold that they must not only prove that the loss was caused by the act of God, but also that no act on their part contributed to the loss.<sup>21</sup> In other words, they must affirmatively show that there was no negligence or fault on their part. If the negligence of the company intervened or contributed to the production of the loss, the rule that the company may be exonerated by the act of God does not apply, since the negligence of the company will be considered the proximate cause of the loss or injury.<sup>22</sup> If this rule should be resorted to by the company for its own protection, it must be shown that the act of God was the proximate, and not the remote, cause of the loss;<sup>23</sup>

1106. See *Sullivan v. West. U. Tel. Co.*, 82 S. C. 569, 64 S. E. 752, 129 Am. St. Rep. 903, 22 L. R. A. (N. S.) 1214, 17 Ann. Cas. 238.

<sup>18</sup> See chapter II.

<sup>19</sup> See chapter IX. Compare *Wallingford v. Columbia, etc.*, R. Co., 26 S. C. 258, 2 S. E. 19; *Denton v. Chicago, etc. R. Co.*, 52 Iowa, 161, 2 N. W. 1093, 35 Am. Rep. 263; *Colton v. Cleveland, etc.*, R. Co., 67 Pa. 211, 5 Am. Rep. 424; *Agnew v. Steamer Contra Costa*, 27 Cal. 425, 87 Am. Dec. 87; *Southern, etc., Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783; *Leonard v. Hendrickson*, 18 Pa. 40, 55 Am. Dec. 587; *Craig v. Childress, Peck (Tenn.)* 270, 14 Am. Dec. 751; *Lamb v. Camden, etc.*, R. Co., 46 N. Y. 271, 7 Am. Rep. 327.

<sup>20</sup> Compare *Railroad Co. v. Reeves*, 10 Wall. 176, 19 L. Ed. 909; *Magnin v. Dinsmore*, 56 N. Y. 168; *Wolf v. American, etc., Co.*, 43 Mo. 421, 97 Am. Dec. 406; *Little Rock, etc., R. Co. v. Corcoran*, 40 Ark. 375.

<sup>21</sup> Compare *Brown v. Adams, etc., Co.*, 15 W. Va. 812; *Ryan v. Missouri, etc., R. Co.*, 65 Tex. 13, 57 Am. Rep. 589; *Steele v. Townsend*, 37 Ala. 247, 79 Am. Dec. 49; *Grey v. Mobile, etc., Co.*, 55 Ala. 387, 28 Am. Rep. 729.

<sup>22</sup> Compare *McGraw v. Baltimore, etc., R. Co.*, 18 W. Va. 361, 41 Am. Rep. 696; *Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235; *Packard v. Taylor*, 35 Ark. 402, 37 Am. Rep. 37.

<sup>23</sup> Compare *Hays v. Kennedy*, 41 Pa. 378, 80 Am. Dec. 627; *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292; *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426; *Steele v. McTyler*, 31 Ala. 667, 70 Am. Dec. 516.



and the burden is cast upon the company to make such showing, for, surely, when it makes this defense—and that about which it knows more than any other—it should be able to sustain it by proof. It seems to us that this proof should be very clearly and affirmatively shown, since to hold otherwise might have the tendency to give these companies an easy defense to avoid many of their liabilities. Some of the courts have held that these companies must show that the act of God was the sole cause of the loss.<sup>24</sup>

§ 360. **Public enemy.**—As has been heretofore adverted to, telegraph or telephone companies are not liable for losses caused by acts of the public enemy; and in considering this question, it might be well to say something about what is meant by the term “public enemy.” The term “public enemy” means those people with whom the country is at war, and does not include thieves, rioters or insurgents. Thus, when the war between the United States and Mexico was raging, the latter was a public enemy to this country; however, there were few adjudications arising out of losses to persons during this war, and there are few to be found in our country up until the beginning of, or during, the Civil War, and all of these pertained to the destruction of goods in the charge of common carriers. In these cases it was held that, as to goods in the possession of carriers operating within the territory under the control of the federal government, the destruction by the Confederate forces was a destruction by the public enemy for which the carrier would not be responsible.<sup>25</sup> Likewise it was held that destruction by the federal troops of goods in the possession of carriers operating within the Confederate lines was also a destruction by the public enemy.<sup>26</sup> But if the goods had been received within the Confederate lines and destroyed by their troops therein,<sup>27</sup> or vice versa, if they had been received and destroyed within the federal lines by their own military troops,<sup>28</sup> the destruction would not be considered as that done by the public enemy and the carriers could not, therefore, relieve themselves of liability. The business of a carrier, in many respects, is similar in character to that of tele-

<sup>24</sup> Compare *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426; *Michaels v. New York, etc., R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415; *Crosby v. Fitch*, 12 Conn. 410, 31 Am. Dec. 745; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142.

<sup>25</sup> See *Morse v. Slue*, 2 Keb. 866, 3 Keb. 72, 112, 135, 2 Lev. 69, 1 Mod. 85, T. Raym. 220, 1 Vent. 190, 238; *Bland v. Adams Express Co.*, 1 Duv. (Ky.) 233, 85 Am. Dec. 623; *Lewis v. Ludwick*, 6 Cold. (Tenn.) 368, 98 Am. Dec. 454; *Nashville, etc., R. Co. v. Estes*, 10 Lea (Tenn.) 749; *Nashville, etc., R. Co. v. Estis*, 7 Heisk. (Tenn.) 622, 24 Am. Rep. 289.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

graph companies; and, as the former has been in use much longer than the latter, whereby there are to be found many more decisions on points of law now considered with respect to telegraph companies, we are often found resorting to such decisions, since they in most instances are applicable to the latter companies.

§ 361. **Same continued—reason for rule.**—It was said in the previous paragraph that insurgents were not classed as the public enemy; but if they have become so hostile and ravenous and have gathered such strength of force as to involve the country in civil war, they will be considered a public enemy.<sup>29</sup> It is not necessary for the government to declare war against those who are in arms against it to make them a public enemy; but if the condition of affairs is such as to place the country in an actual state of war, such insurgents then will be nothing less than an enemy to the public. One of the great reasons why all corporations exercising public functions are relieved from losses caused by the public enemy is that the public has failed to discharge its part of the agreement—under which these business enterprises assumed public duties—in protecting them in their inheritable rights and guaranteeing them a free exercise of their business, unmolested by any act which should be protected by the government. As the government has failed to carry out its part of the agreement, the other contracting party, as in all contracts, cannot be forced to continue operating under the same agreement; and any loss or injury which has been brought about by the party at fault cannot afterwards be taken advantage of by this party or any of his agencies. It is the duty of telegraph and telephone companies, however, when their business is being interfered with by the public enemy, to use due care and diligence to prevent any loss which might likely be caused by the latter; and so, where they are derelict in this respect, or where their own negligent acts have intervened and contributed to the production of the loss, they will not be exonerated for such acts, since their negligence will be deemed the proximate cause of the loss. They can never be relieved from liability for the acts of the public enemy until such fact is proven affirmatively by them to be the proximate cause of the loss.<sup>30</sup> Not only is the burden of proof cast upon these companies, but they must further show by competent and sufficient evidence that the loss was not the re-

<sup>29</sup> Nashville, etc., *R. Co. v. Estes*, 10 Lea (Tenn.) 749; *McCranie v. Wood*, 24 La. Ann. 406; *Holladay v. Kennard*, 12 Wall. 254, 30 L. Ed. 390; *Southern, etc., Co. v. Womack*, 1 Heisk. (Tenn.) 256; *United States v. Palmer*, 3 Wheat. 610, 4 L. Ed. 471.

<sup>30</sup> *Holladay v. Kennard*, 12 Wall. 254, 30 L. Ed. 390.

sult of any negligence or want of care on their part. It may seem strange, from what has been said with respect to the government failing to perform its part of the contract in protecting these companies in their business, that there should be any duty on the part of the latter to exercise care in attempting to avoid losses arising from acts of the public enemy. But it must be understood that, while these companies stand in a most peculiar relation toward the government, in that they do not have, strictly speaking, the same senses which a real human possesses, and that their privileges, duties and exemptions are different, in some respects, to a private citizen, yet they are considered, under the rules of law, to be classed and comprehended under the term "citizen." It is the duty of every citizen—whether he be but a common layman, toiling through the chilly climes of the North, or the sultry suns of the South, in the faithful performance of his manual services, or whether he be a bonded officer in the discharge of his official duties—to protect the government in its laws and in its property. To this extent, as all other citizens, these companies must extend a willing hand. And whenever it is possible for them, by exercising due and reasonable care, to protect any property of the government, or any citizen thereof, from the depredation or destruction of the public enemy, it most assuredly is part of their duty to do so.

§ 362. *Same continued—mobs, strikes, etc.*—Under the ancient rule, carriers were not exonerated for losses caused by the acts of mobs, or other riotous persons; but the stringency of this rule has been somewhat relaxed by the more modern authorities.<sup>31</sup> They are still held liable for all losses caused by such acts, but are not liable for loss in the transportation of goods by any delay caused thereby. There is a difference, however, in the application of this rule to carriers and to telegraph and telephone companies.<sup>32</sup> As a general rule, the latter companies are not liable for losses arising from acts of mobs and other riotous persons.<sup>33</sup> The acts of the mob stand, with respect to these companies, in almost the same category as those of the public enemy.<sup>34</sup> The different means and instrumentalities through which they accomplish their respective corporate purposes bring about the difference in the application of this rule.<sup>35</sup> It is never presumed that mobs intend to take possession of goods and convert them to their own use: and, the

<sup>31</sup> See monographic headnote, 97 Am. St. Rep. 526.

<sup>32</sup> *Sullivan v. West. U. Tel. Co.*, 82 S. C. 569, 64 S. E. 752, 129 Am. St. Rep. 303, 22 L. R. A. (N. S.) 1214, 17 Ann. Cas. 238, quoting author.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*



tangible property to such being in the custody of the carriers, they are more able to protect and deliver them safely to the consignee; and, as has been said, they are not liable for losses caused by such delay.<sup>36</sup> On the other hand, the main and principal object of mobs and other riotous persons who interfere with the business of telegraph companies is to prevent and obstruct the transmission of news; especially until they shall have accomplished some particular purpose.<sup>37</sup> As has been said, they are never held liable as insurers,<sup>38</sup> unless an express agreement has been entered into to that effect.<sup>39</sup> And for the reason that they are not in possession of the tangible property of the message in transit, they do not have the same opportunity to protect it as the carrier has his goods.<sup>40</sup> It is the duty, however, of these companies, where they have been thus interfered with, to make a reasonable effort to transmit the telegram by other lines or by other means;<sup>41</sup> and on a failure to do so, they will be held liable for all losses suffered.<sup>42</sup>

**§ 363. Same continued—strikes, not liable—must supply places.** The same rule applies where the mob is composed of employés of the company who are on a strike.<sup>43</sup> One of the most puzzling questions which confront these large corporations and other public institutions in this day and time is, How they may be able to manage and control their employés to their best interest, and at the same time faithfully discharge the duties they owe to the public? The term "strike" is applied commonly to a combined effort on the part of a body of workmen employed by the same master to enforce a demand for higher wages, shorter hours, or some other concession, by stopping work in a body at a prearranged time, and refusing themselves to resume work, or often allowing others to tender their services to assist in carrying on such work, until the demanded concession shall have been granted.<sup>44</sup> There is a distinction to be drawn between the liabilities of common car-

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See § 198b.

<sup>39</sup> See § 358.

<sup>40</sup> *Sullivan v. West. U. Tel. Co.*, 82 S. C. 569, 64 S. E. 752, 129 Am. St. Rep. 903, 22 L. R. A. (N. S.) 1214, 17 Ann. Cas. 238, quoting author; *Halsted v. Postal Tel. Cable Co.*, 193 N. Y. 293, 85 N. E. 1078, 19 L. R. A. (N. S.) 1021, 127 Am. St. Rep. 952.

<sup>41</sup> *Sullivan v. West. U. Tel. Co.*, 82 S. C. 569, 64 S. E. 752, 129 Am. St. Rep. 903, 22 L. R. A. (N. S.) 1214, 17 Ann. Cas. 238, quoting author.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* See *West. U. Tel. Co. v. McMorris*, 158 Ala. 563, 48 South. 349, 132 Am. St. Rep. 46.

<sup>44</sup> *Anderson's L. Dict.*; *Black's L. Dict.*; *Bouvier's L. Dict.*; *Delaware, etc., R. Co. v. Bowns*, 58 N. Y. 582. See *Kemp v. Div. No. 241, etc.*, 255 Ill. 213, 99 N. E. 389, Ann. Cas. 1913D, 347.

riers and telegraph companies for the acts of their respective employés whose object is to accomplish some of the above-mentioned concessions. Common carriers, being insurers, are liable for all losses caused by the acts of their employés while on a strike; provided the same has not become such as would be considered a crime or an unlawful act of the employés. For a loss resulting solely from lawless violence of men not in the employment of the company, the latter will not be responsible, even though the men, whose violence caused the loss, had but a short time before been employed by the company.<sup>45</sup> If they have employed other competent men within a reasonable time to supply the places of the striking employés, but these have been prevented from accepting employment by the violent acts of the latter, they will not be liable for any loss resulting thereby.<sup>46</sup> Telegraph companies are not insurers and are not, therefore, liable for losses caused by the acts of their employés while on a strike.<sup>47</sup> If, however, the strike has been caused by any fault of the company, in unreasonably reducing the wages of the employés, or increasing the time of service unreasonably long, or in otherwise refusing to grant reasonable concessions to them, it will be liable. Telegraph and telephone companies must exercise reasonable diligence in making an effort to supply the places of the employés with competent men; and on a failure so to do, they will be liable for all losses resulting therefrom. If the strike is among the employés discharging a certain particular line of business, and the same can be performed by those who have not made a strike, it is the duty of the company to see that the latter discharge this duty.<sup>48</sup>

<sup>45</sup> Pittsburgh, etc., R. Co. v. Hazen, 84 Ill. 36, 25 Am. Rep. 422.

<sup>46</sup> Pittsburgh, etc., R. Co. v. Hazen, 84 Ill. 36, 25 Am. Rep. 422. See Fewings v. Mendenhall, 88 Minn. 336, 93 N. W. 127, 60 L. R. A. 601, 97 Am. St. Rep. 519, and note to the latter report.

<sup>47</sup> Sullivan v. West. U. Tel. Co., 82 S. C. 569, 64 S. E. 752, 129 Am. St. Rep. 903, 22 L. R. A. (N. S.) 1214, 17 Ann. Cas. 238, quoting author.

*Strikes as an excuse for delay in transmitting messages.*—See Telegraph Co. v. Miller, 97 Miss. 225, 52 South. 701; Telephone Company v. Guinn (Tex. Civ. App.) 130 S. W. 616; Telephone Co. v. Ivy, 177 Fed. 63, 100 C. C. A. 481. See note 197 Am. St. Rep. 519.

<sup>48</sup> However, in Marvin v. West. U. Tel. Co., 15 Chi. Leg. N. 416, it appeared that on account of a strike of its operators and linemen, which caused a short and insufficient force in the number of its operators and employés, the company refused to accept a message for transmission unless the sender would agree in writing that it be stamped and "accepted subject to delay." He refused to allow the message to be so stamped, and sued the company for the statutory penalty for not receiving and transmitting the message. The court, holding the company liable, said: "The uses and benefits of the franchises conferred by the laws of the state are immeasurably of interest to the public as well as for the corporation; and the corporation is held in its duty to the

§ 364. **Same continued—in cases of express contracts.**—Where a telegraph company makes an express contract with the sender, wherein it undertakes without limitation or qualification to safely transmit and deliver a message within a time definitely fixed by contract, the fact that a mob, or the employés while on a strike, prevents the company from performing the contract, will not relieve it from liability for a loss suffered during the transmission of the message.<sup>49</sup> It is necessary in these contracts, as in those expressly made, wherein these companies enlarge their common-law liability with respect to losses caused by the act of God or the public enemy, that the extra risk or hazard assumed must be very explicitly given; for if there is any doubt or ambiguity on the face of the contract, it will be construed most forcibly in favor of the company.<sup>50</sup> So it will be very clearly seen that there is a marked distinction between cases where there is no express contract to transmit and deliver within a limited time and cases where there is such an express contract. An express contract binding a telegraph company to transmit a message irrespective of its being interfered with by the act of God will not necessarily bind the company for losses caused by the acts of a strike.

§ 365. **Connecting lines.**—As has been seen, a telegraph company may enter into an express contract to transmit and deliver safely certain messages intrusted to it, irrespective of the liabilities from which it may have been relieved under the common law.<sup>51</sup> In other words, it may make an express contract to transmit a message correctly or be liable for any losses incurred by a failure to do so, although such loss may be the result of an act of God or the public enemy, or acts of mobs or strikes. But where such contract is en-

sender, and the sender is entitled, on the presentation of his message, and the payment to the corporation of the compensation established by it for its transmission, to have the same transmitted through its electric wires within a reasonable time for electric transmission, and the company is bound to furnish all necessary facilities for such transmission, and any difference which may arise between the company and its employés in respect to their employment is a subject with which the sender has nothing to do. It is a public franchise, granted to the company for the purpose of providing a mode of rapid transmission of messages for the public and presumably (the company) engages on its part to use it in such manner as will accomplish the object for which the legislature designed it. On assuming the duty of functions of a corporate body under state authority, for the transaction of business for the public, the corporation is bound to supply all the necessary facilities, either in material or labor, to transact the business which, by the terms of its incorporation, it undertakes."

<sup>49</sup> See § 358.

<sup>50</sup> See § 358.

<sup>51</sup> *Smith v. West. U. Tel. Co.*, 84 Tex. 359, 19 S. W. 441, 31 Am. St. Rep. 59; *Leonard v. N. Y., etc., Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446.



tered into between the sender and a telegraph company, it will not bind a connecting company over whose lines it is necessary to transmit the message, even though it is the custom to transmit messages over these connecting lines.<sup>52</sup> If, however, there is an express agreement with the connecting company to assume all risk or undertaking of the initial lines,<sup>53</sup> or if they are carrying on a partnership business,<sup>54</sup> or if they are leased<sup>55</sup> or owned by the initial company, they will be bound by the contracts of the former. It seems that where they are bound only by an express agreement, this should be conditional on the connecting company accepting the message.<sup>56</sup> As was said, the companies could, under certain circumstances, refuse to enter into a contract to this effect,<sup>57</sup> and the same right should be extended to a connecting company; because the conditions there stated, which would give the initial company the right to refuse to enter into a contract of this nature, might not exist with respect to this company at the time the message was tendered to it, but would with the connecting line. Of course the initial company would, nevertheless, be liable. Where there is such an extraordinary risk assumed, and it is necessary for the message to be transmitted over connecting lines to reach the destination, the initial company should ascertain as to whether the connecting company would accept the message, before the former accepts it. When this is done, and all the connecting lines agree to accept the message, under the contract of the initial company, they will then be liable.<sup>58</sup>

**§ 366. Negligence of the sender or sendee.**—Another ground allowed, under the common law, for relieving a telegraph company for losses caused in a failure to correctly transmit and deliver a message, is by acts of either the sender or sendee.<sup>59</sup> There is no consideration of policy which demands that these companies should be held to account for an injury occasioned by the sender or sendee's own act; and it is immaterial whether or not such act of either of these parties, causing the loss, amounts to negligence.<sup>60</sup> Thus, if the sender fails to address the message correctly,<sup>61</sup> or where he

<sup>52</sup> *Smith v. West. U. Tel. Co.*, 84 Tex. 359, 31 Am. St. Rep. 59, 19 S. W. 441.

<sup>53</sup> See § 447 et seq.

<sup>54</sup> See § 459 et seq.

<sup>55</sup> See § 447 et seq.

<sup>56</sup> See § 457.

<sup>57</sup> See § 358.

<sup>58</sup> See § 457.

<sup>59</sup> See § 276 et seq. See, also, § 324 et seq.

<sup>60</sup> *Hart v. Chicago, etc., R. Co.*, 69 Iowa, 485, 29 N. W. 597; *Choate v. Crowninshield*, 3 Cliff. 184, Fed. Cas. No. 2,691.

<sup>61</sup> See §§ 309, 325, 326.

fails to make prepayment of charges on demand,<sup>62</sup> or where the operator, who is the sender, fails to correctly transmit and loss is incurred,<sup>63</sup> the company will not be liable. When the addressee misconstrues an ambiguous telegram,<sup>64</sup> or when he refuses to pay the extra charges for delivery beyond the free delivery limit,<sup>65</sup> his acts will relieve the company for any loss caused thereby.

<sup>62</sup> See § 279.

<sup>63</sup> See § 327.

<sup>64</sup> See §§ 333, 334.

<sup>65</sup> See §§ 343, 344.

## CHAPTER XVI

## COMMON-LAW LIABILITIES

- § 367. Stipulation in contract of sending—in general.
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- 389. Same continued—not to be prosecuted by the public.
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- § 411. Burden of proof.
- 412. Proof of assent to stipulation.
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- 419. The correct view as considered.
- 420. Assent—proof of—what amounts to.
- 421. Stipulation posted in company's office—not binding.
- 422. Messages written on blanks of another company—binding.
- 423. Same continued—knowledge of company's stipulations.
- 424. Messages delivered to company by telephone or verbally.
- 425. Principal bound by the knowledge of the agent.

§ 367. **Stipulation in contract of sending—in general.**—Telegrams are invariably written on blanks furnished by telegraph companies, on the backs of which are generally found stipulations exempting them from certain liabilities, and which are apparently agreed to by the sender when he attaches his signature thereto. The question with which the courts have been and are still confronted is whether such contracts or stipulations are binding, either on the sender<sup>1</sup> or on the addressee,<sup>2</sup> or on both? The courts are not in harmony on this subject. Some hold that some of these stipulations are reasonable and binding<sup>3</sup> and others hold that none of them can be enforced;<sup>4</sup> still others hold that all of them are binding where they are not in conflict with any statute or against public policy.<sup>5</sup> Many states have adopted statutes which provide that telegraph companies may adopt and enforce reasonable rules and regulations for the purpose of carrying on their business, and thereby relieve themselves from some of their common-law liabilities;<sup>6</sup> and where statutes have not been enacted to this effect, the courts, in some of those states, have held that they had the right, without such statutes, to make such rules and regulations. It is held in most, if not in all, of the states that the company may, by a special express contract, limit its common-law liability. There is, however, some conflict among the courts as to how far they may be limited and what is sufficient to constitute a valid special contract.

<sup>1</sup> See § 385.

<sup>2</sup> See § 416.

<sup>3</sup> See § 376.

<sup>4</sup> *West. U. Tel. Co. v. Beals*, 56 Neb. 415, 76 N. W. 903, 71 Am. St. Rep. 682; *Kemp v. West. U. Tel. Co.*, 28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363; *West. U. Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 66 Am. St. Rep. 361, 36 L. R. A. 711. See § 407.

<sup>5</sup> See chapter XIV.

<sup>6</sup> Examine the local statute.

The various phases of these stipulations will be considered in the following sections.

§ 368. **Negligence—cannot contract against—in most states.**—The general rule, supported by the weight of authority, is that telegraph, telephone or electric companies cannot by any kind of a contract exempt themselves from losses caused by their own negligence or that of their servants.<sup>7</sup> The rule rests upon the consideration of public policy and upon the fact that to allow the companies

<sup>7</sup> Willock v. Pennsylvania R. Co., 166 Pa. 184, 30 Atl. 948, 27 L. R. A. 228, 45 Am. St. Rep. 674; Thomas v. Wabash, etc., R. Co. (C. C.) 63 Fed. 200; Eells v. St. Louis, etc., R. Co. (C. C.) 52 Fed. 903; Mobile, etc., R. Co. v. Hopkins, 41 Ala. 486, 94 Am. Dec. 607; Louisville, etc., R. Co. v. Grant, 99 Ala. 325, 13 South. 599; Stanard, etc., Co. v. White Line, etc., Co., 122 Mo. 258, 26 S. W. 704; Johnson v. Alabama, etc., R. Co., 69 Miss. 191, 11 South. 104, 30 Am. St. Rep. 534; Squire v. New York, etc., R. Co., 98 Mass. 239, 93 Am. Dec. 162; American U. Tel. Co. v. Daughtery, 89 Ala. 191, 7 South. 660; Stiles v. West. U. Tel. Co., 2 Ariz. 308, 15 Pac. 712; West. U. Tel. Co. v. Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744; West. U. Tel. Co. v. Graham, 1 Colo. 230, 9 Am. Rep. 136; West. U. Tel. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480. Compare West. U. Tel. Co. v. Fontaine, 58 Ga. 433; Tyler v. West. U. Tel. Co., 60 Ill. 421, 14 Am. Rep. 38; West. U. Tel. Co. v. Tyler, 74 Ill. 168, 24 Am. Rep. 279; West. U. Tel. Co. v. Meek, 49 Ind. 53; West. U. Tel. Co. v. Fenton, 52 Ind. 1; West. U. Tel. Co. v. Adams, 87 Ind. 598, 44 Am. Rep. 776; West. U. Tel. Co. v. Meredith, 95 Ind. 93; Central U. Tel. Co. v. Swoveland, 14 Ind. App. 341, 42 N. E. 1035; Sweatland v. Illinois, etc., Tel. Co., 27 Iowa, 433, 1 Am. Rep. 285; Manville v. West. U. Tel. Co., 37 Iowa, 214, 18 Am. Rep. 8; Harkness v. West. U. Tel. Co., 73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672; Camp v. West. U. Tel. Co., 1 Metc. (Ky.) 164, 71 Am. Dec. 461; Smith v. West. U. Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126; La Grange v. Southwestern Tel. Co., 25 La. Ann. 383; Bartlett v. West. U. Tel. Co., 62 Me. 209, 16 Am. Rep. 437; Ayer v. West. U. Tel. Co., 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353; West. U. Tel. Co. v. Goodbar (Miss.) 7 South. 214; Reed v. West. U. Tel. Co., 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609, overruling Wann v. West. U. Tel. Co., 37 Mo. 472, 90 Am. Dec. 395; Kemp v. West. U. Tel. Co., 28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363. Compare Becker v. West. U. Tel. Co., 11 Neb. 87, 7 N. W. 868, 38 Am. Rep. 356; Sherrill v. West. U. Tel. Co., 116 N. C. 655, 21 S. E. 429; Brown v. Postal Tel. Co., 111 N. C. 187, 16 S. E. 179, 17 L. R. A. 648, 32 Am. St. Rep. 793; West. U. Tel. Co. v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500; Marr v. West. U. Tel. Co., 85 Tenn. 529, 3 S. W. 496; Pepper v. West. U. Tel. Co., 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699; West. U. Tel. Co. v. Broesche, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843; West. U. Tel. Co. v. Neill, 57 Tex. 283, 44 Am. Rep. 589; Pepper v. West. U. Tel. Co., 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699; Womack v. West. U. Tel. Co., 58 Tex. 176, 44 Am. Rep. 614; Wertz v. West. U. Tel. Co., 7 Utah, 446, 27 Pac. 172, 13 L. R. A. 510, note; Gillis v. West. U. Tel. Co., 61 Vt. 461, 17 Atl. 736, 4 L. R. A. 611, note, 15 Am. St. Rep. 917; Candee v. West. U. Tel. Co., 34 Wis. 471, 17 Am. Rep. 452; Thompson v. West. U. Tel. Co., 64 Wis. 531, 25 N. W. 789, 54 Am. St. Rep. 644; Bailey v. West. U. Tel. Co., 227 Pa. 522, 76 Atl. 736, 43 L. R. A. (N. S.) 502, 19 Ann. Cas. 895; West. U. Tel. Co. v. Alford, 110 Ark. 379, 161 S. W. 1027, 50 L. R. A. (N. S.) 94.

to absolve themselves from the duty of exercising care and fidelity, would be inconsistent with the very nature of their undertaking.<sup>8</sup> It is the duty of every citizen, while following his daily vocation, to exercise due care and fidelity toward the rights of his fellow man; and for any negligent failure to do so, whereby the latter suffers loss, the former will be liable. These companies have assumed public functions and the care and fidelity which they owe the public is even much greater than those of private citizens. In other words, private citizens do not stand on equal footing with these companies, but the latter have acquired, in consideration of public duties assumed, certain privileges and exemptions, under the articles of incorporation, which are not enjoyed by the public in general;<sup>9</sup> therefore to permit them to exempt themselves from liability caused by their negligence would, in effect, authorize them to abandon the most essential duties of their employment.<sup>10</sup>

**§ 369. Applicable to statutory penalty.**—The rule that a telegraph company cannot exempt itself by contract from losses caused by its own negligence or that of its servants is applicable to statutory penalties.<sup>11</sup> Thus, where a company is sued for negligently transmitting or delivering a message, under a statute imposing a penalty on telegraph companies for failing to exercise reasonable care and diligence in transmitting or delivering messages, it will be liable although the message was written on a blank form of the company, on the back of which was a stipulation purporting to be a contract exempting the company for any loss caused by its negligence, provided the same was not ordered to be repeated.<sup>12</sup>

**§ 370. May contract against negligence in some states.**—In those states where the lines are sharply drawn as to their character as common carrier,<sup>13</sup> and where their business is considered as

<sup>8</sup> *Bailey v. West. U. Tel. Co.*, 227 Pa. 522, 76 Atl. 736, 43 L. R. A. (N. S.) 502, 19 Ann. Cas. 895; *West. U. Tel. Co. v. Alford*, 110 Ark. 379, 161 S. W. 1027, 50 L. R. A. (N. S.) 94; *West. U. Tel. Co. v. Milton*, 53 Fla. 484, 43 South. 495, 11 L. R. A. (N. S.) 560, 125 Am. St. Rep. 1077.

Not necessary to use the word "negligence." *Halsted v. Postal Tel. Cable Co.*, 193 N. Y. 293, 85 N. E. 1078, 127 Am. St. Rep. 952, 19 L. R. A. (N. S.) 1021; *Moulton v. St. Paul, etc., R. Co.*, 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781.

<sup>9</sup> See chapter 11.

<sup>10</sup> *West. U. Tel. Co. v. Graham*, 1 Colo. 230, 9 Am. Rep. 140.

<sup>11</sup> See chapter XXV.

<sup>12</sup> *West. U. Tel. Co. v. Adams*, 87 Ind. 598, 44 Am. Rep. 776; *West. U. Tel. Co. v. Cobbs*, 47 Ark. 334, 1 S. W. 558, 58 Am. Rep. 756; *West. U. Tel. Co. v. Buchanan*, 35 Ind. 429, 9 Am. Rep. 744; *West. U. Tel. Co. v. Young*, 93 Ind. 118.

<sup>13</sup> Where telegraph companies are declared by constitution or statute to be common carriers: *West. U. Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W.



purely of private concern, it is held that telegraph companies may limit their liability for their own negligence or errors especially when arising from any cause except willful misconduct or gross negligence;<sup>14</sup> but the weight of authority is to the contrary.<sup>15</sup> And in these states it seems that there is a distinction between slight or ordinary negligence and such as amounts to gross negligence or willful default;<sup>16</sup> and they hold that these companies can only contract against liabilities caused by slight or ordinary negligence<sup>17</sup> and not such as are caused by gross negligence.<sup>18</sup> As was said, "The exemption is not extended to acts or omissions involving gross negligence, but is confined to such as are incident to the service, and may occur when there is slight attaching culpability in its officers and employés."<sup>19</sup> It has also been held that these companies could contract against liabilities of inadvertence, but not against gross negligence, misconduct or bad faith.<sup>20</sup> The rule in New York seems to be that, while a telegraph company cannot

106S. 18 Ky. Law Rep. 995, 66 Am. St. Rep. 361, 36 L. R. A. 711; Blackwell Milling, etc., Co. v. West. U. Tel. Co., 17 Okl. 376, 89 Pac. 235, 10 Ann. Cas. 855; Postal Tel., etc., Co. v. Wells, 82 Miss. 733, 35 South. 190.

<sup>14</sup> West. U. Tel. Co. v. Carew, 15 Mich. 525; Birkett v. West. U. Tel. Co., 103 Mich. 361, 50 Am. St. Rep. 374, 61 N. W. 645, 33 L. R. A. 404; Redpath v. West. U. Tel. Co., 112 Mass. 71, 17 Am. Rep. 69; Wann v. West. U. Tel. Co., 37 Mo. 472, 90 Am. Dec. 395; U. S. Tel. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519; Hart v. West. U. Tel. Co., 66 Cal. 579, 6 Pac. 637, 56 Am. Rep. 119. This question, with full citation of the earlier cases, is fully and learnedly considered in a note of 71 Am. Dec. 463, 466, 467, etc.; West. U. Tel. Co. v. Stevenson, 128 Pa. 442, 15 Am. St. Rep. 687, 18 Atl. 441, 5 L. R. A. 515; Pearsall v. West. U. Tel. Co., 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662.

<sup>15</sup> See § 390.

<sup>16</sup> See §§ 372, 373.

<sup>17</sup> Illinois Central R. Co. v. Morrison, 19 Ill. 136; Wabash, etc., R. Co. v. Brown, 152 Ill. 484, 39 N. E. 273.

<sup>18</sup> Mowry v. West. U. Tel. Co., 51 Hun, 126, 4 N. Y. Supp. 666; Postal Tel. Cable Co. v. Nichols, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A. (N. S.) 870; U. S. Tel. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519; Fleischner v. Pacific Postal Tel. Cable Co. (C. C.) 55 Fed. 738; White v. West. U. Tel. Co. (C. C.) 14 Fed. 710; Construction Co. v. Tel. Co., 163 Cal. 298, 125 Pac. 242. See, also, Halsted v. Postal Tel. Cable Co., 193 N. Y. 293, 85 N. E. 1078, 127 Am. St. Rep. 952, 19 L. R. A. (N. S.) 1021.

<sup>19</sup> Lassiter v. West. U. Tel. Co., 89 N. C. 336; Becker v. West. U. Tel. Co., 11 Neb. 87, 7 N. W. 868, 38 Am. Rep. 356; Grinnell v. West. U. Tel. Co., 113 Mass. 299, 18 Am. Rep. 485; Redpath v. West. U. Tel. Co., 112 Mass. 71, 17 Am. Rep. 69.

<sup>20</sup> Wann v. West. U. Tel. Co., 37 Mo. 472, 90 Am. Dec. 395; U. S. Tel. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519; Hart v. West. U. Tel. Co., 66 Cal. 579, 6 Pac. 637, 56 Am. Rep. 119; White v. West. U. Tel. Co. (C. C.) 14 Fed. 710, 5 McCrary, 103; MacAndrew v. Electric Tel. Co., 17 C. B. 3, 84 E. C. L. 3.

contract against its own negligence, yet it may against the negligence of its servants in any degree.<sup>21</sup> And it seems to be the holding in other states that they can relieve themselves from liability for negligence where the services are done gratuitously.<sup>22</sup> In those states which hold that these companies may contract against liabilities for negligence, the contract under which they claim the exemption must be clear and free from doubt, for the exemption will not be granted where the language of the contract is ambiguous.<sup>23</sup>

§ 371. **Prohibited by statutes in some states.**—In some states in which it may have formerly been the rule that telegraph companies could contract against their own negligence, to some extent at least, the same has been changed either by statute or later decisions. Thus the rule in Nebraska has been established by a statute which eliminates considerations of degree of negligence in this connection.<sup>24</sup> In Georgia it was intimated in one case that these companies might restrict their liability except for gross negligence,<sup>25</sup> but in a later case the rule was announced that they could not contract against their negligence in any degree.<sup>26</sup> In Texas it was held that the stipulations of these companies will not extend to injuries caused by the "misconduct, fraud or want of due care on

<sup>21</sup> *Mynard v. Syracuse, etc., R. Co.*, 71 N. Y. 180, 27 Am. Rep. 28; *Nicholas v. New York, etc., R. Co.*, 89 N. Y. 370; *Smith v. New York, etc., R. Co.*, 24 N. Y. 222; *Cragin v. New York, etc., R. Co.*, 51 N. Y. 61, 10 Am. Rep. 559.

<sup>22</sup> *Griswold v. New York, etc., R. Co.*, 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115; *Higgins v. New Orleans, etc., R. Co.*, 28 La. Ann. 133; *Quimby v. Boston, etc., R. Co.*, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; *Kinney v. Central R. Co.*, 32 N. J. Law, 407, 90 Am. Dec. 675; *Id.*, 34 N. J. Law, 513, 3 Am. Rep. 265; *Annas v. Milwaukee, etc., R. Co.*, 67 Wis. 46, 30 N. W. 282, 58 Am. Rep. 848.

<sup>23</sup> *Lassiter v. West. U. Tel. Co.*, 89 N. C. 336; *Pegram v. West. U. Tel. Co.*, 97 N. C. 57, 2 S. E. 256; *Becker v. West. U. Tel. Co.*, 11 Neb. 87, 7 N. W. 868, 38 Am. Rep. 356; *Grinnell v. West. U. Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485; *Redpath v. West. U. Tel. Co.*, 112 Mass. 71, 17 Am. Rep. 69; *Mynard v. Syracuse, etc., R. Co.*, 71 N. Y. 180, 27 Am. Rep. 28. They should be strictly construed, *Fleischner v. Pacific Postal Cable Co.* (C. C.) 55 Fed. 738; and include only exemptions mentioned, *Baldwin v. U. S. Tel. Co.*, 54 Barb. (N. Y.) 505, reversed on other grounds in 45 N. Y. 744, 6 Am. Rep. 165; *Sprague v. West. U. Tel. Co.*, 6 Daly (N. Y.) 200, affirmed in 67 N. Y. 590; *Bryant v. American Tel. Co.*, 1 Daly (N. Y.) 575; *Beatty Lumber Co. v. West. U. Tel. Co.*, 52 W. Va. 410, 44 S. E. 309.

<sup>24</sup> *Kemp v. West. U. Tel. Co.*, 28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363.

<sup>25</sup> *West. U. Tel. Co. v. Fontaine*, 58 Ga. 433.

<sup>26</sup> *West. U. Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480. See, also, *West. U. Tel. Co. v. Goodbar* (Miss.) 7 South, 214.

the part of company, its servants or agents.”<sup>27</sup> It is held, however, that this statute does not extend to interstate messages.<sup>28</sup> Statutes similar to these have been passed in other states, and in one of these, at least, it was held that such a statute was not repugnant to the federal constitution as a regulation of commerce.<sup>29</sup>

§ 372. **Gross negligence.**—As has been seen, there seems to be a holding among some of the courts that there are different degrees of negligence, or that there is a difference between negligence and gross negligence, but the weight of authority is that there are no degrees of negligence; and yet what the term “gross negligence” means is not to be easily ascertained. There is authority for holding it to be equivalent to fraud or intentional wrong.<sup>30</sup> But a majority of the cases seem to hold it to be a failure to exercise ordinary care. It was said by Baron Rolfe that he could “see no difference between gross negligence and negligence; that it was the same thing with vituperative epithet.”<sup>31</sup> There is really no intelligible distinction existing between the two words,<sup>32</sup> but if the act of the company should extend to what might be considered a willful or intentional wrong—if this is meant to be gross negligence—there is a distinction. Telegraph companies which hold themselves out to the public must exercise the same diligence and care that any prudent and careful person would do under similar circumstances,<sup>33</sup> and whenever they attempt to shield themselves from performing such duties by claiming an exemption therefrom by any contract or regulation entered into by them with their patrons, they then step beyond the bounds of right, justice and good conscience.<sup>34</sup> When they fail to discharge their duty it is negligence, whether it be simply ordinary or gross negligence.<sup>35</sup>

<sup>27</sup> West. U. Tel. Co. v. Neill, 57 Tex. 283, 44 Am. Rep. 589; Womack v. West. U. Tel. Co., 58 Tex. 176, 44 Am. Rep. 614.

<sup>28</sup> Missouri Pac. R. Co. v. Sherwood, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643; Missouri Pac. R. Co. v. International, etc., Co., 84 Tex. 149, 19 S. W. 459.

<sup>29</sup> Hart v. Chicago, etc., R. Co., 69 Iowa, 485, 29 N. W. 597.

<sup>30</sup> Jones on Bailees, 8-46 et seq.

<sup>31</sup> Wilson v. Brett, 11 M. & W. 113.

<sup>32</sup> Hinton v. Dibbon, 2 Ad. & El. (N. S.) 646; Austin v. Manchester R. Co., 11 Eng. L. & Eq. 573.

<sup>33</sup> See § 285; Strong v. West. U. Tel. Co., 18 Idaho, 389, 109 Pac. 910, 30 L. R. A. (N. S.) 409, Ann. Cas. 1912A, 55.

<sup>34</sup> Strong v. West. U. Tel. Co., 18 Idaho, 389, 109 Pac. 910, 30 L. R. A. (N. S.) 409, Ann. Cas. 1912A, 55.

<sup>35</sup> Gillis v. West. U. Tel. Co., 61 Vt. 461, 17 Atl. 736, 4 L. R. A. 611, 15 Am. St. Rep. 917; Aiken v. West. U. Tel. Co., 5 S. C. 358; Beal v. South Devon Co., 3 H. & C. 337.



§ 373. **Gross negligence—what constitutes.**—In those states where it is claimed that there is a distinction between negligence and gross negligence it seems that it is rather difficult for the courts therein to determine what facts are necessary to constitute gross negligence. It has been held by some authorities that, where a message is improperly transmitted, this is sufficient evidence to show gross negligence in the absence of proof showing why such error was made; but the weight of authority is to the contrary.<sup>36</sup> Thus, where the only evidence of negligence is that the operator sent in the message the word "bain" for "bail," it was held that there was no proof of gross negligence.<sup>37</sup> The same rule is true where the word "fourths" is written instead of "eighths" in a message from an agent informing his principal of the price of cotton.<sup>38</sup> But to make as many as three errors in a message containing only nine simple words is held to be gross negligence. Thus a message tendered to be sent contained the following words: "Ship Bones, sulky and traps to Valley Falls, immediately, G. Grall." And the message received by the addressee read thus: "Ship Beans, sulky and trap to Neosha Falls immediately, G. Crawley." Here it was held that the evidence showed gross negligence.<sup>39</sup> In another case it appeared that the message was plainly written out and not to be easily mistaken by anybody with ordinary understanding who should examine it with ordinary care. The operator materially changed the message by transmitting the word "Salina" for "Salene." There being no exonerating or explanatory evidence offered by the company, the court held that it was a case of gross negligence.<sup>40</sup> It was held gross negligence for the receiving operator, who had been informed that the message contained nine words, to deliver the message with only seven words.<sup>41</sup> In order for any court to arrive at an accurate determination as to whether a telegraph company has, in the transmission, committed an error which amounts to gross negligence within the meaning of the rule stated, it is necessary for all the facts and circumstances surrounding the particular case to be carefully considered. Because of the fact that

<sup>36</sup> *Pegram v. West. U. Tel. Co.*, 97 N. C. 57, 2 S. C. 256; *West. U. Tel. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *Becker v. West. U. Tel. Co.*, 11 Neb. 87, 7 N. W. 868, 38 Am. Rep. 356; *Jones v. West. U. Tel. Co. (C. C.)* 18 Fed. 717.

<sup>37</sup> *Hart v. West. U. Tel. Co.*, 66 Cal. 579, 6 Pac. 637, 56 Am. Rep. 119.

<sup>38</sup> *Lassiter v. West. U. Tel. Co.*, 89 N. C. 334; *White v. West. U. Tel. Co. (C. C.)* 14 Fed. 710.

<sup>39</sup> *West. U. Tel. Co. v. Crall*, 38 Kan. 679, 5 Am. St. Rep. 795, 17 Pac. 309.

<sup>40</sup> *West. U. Tel. Co. v. Howell*, 38 Kan. 685, 17 Pac. 313.

<sup>41</sup> *West. U. Tel. Co. v. Goodbar (Miss.)* 7 South. 214.

different circumstances alter all cases, it would be difficult to lay down any fixed rule by which courts might be guided. An error of a single word in the transmission of a message may or may not amount to gross negligence.

§ 374. **Ignorance of operator of the locality of the place.**—It is the duty of telegraph operators to know the localities of the towns in the state to which their lines extend,<sup>42</sup> and it is held that the ignorance of the operator of such a fact, especially where it is of sufficient nearness to the office in which he works or is of some importance, whereby he fails to make a transmission thereto, is evidence of gross negligence. Thus, where the message was addressed to a party at the county seat of the adjoining county, it was held gross negligence in him sending it to another place.<sup>43</sup> The court said in this case: "That if the agent of a company should not know of the existence of a town which is the county seat of a neighboring county, the town being one of the stations on the lines of the company, shows his utter unfitness for the position, \* \* \* the company was guilty of gross negligence in employing such an operator." In another case it was held by the court that the operators are bound to know the locality of any state to which a message is sent.<sup>44</sup> So it was held that an error in the name of the destination, unexplained, is evidence of gross negligence.<sup>45</sup> And where the message has not been sent at all, it is purely evidence of gross negligence.<sup>46</sup>

§ 375. **Conflict of laws.**—Contracts exempting telegraph companies from some of the common-law liabilities for transmitting interstate messages must be proved, as a matter of evidence, according to the law of the forum;<sup>47</sup> but, the general rule is that the law of the place where the contract of sending is made, and not that of the state to which the message is sent or where the error occurred, governs as to its nature, validity and interpretation.<sup>48</sup> So it has

<sup>42</sup> See § 275.

<sup>43</sup> *West. U. Tel. Co. v. Buchanan*, 35 Ind. 429, 9 Am. Rep. 744.

<sup>44</sup> *West. U. Tel. Co. v. Simpson*, 73 Tex. 422, 11 S. W. 385.

<sup>45</sup> *West. U. Tel. Co. v. Howell*, 38 Kan. 685, 17 Pac. 313; *Postal Tel. Cable Co. v. Robertson*, 36 Misc. Rep. 785, 74 N. Y. Supp. 876, message directed to Toledo sent to Chicago.

<sup>46</sup> *Garrett v. West. U. Tel. Co.*, 83 Iowa, 257, 49 N. W. 88.

<sup>47</sup> See *West. U. Tel. Co. v. Hill*, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058; *West. U. Tel. Co. v. Phillips* (Tex. Civ. App.) 30 S. W. 494; *The Guildhall* (D. C.) 58 Fed. 796; *Hoadley v. Northern Transfer Co.*, 115 Mass. 304, 15 Am. Rep. 106; *West. U. Tel. Co. v. Lovely* (Tex. Civ. App.) 52 S. W. 563. See cases in following note.

<sup>48</sup> The Missouri Supreme Court, in *Reed v. West. U. Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492, relying upon the authorities

been held that, if the state in which the contract of sending is made does not give these companies the right by statute to contract against common-law liabilities, they cannot exonerate themselves

with reference to a contract for the transportation of persons or property, held that a contract made in Iowa for the transmission of a telegram from a point in that state to a point in Missouri was governed by the law of Iowa with respect to the liability of the company, notwithstanding that the contract was to be partially performed in Missouri. It was accordingly held that it was not error to admit in evidence the statute of Iowa making the proprietor of a telegraph company liable for all mistakes in transmitting messages made by any person in his employment, and for all damages resulting from a failure to perform any of the duties required by law. This case also involved the validity of a stipulation limiting the liability of the company for mistakes in un-repeated messages, whether happening through the negligence of the company's servants or otherwise, to the amount received for sending the same. This stipulation was held invalid so far as it attempted to limit the liability for negligent mistakes, but the court, notwithstanding this general position that the contract was governed by the law of Iowa, seems to have determined this question upon general practice and according to its own ideas as to the correct rule, and without a special reference to decisions in Iowa upon the subject.

The Supreme Court of Mississippi, in *Shaw v. Postal Tel. & Cable Co.*, 79 Miss. 670, 31 South. 222, 89 Am. St. Rep. 666, 56 L. R. A. 486, also takes the position that whether the action be *ex contractu* or *ex delicto*, arising out of the contract, it must be controlled by the *lex loci* of the contract, and in this case it was held that the stipulation in a contract for the transmission of a cipher telegram which exempts the company from liability for mistakes unless a small additional fee is paid, being valid under a statute of Maine, where the contract was made, and from which the despatch was sent to a point in Mississippi, would be upheld, notwithstanding that such a provision would be invalid by the law of Mississippi. It is intimated in this case that, if the law of Massachusetts on the subject had been nonstatutory, the Mississippi court would have applied the rule of law as laid down by the courts of Mississippi, not because the law of Mississippi ought to govern, but because the courts of Mississippi are not bound by decisions of courts of Massachusetts on a question of common law.

*Burgess v. West. U. Tel. Co.*, 92 Tex. 125, 46 S. W. 794, 71 Am. St. Rep. 833, reversed the decision of the Court of Civil Appeals (Tex. Civ. App.) 43 S. W. 1033, that the Texas statute invalidated any stipulation in a contract by a telegraph company whereby the time for giving notice of a claim for damages as a condition precedent to the right to sue in less than ninety days was an unlawful interference with interstate commerce as applied to a telegram sent from New Orleans to a point in Texas, applied the Texas statute upon the presumption that the Louisiana statute was the same, there being no difference on that point. This case, therefore, apparently assumed that the law of Louisiana would have been applied if proved, even if it conflicted with the law of Texas. *Bryan v. West. U. Tel. Co.*, 133 N. C. 603, 45 S. E. 938; *Hancock v. West. U. Tel. Co.*, 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403; *West. U. Tel. Co. v. Cooper*, 29 Tex. Civ. App. 591, 69 S. W. 427; *West. U. Tel. Co. v. Waller*, 96 Tex. 589, 74 S. W. 751, 97 Am. St. Rep. 936; *Stone & Co. v. Post. Tel. Co.*, 31 R. I. 174, 76 Atl. 762, 29 L. R. A. (N. S.) 795, holding that the liability of a telegraph company in tort for error in the transmission of a message is governed by the law of the state where the message originated.

In the case of *Heath v. Postal Tel. & Cable Co.*, 87 S. C. 219, 69 S. E. 293,



from losses or injuries caused in another state, and one in which they may limit their liabilities, even though the action is brought in the latter state.<sup>49</sup> As said in the above case, "One state cannot be made the dumping ground for lawsuits between citizens of another state when they cannot recover from each other in their own state, where they made the contract." But if the law of the state in which the contract is made is not pleaded or shown, it will be presumed to be the same as that in which the suit is brought,<sup>50</sup> especially where the common law prevails in the latter state.<sup>51</sup>

the Southern Carolina Supreme Court held that, while an action against a telegraph company for nondelivery, delayed delivery, or delivery of an erroneous message is an action *ex delicto*, and the cause of action always arises at the place where the message is to be delivered, and sometimes elsewhere, yet it is true that in cases *ex delicto* arising out of contract all questions affecting the nature, validity and interpretation of the contract are to be governed by the law of the state in which the contract was made, and is to be determined in whole or in part. It was accordingly held that, the telegram in that case, having been sent from a point in New York to a point in South Carolina, the law of New York governed, the question apparently being as to the right to recover special damages, not, however, damages for mental anguish. In *Gray v. West. U. Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301, conceded that the law of the state in which the contract was made, and from which the telegram was sent, was probably controlling when the remedy of the plaintiff was on the contract alone.

*Based on the law relating to common carriers.*—This rule of law is based upon that applied to common carriers, for it is a well-established rule that the validity of a stipulation in a contract for transportation of persons or property from one state or country to another limiting the carriers' common-law liability is to be determined by the law of the place where the contract was made and transportation commenced, without reference to the law of the place of destination, or to the law of the place where the alleged breach of contract or loss or injury occurred. See *The Henry B. Hyde* (D. C.) 82 Fed. 681; *Hale v. N. J. Steam Navigation Company*, 15 Conn. 546, 39 Am. Dec. 398.

*Exemption for liabilities for negligent loss or injury.*—See *Liverpool, etc., Steam Company v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; *Mexican National R. R. Co. v. Jackson*, 55 C. C. A. 315, 118 Fed. 549; *Fonseca v. Cunard, etc., Co.*, 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. Rep. 660; *Davis v. Chicago, etc., R. Co.*, 93 Wis. 470, 67 N. W. 16, 1132, 33 L. R. A. 654, 57 Am. St. Rep. 935.

*Limitation of amount of carriers' liability.*—See *Potter v. The Majestic*, 9 C. C. A. 161, 60 Fed. 624, 23 L. R. A. 746, reversed on another point in *The Majestic*, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. Ed. 1039.

<sup>49</sup> *Shaw v. Postal Tel. & Cable Co.*, 79 Miss. 670, 31 South. 222, 89 Am. St. Rep. 666, 56 L. R. A. 486. See, also, § 488.

*Interstate messages.*—See § 433.

<sup>50</sup> See *Reed v. West. U. Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609; *West. U. Tel. Co. v. McNairy*, 34 Tex. Civ. App. 389, 78 S. W. 969; *Cherry v. Sprague*, 187 Mass. 113, 72 N. E. 456, 67 L. R. A. 33, 105 Am. St. Rep. 381, and exhaustive note thereunder; § 488; *Burgess v. West. U. Tel. Co.*, 92 Tex. 125, 46 S. W. 794, 71 Am. St. Rep. 833.

<sup>51</sup> *Shaw v. Postal Tel. & Cable Co.*, 79 Miss. 670, 31 South. 222, 89 Am. St. Rep. 666, 59 L. R. A. 486.

While this is the general rule, yet there are exceptions to it,<sup>52</sup> founded upon the supposed intention of the parties, gathered from surrounding circumstances. Thus, if it be gathered from circumstances surrounding the particular case that it was the intention of the parties to be bound by the laws of the state in or through which the message was sent, and not by those of the state in which the contract of sending was made, the rule of law in the former state must control in the construction of the contract.<sup>53</sup> It is also a general rule that the contract will not be enforced if it would be against the policy and institution of the state in which it is sought to be enforced.<sup>54</sup>

§ 376. **Stipulation for repeating messages.**—The blanks commonly used by telegraph companies contain a stipulation to the effect that they will not be liable for errors, delays or nondelivery of messages for more than the amount received by them for trans-

<sup>52</sup> Some authorities refuse to adopt this rule on the ground that the place of delivery of the telegram is the sole place of performance of the contract. Thus, in *West. U. Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 66 Am. St. Rep. 361, 36 L. R. A. 711, the court applied a provision of the Kentucky Constitution preventing common carriers, including telegraph companies, from contracting for relief from either common-law liability to a contract made in Georgia for the transmission of a telegram from a point in that state to a point in Kentucky, upon the ground that Kentucky was the sole place of performance. The delay in the delivery of the message in that case was due to a mistake in the name of the addressee that seems to have been made at the sending office in Georgia.

In *Howard v. West. U. Tel. Co.*, 119 Ky. 625, 27 Ky. Law Rep. 858, 84 S. W. 764, 86 S. W. 982, 7 Ann. Cas. 1065, it was held that the law of Kentucky is the law of the place of performance, permitting the recovery of damages for mental anguish governed in case of a telegram sent from a point in West Virginia to a point in Kentucky, irrespective of the question whether the negligence was that of a West Virginia or Kentucky agent of the telegraph company. See § 488.

<sup>53</sup> In the case of *Liverpool, etc., Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788, involving the validity of a stipulation limiting the carrier's common-law liability, the court said: "According to the common practice, if not to uniform concurrence of authority, the general rule that the nature, the obligation and interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, regards a contract of affreightment made in one country between citizens and residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties when entering into the contract clearly manifest a mutual intention that it shall be governed by the law of some other country." See § 488.

<sup>54</sup> See *Reed v. West. U. Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609; *Shaw v. Postal Tel. Cable Co.*, 79 Miss. 670, 31 South. 222, 56 L. R. A. 486, 89 Am. St. Rep. 666. See, also, *The Kensington*, 183 U. S. 223, 22 Sup. Ct. 102, 46 L. Ed. 190; *The Brantford City* (D. C.) 29 Fed. 373; *The Iowa* (D. C.) 50 Fed. 561; *Chicago, etc., Co. v. Gardiner*, 51 Neb. 70, 70 N. W. 508; *Hart v. Pa. R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717.

mission, unless the same is ordered to be repeated. The stipulation has not varied in form or language from that now used by the Western Union Telegraph Company. It provides that: "To guard against mistakes, the sender of the message should order it repeated, that is, telegraphed back to the original office. For repeating, one-half the regular rate is charged in addition. And it is agreed between the sender of the following message and this company, that the said company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery of any un-repeated message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for nondelivery of any repeated messages beyond fifty times the sum received for sending the same, unless specially insured."

§ 377. **Same continued—validity of such a stipulation.**—The validity of the stipulations in the blank form by which these companies have attempted to exonerate themselves for all losses caused by errors made in the transmission or delays in delivering messages, except the amount received for sending, unless the message is ordered to be repeated, has been variously viewed by the courts, some of which hold them to be valid;<sup>55</sup> yet the weight of author-

<sup>55</sup> *Wheelock v. Postal Tel. & Cable Co.*, 197 Mass. 119, 83 N. E. 313, 14 Ann. Cas. 188; *Grinnell v. West. U. Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485; *Clement v. West. U. Tel. Co.*, 137 Mass. 463; *Redpath v. West. U. Tel. Co.*, 112 Mass. 71, 17 Am. Rep. 69; *U. S. Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519; *Jacob v. West. U. Tel. Co.*, 135 Mich. 600, 98 N. W. 402; *Hart v. West. U. Tel. Co.*, 66 Cal. 579, 6 Pac. 637, 56 Am. Rep. 119; *Birkett v. West. U. Tel. Co.*, 103 Mich. 361, 61 N. W. 645, 50 Am. St. Rep. 374, 33 L. R. A. 404; *Coit v. West. U. Tel. Co.*, 130 Cal. 657, 63 Pac. 83, 80 Am. St. Rep. 153, 53 L. R. A. 678; *West. U. Tel. Co. v. Carew*, 15 Mich. 525; *Kiley v. West. U. Tel. Co.*, 109 N. Y. 231, 16 N. E. 75; *Halsted v. Post. Tel. Cable Co.*, 193 N. Y. 293, 85 N. E. 1078, 127 Am. St. Rep. 952, 19 L. R. A. 1021; *Passmore v. West. U. Tel. Co.*, 78 Pa. 238; *Breese v. U. S. Tel. Co.*, 48 N. Y. 132, 8 Am. Rep. 526; *Harris v. West. U. Tel. Co.*, 9 Phila. (Pa.) 88; *Ayres v. West. U. Tel. Co.*, 65 App. Div. 149, 72 N. Y. Supp. 634; *Primrose v. West. U. Tel. Co.*, 154 U. S. 1, 14 Supp. Ct. 1098, 38 L. Ed. 883; *Box v. Postal Tel. Cable Co.*, 165 Fed. 138, 91 C. C. A. 172, 28 L. R. A. (N. S.) 566; *West. U. Tel. Co. v. Coggin*, 68 Fed. 137, 15 C. C. A. 231; *Weld v. Cable Co.*, 199 N. Y. 88, 92 N. E. 415; *Stone & Company v. Postal Tel. Cable Co.*, 31 R. I. 174, 76 Atl. 762, 29 L. R. A. (N. S.) 795; *Williams v. Tel. Co. (D. C.)* 203 Fed. 140; *MacAndrew v. Electric Tel. Co.*, 17 C. B. 3, 1 Jur. N. S. 1073, 25 L. J. C. P. 26; *Baxter v. Dominion Tel. Co.*, 37 U. C. Q. B. 470. See *Beatty Lumber Co. v. West. U. Tel. Co.*, 52 W. Va. 410, 44 S. E. 309; *Milling Co. v. Tel. Co.*, 151 Mich. 425, 115 N. W. 698, 15 L. R. A. (N. S.) 1170, 14 Ann. Cas. 287; *West. U. Tel. Co. v. Milling Co.*, 218 U. S. 406, 31 Supp. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815; *Stone & Co. v. Postal Tel. & Cable Co.*, 35 R. I. 498, 87 Atl. 319, 46 L. R. A. (N. S.) 150; *West. U. Tel. Co. v. Dant*, 42 App. D. C. 398, Ann. Cas. 1916A, 1132 L. R. A. 1915B, 685; *Leedy v. West. U. Tel. Co.*, 130 Tenn. 547, 172 S. W. 278, gross negligence; *Weld v. Postal Tel. Cable Co.*, 210 N. Y. 59, 103 N. E. 957, reversing 148 App. Div. 588, 133 N. Y. Supp. 228; *West. U. Tel. Co. v. Bennett*, 58



ity is that they are void and unenforceable.<sup>56</sup> The latter courts considered these stipulations as a mere device for avoiding liabilities for acts of their own negligence or willful wrongs. As has been

Tex. Civ. App. 60, 124 S. W. 151; West. U. Tel. Co. v. Anniston Cordage Co., 6 Ala. App. 351, 59 South. 757; West. U. Tel. Co. v. Dobyns, 41 Okl. 403, 138 Pac. 570; Williams v. West. U. Tel. Co. (D. C.) 203 Fed. 140; Rhyne v. West. U. Tel. Co., 164 N. C. 394, 80 S. E. 152. Under West. U. Tel. Co. v. Dant, supra, Act of Congress of June 18, 1910, impliedly warrants a contract limitation of liability in case of an unrepeatd interstate message.

<sup>56</sup> *Alabama*.—Amer. U. Tel. Co. v. Daughtery, 89 Ala. 191, 7 South. 660; West. U. Tel. Co. v. Crawford, 110 Ala. 460, 20 South. 111; West. U. Tel. Co. v. Chamblee, 122 Ala. 428, 25 South. 232, 82 Am. St. Rep. 89; Tel. Co. v. Cordage Co., 6 Ala. App. 351, 59 South. 757.

*Arizona*.—Stiles v. West. U. Tel. Co., 2 Ariz. 308, 15 Pac. 712.

*Arkansas*.—West. U. Tel. Co. v. Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744.

*California*.—Union Const. Co. v. West. U. Tel. Co., 163 Cal. 298, 125 Pac. 242.

*Colorado*.—West. U. Tel. Co. v. Graham, 1 Col. 239, 9 Am. Rep. 136.

*Florida*.—West. U. Tel. Co. v. Milton, 53 Fla. 484, 43 South. 495, 125 Am. St. Rep. 1077, 11 L. R. A. (N. S.) 560.

*Georgia*.—West. U. Tel. Co. v. Blanchard, 68 Ga. 299, 49 Am. Rep. 480. Compare West. U. Tel. Co. v. Fontaine, 58 Ga. 433.

*Idaho*.—Strong v. West. U. Tel. Co., 18 Idaho, 389, 109 Pac. 910, 30 L. R. A. (N. S.) 409.

*Illinois*.—Tyler v. West. U. Tel. Co., 60 Ill. 421, 14 Am. Rep. 38; West. U. Tel. Co. v. Tyler, 74 Ill. 168, 24 Am. Rep. 279; West. U. Tel. Co. v. Harris, 19 Ill. App. 347; North Packing, etc., Co. v. West. U. Tel. Co., 70 Ill. App. 279.

*Indiana*.—West. U. Tel. Co. v. Fenton, 52 Ind. 1; West. U. Tel. Co. v. Todd, 22 Ind. App. 701, 54 N. E. 446; West. U. Tel. Co. v. Buchanan, 35 Ind. 429, 9 Am. Rep. 744; West. U. Tel. Co. v. Adams, 87 Ind. 598, 44 Am. Rep. 777; West. U. Tel. Co. v. Meek, 49 Ind. 53; West. U. Tel. Co. v. Meredith, 95 Ind. 93; Central Union Tel. Co. v. Swoveland, 14 Ind. App. 341, 42 N. E. 1035.

*Iowa*.—Sweetland v. Illinois, etc., Tel. Co., 27 Iowa, 433, 1 Am. Rep. 285; Manville v. West. U. Tel. Co., 37 Iowa, 214, 18 Am. Rep. 8; Harkness v. West. U. Tel. Co., 73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672.

*Kansas*.—West. U. Tel. Co. v. Crall, 38 Kan. 679, 17 Pac. 309, 5 Am. St. Rep. 795.

*Kentucky*.—West. U. Tel. Co. v. Eubanks, 100 Ky. 591, 38 S. W. 1068, 66 Am. St. Rep. 361, 36 L. R. A. 711; Postal Tel. Cable Co. v. Schaefer, 110 Ky. 907, 62 S. W. 1119, 23 Ky. Law Rep. 344; Smith v. West. U. Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126. Compare Camp v. West. U. Tel. Co., 1 Mete. (Ky.) 164, 71 Am. Dec. 461.

*Louisiana*.—La Grange v. Southwestern Tel. Co., 25 La. Ann. 383.

*Maine*.—Ayer v. West. U. Tel. Co., 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353; Bartlett v. West. U. Tel. Co., 62 Me. 209, 16 Am. Rep. 437.

*Minnesota*.—Francis v. West. U. Tel. Co., 58 Minn. 252, 59 S. W. 1078, 42 Am. St. Rep. 507, 25 L. R. A. 406.

*Mississippi*.—Postal Tel., etc., Co. v. Wells, 82 Miss. 733, 35 South. 190; West. U. Tel. Co. v. Goodbar (Miss.) 7 South. 214.

*Missouri*.—Reed v. West. U. Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492, overruling Wann v. West. U. Tel. Co., 37 Mo. 472, 90 Am. Dec. 395.

*Nebraska*.—West. U. Tel. Co. v. Lowrey, 32 Neb. 732, 49 N. W. 707; Kemp v. West. U. Tel. Co., 28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 366; West. U. Tel. Co. v. Beals, 56 Neb. 415, 76 N. W. 903, 71 Am. St. Rep. 682. Compare

seen, they cannot enforce any regulation or contract, by means of which they may relieve themselves for any losses caused by their own negligence or that of their servants.<sup>57</sup> Any rule which seeks to relieve them from exercising their employment with diligence, skill and integrity contravenes public policy as well as the law;<sup>58</sup> and whenever they attempt to avoid these duties, they do so at the expense of and injury to their patrons.<sup>59</sup> Telegraph companies claim that, as they are required to exercise very great care and dili-

*Becker v. West. U. Tel. Co.*, 11 Neb. 87, 7 N. W. 868, 38 Am. St. Rep. 356. See *American Ex. Co. v. Postal Tel. Cable Co.*, 97 Neb. 701, 151 N. W. 240.

*New Mexico.*—*West. U. Tel. Co. v. Longwill*, 5 N. M. 308, 21 Pac. 339.

*North Carolina.*—*Brown v. Postal Telegraph Cable Co.*, 111 N. C. 187, 16 S. E. 179, 32 Am. St. Rep. 793, 17 L. R. A. 648, overruling *Lassiter v. West. U. Tel. Co.*, 89 N. C. 334; *Thompson v. West. U. Tel. Co.*, 107 N. C. 449, 12 S. E. 427; *Williamson v. Postal Telegraph Co.*, 151 N. C. 223, 65 S. E. 974; *Sherrill v. West. U. Tel. Co.*, 116 N. C. 655, 21 S. E. 429; *Young v. West. U. Tel. Co.*, 168 N. C. 36, 84 S. E. 45.

*Ohio.*—*West. U. Tel. Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500.

*Oklahoma.*—*Blackwell Milling, etc., Co. v. West. U. Tel. Co.*, 17 Okl. 376, 89 Pac. 235, 10 Ann. Cas. 855.

*Tennessee.*—*Marr v. West. U. Tel. Co.*, 85 Tenn. 529, 3 S. W. 496; *Pepper v. West. U. Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660.

*Texas.*—*West. U. Tel. Co. v. Burrow*, 10 Tex. Civ. App. 122, 30 S. W. 378; *Gulf, etc., R. Co. v. Wilson*, 69 Tex. 739, 7 S. W. 653; *West. U. Tel. Co. v. Tobin* (Tex. Civ. App.) 56 S. W. 540; *West. U. Tel. Co. v. Norris*, 25 Tex. Civ. App. 43, 60 S. W. 982; *West. U. Tel. Co. v. Ragland* (Tex. Civ. App.) 61 S. W. 421; *Mitchell v. West. U. Tel. Co.*, 12 Tex. Civ. App. 262, 33 S. W. 1016; *West. U. Tel. Co. v. Nagle*, 11 Tex. Civ. App. 539, 32 S. W. 707; *Postal Tel. Cable Co. v. Sunset Construction Co.*, 102 Tex. 148, 114 S. W. 98; *West. U. Tel. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843; *Womack v. West. U. Tel. Co.*, 58 Tex. 176, 44 Am. Rep. 614; *West. U. Tel. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *West. U. Tel. Co. v. Hines*, 22 Tex. Civ. App. 315, 54 S. W. 627; *West. U. Tel. Co. v. Odom*, 21 Tex. Civ. App. 537, 52 S. W. 632; *Mitchell v. West. U. Tel. Co.*, 12 Tex. Civ. App. 262, 33 S. W. 1016; *Telegraph Co. v. Smith* (Tex. Civ. App.) 130 S. W. 622.

*Utah.*—*Wertz v. West. U. Tel. Co.*, 7 Utah, 446, 27 Pac. 172, 13 L. R. A. 510.

*Vermont.*—*Gillis v. West. U. Tel. Co.*, 61 Vt. 461, 17 Atl. 736, 15 Am. St. Rep. 917, 4 L. R. A. 611.

*Wisconsin.*—*Thompson v. Western Union*, 64 Wis. 531, 25 N. W. 789, 54 Am. Rep. 644; *Fox v. Postal Telegraph Cable Co.*, 138 Wis. 648, 120 N. W. 399, 28 L. R. A. (N. S.) 490; *Candee v. West. U. Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452; *Hibbard v. West. U. Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 775.

*Federal.*—*West. U. Tel. Co. v. Commercial Milling Co.*, 218 U. S. 406, 37 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815, holding that statutes prohibiting such contracts for interstate messages do not deny the company of equal protection of the law where common carriers may contract against common-law liability; *Postal Tel. Cable Co. v. Nichols*, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A. (N. S.) 870, 14 Ann. Cas. 369.

<sup>57</sup> See § 368.

<sup>58</sup> *West. U. Tel. Co. v. Blanchard*, 68 Ga. 229, 45 Am. Rep. 480.

<sup>59</sup> *Ayer v. West. U. Tel. Co.*, 79 Me. 493, 1 Am. St. Rep. 353, 10 Atl. 495.

gence in making an accurate transmission of messages,<sup>60</sup> this is the best means of performing this duty, and for this reason the regulation is a reasonable one. This is unquestionably true, but that is no reason why they should not in the exercise of reasonable care in transmitting the messages delivered to them, repeat such messages in order to avoid mistakes and errors, irrespective of an agreement to that effect. It does not require very much more time to repeat the message, and the expense is but little increased.

§ 378. **Same continued—further reasons for their own protection.**—Telegraph companies have accepted valuable privileges from the public, and in consideration of these they have undertaken to do certain duties for the public—that is, to exercise due care in transmitting all messages presented to them after payment of the charges,<sup>61</sup> and to exercise due diligence to find and deliver to the addressee a copy of the same.<sup>62</sup> In order for them to perform these duties, they must provide themselves with proper and suitable instruments, and employ skilled operators.<sup>63</sup> When a message is presented, with payment of charges, the sender has done what the law requires of him.<sup>64</sup> He has performed his part of the contract entered into between him and the company, the same being that which the latter holds itself out to the public to be ever willing and ready to perform.<sup>65</sup> It then devolves upon the company to comply with its part of the contract—that is, to exercise good faith, due care and diligence in the transmission and delivery of the message.<sup>66</sup> As was said: "If their wires and instruments are in proper order, and their operators skillful, and careful, it will traverse the wires precisely in the words and figures which composed it when placed upon the wires, and is sure, in that shape and form, to reach its destination, no atmospheric causes intervening to prevent."<sup>67</sup> To hold that a telegraph company could exempt itself from any liability by such a stipulation would be relieving it from duties which have been placed upon it in exchange for a valuable right which none save it could enjoy—the right of eminent domain. They are as much bound to perform this duty as a public carrier is to deliver safely the goods in its charge.

<sup>60</sup> See chapter XII.

<sup>61</sup> See *West. U. Tel. Co. v. Milton*, 53 Fla. 484, 43 South. 495, 11 L. R. A. (N. S.) 561, 125 Am. St. Rep. 1077.

<sup>62</sup> See § 288, et seq.

<sup>63</sup> See § 249.

<sup>64</sup> See chapter XIX.

<sup>65</sup> See chapter II.

<sup>66</sup> See chapter XII.

<sup>67</sup> *West. U. Tel. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 280.



**§ 379. Same continued—extra charge—no increase of duty.—**

The additional charges for repeating the message do not increase the duty which the company owes to the public and that which was prescribed inferentially in the granted privileges. There is nothing on the part of the sender's contract which could be considered as increasing this duty. It is not such a charge as to make the company insurers,<sup>68</sup> since they are not so held by the common law. It is not a contractual consideration, for there is nothing given by the company in return for the consideration. Then, it must only be an additional source of revenue to the company and a protection to the latter for its own negligence; it can be nothing else—a free gift which is within the discretion of the sender to make. The sender presents a telegram to be sent and the company says what it will charge for sending same; this being paid, the company must then exercise that care and diligence in transmitting and delivering the message correctly that any person would exercise under similar circumstances for himself.<sup>69</sup> How this duty must be performed is left entirely with the company. If it should deem it proper and advisable that the message should be repeated in order to determine whether or not the duty had been performed, then it should repeat the message,<sup>70</sup> and that, too, without any extra charge or consultation with the sender. If it cannot correctly transmit messages without repeating them, they should be repeated, but in either instance it cannot exempt itself from losses caused by a failure to transmit correctly.

**§ 380. Same continued—delay in delivery—nondelivery.—**

Another reason why these stipulations should not be binding is that they are not provided for with a view to enable telegraph companies to make a correct transmission of messages, but rather to protect them from liability. In these contracts it is stipulated that the company will not be liable for a failure to make a prompt delivery, or, in other words, they will not be liable for losses caused by a delay in the delivery or nondelivery of the message, unless it is ordered to be repeated.<sup>71</sup> As it may be clearly seen, the object

<sup>68</sup> *West. U. Tel. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 280.

<sup>69</sup> See chapter XII.

<sup>70</sup> *Ayer v. West. U. Tel. Co.*, 79 Me. 493, 1 Am. St. Rep. 353, 10 Atl. 495; *West. U. Tel. Co. v. Milton*, 53 Fla. 484, 43 South. 495, 11 L. R. A. (N. S.) 561, 125 Am. St. Rep. 1077, quoting author.

<sup>71</sup> Some courts sustain this idea. *Jacob v. West. U. Tel. Co.*, 135 Mich. 600, 98 N. W. 402; *Clement v. West. U. Tel. Co.*, 137 Mass. 463; *Birkett v. West. U. Tel. Co.*, 103 Mich. 361, 61 N. W. 645, 50 Am. St. Rep. 374, 33 L. R. A. 404; *Monsees v. West. U. Tel. Co.*, 127 App. Div. 289, 111 N. Y. Supp. 53; *Ayres v. West. U. Tel. Co.*, 65 App. Div. 149, 72 N. Y. Supp. 634.

in repeating a message is to ascertain whether it has been correctly transmitted and not whether it has been promptly delivered at all.<sup>72</sup> If, after having the message repeated, it was ascertained that it had been correctly transmitted, this fact would not remedy a loss caused by a failure to deliver promptly or for a nondelivery. To exonerate a company from losses caused by acts of the company which could not be prevented by repeating the message would of course be absurd.<sup>73</sup> As will be seen, some courts hold that while the stipulation may be reasonable in so far as its object is to protect the company from loss caused by errors made in the transmission, yet it is

See *Purdum Naval Stores Co. v. West. U. Tel. Co.* (C. C.) 153 Fed. 327; *Thompson v. West. U. Tel. Co.*, 107 N. C. 449, 12 S. E. 427; *Barnes v. West. U. Tel. Co.*, 24 Nev. 125, 54 Pac. 438, 77 Am. St. Rep. 791; *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844; *Amer. U. Tel. Co. v. Daughtery*, 89 Ala. 191, 7 South. 660; *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; *West. U. Tel. Co. v. Fenton*, 52 Ind. 1; *West. U. Tel. Co. v. Henley*, 157 Ind. 90, 60 N. E. 682; *Gulf, etc., R. R. Co. v. Wilson*, 69 Tex. 739, 7 S. W. 653; *West. U. Tel. Co. v. Linn*, 87 Tex. 7, 26 S. W. 490, 47 Am. St. Rep. 58; *West. U. Tel. Co. v. Burrow*, 10 Tex. Civ. App. 122, 30 S. W. 378; *West. U. Tel. Co. v. Lyman*, 3 Tex. Civ. App. 460, 22 S. W. 656; *West. U. Tel. Co. v. Reeves*, 8 Tex. Civ. App. 37, 27 S. W. 318.

<sup>72</sup> *West. U. Tel. Co. v. Fenton*, 52 Ind. 1; *West. U. Tel. Co. v. Graham*, 1 Colo. 230, 9 Am. Rep. 136; *Barnes v. West. U. Tel. Co.*, 24 Neb. 125, 50 Pac. 438, 77 Am. St. Rep. 791; *Box v. Post. Tel. Co.*, 165 Fed. 138, 91 C. C. A. 172, 28 L. R. A. (N. S.) 566; *Purdum Naval Stores Co. v. West. U. Tel. Co.* (C. C.) 153 Fed. 327.

<sup>73</sup> Some of the courts hold that these stipulations do not purport to relieve telegraph companies from liabilities which a repetition would not have prevented, *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; *North Packing, etc., Co. v. West. U. Tel. Co.*, 70 Ill. App. 275; *West. U. Tel. Co. v. Graham*, 1 Colo. 230, 9 Am. Rep. 136; *West. U. Tel. Co. v. Fenton*, 52 Ind. 1; *Barnes v. West. U. Tel. Co.*, 24 Nev. 125, 50 Pac. 438, 77 Am. St. Rep. 791; *Beatty Lumber Co. v. West. U. Tel. Co.*, 52 W. Va. 410, 40 S. E. 309; *Box v. Post. Tel. Co.*, 165 Fed. 138, 91 C. C. A. 172, 28 L. R. A. (N. S.) 566; *Fleischner v. Pac. Postal Tel. Cable Co.* (C. C.) 55 Fed. 738; as in case of a total failure to transmit, *Birney v. N. Y., etc., Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607; *West. U. Tel. Co. v. Way*, 83 Ala. 544, 4 South. 844; *Beatty Lumber Co. v. West. U. Tel. Co.*, 52 W. Va. 410, 44 S. E. 309; *Mowry v. West. U. Tel. Co.*, 51 Hun. 126, 4 N. Y. Supp. 666; *Birkett v. West. U. Tel. Co.*, 103 Mich. 361, 61 N. W. 645, 50 Am. St. Rep. 374, 33 L. R. A. 404; or deliver the message, *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126; *Gulf, etc., Co. v. Wilson*, 69 Tex. 739, 7 S. W. 653; *West. U. Tel. Co. v. Broesch*, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843; *West. U. Tel. Co. v. Nagle*, 11 Tex. Civ. App. 539, 32 S. W. 707; *West. U. Tel. Co. v. Burrow*, 10 Tex. Civ. App. 122, 30 S. W. 378; *Beatty Lumber Co. v. West. U. Tel. Co.*, 52 W. Va. 410, 44 S. E. 309; *Purdum Naval Stores Co. v. West. U. Tel. Co.* (C. C.) 153 Fed. 329; *Bell v. Dominion Tel. Co.*, 25 L. C. Jur. 248; or a negligent delay in transmission, *Box v. Post. Tel. Cable Co.*, 165 Fed. 138, 91 C. C. A. 172, 28 L. R. A. (N. S.) 566; *Thompson v. West. U. Tel. Co.*, 107 N. C. 449, 12 S. E. 427; *Fleischner v. Pac. Postal Tel. Cable Co.* (C. C.) 55 Fed. 738; or delivery, *West. U. Tel. Co.*

not reasonable when its further object is to protect the company from loss caused by a delay in delivery or for nondelivery.

§ 381. **Same continued—not a contract—compared to a bill of lading.**—Whether or not the paper on which the sender writes the message, and to which he attaches his name, is a contract and such as will bind him to all the stipulations contained therein, depends upon circumstances.<sup>74</sup> The general rule is that a receipt or bill of lading, when assented to by the consignor, is a contract between him and the shipper, and all reasonable stipulations therein contained are binding on both.<sup>75</sup> In order, however, for the receipt or bill of lading to be binding, the minds of the parties, as in other cases, must meet; that is, the terms of the contract must be accepted and assented to by the consignor. It has been held that when the terms of the bill of lading, or the stipulations contained therein, are sufficiently clear and conspicuous, and the consignor has signed his name thereto, this fact is *prima facie* evidence that he has assented to the terms of the contract. The blank forms furnished by telegraph companies to their patrons, and on which the messages are required to be written cannot be compared with the receipts or bills of lading of carriers, with respect to their special contractual nature, because the contract is not the same. One of the main incidents to telegraph companies is to accomplish their purposes in the shortest time possible. Quickness and celerity is the life and mainspring of their existence. It is seldom that a person applies to these companies for service unless his business is of the utmost importance and, therefore, needs immediate attention. For these reasons he has not time to deliberate and consider special contracts contained in these blank forms and reject them if they should not be acceptable. This is not always the case with the consignor of goods. In the latter case the advantages of each are more equal. There is also something given by the carrier to the consignor, in the nature of consideration, to enforce the stipulation, which is not given in the former case, and which will be hereafter considered. It may be proper to state here that, where the stipula-

v. Graham, 1 Colo. 230, 9 Am. Rep. 136; West. U. Tel. Co. v. Henderson, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; North Packing Co. v. West. U. Tel. Co., 70 Ill. App. 279; West. U. Tel. Co. v. Fenton, 52 Ind. 1; Barnes v. West. U. Tel. Co., 24 Nev. 125, 50 Pac. 438, 77 Am. St. Rep. 791.

<sup>74</sup> Tyler v. West. U. Tel. Co., 60 Ill. 421, 14 Am. Rep. 45.

<sup>75</sup> Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49; Cincinnati, etc., R. Co. v. Pontius, 19 Ohio St. 221, 2 Am. Rep. 391; Hill v. Syracuse, etc., R. Co., 73 N. Y. 351, 29 Am. Rep. 163; Erie, etc., R. Co. v. Dater, 91 Ill. 195, 33 Am. Rep. 51; Mobile, etc., R. Co. v. Weiner, 49 Miss. 725; Levering v. Union Transp. Co., 42 Mo. 88, 97 Am. Dec. 320.



tions are reasonable, the same rule will apply to both of these companies. The above variance in the application of the rule is where it is necessary that a special express contract shall be made to exempt these companies from the usual common-law liabilities.<sup>76</sup>

§ 382. **Same continued—contract—no consideration.**—It is a general rule of the law of contracts that, in order for an agreement between two parties to be valid and enforceable, their minds must not only come together at the same time with respect to the same subject-matter, but there must be a mutual consideration. In the cases in which the courts held that the receipts or bills of lading were contracts, there were mutual considerations. The consignor agreed to release the carrier of some of the common-law liabilities in consideration of the latter making a reduction in the charges for shipping.<sup>77</sup> In the case of a telegram, however, the facts are different. It is very clear that there is an additional charge exacted of the sender, and it is presumed to be a consideration; but, in order for it to be such, there must be given something in return for its value, and unless there is, the first is not a consideration, but rather a gift—as said, an additional source of revenue. Telegraph companies are public servants, and it is their duty as such to exercise a very great degree of care to make correct and accurate transmission of all messages tendered to them.<sup>78</sup> In order to do this it devolves upon them to employ skilled and competent servants<sup>79</sup> and prepare themselves with all the modern facilities and improvements.<sup>80</sup> Then, any act on the part of the sender in compensating them additionally for repeating the message increases this obligation or duty. Telegraph companies hold themselves out to the public to be ready and willing to perform certain duties with the highest degree of care and fidelity.<sup>81</sup> Then, is it possible for them or any other party entering into a contract for a valuable consideration to promise and not to promise, or to create and not to create, an obligation or duty, at one and the same moment and by one and the same act? The inconsistency and impossibility of such things are obvious.<sup>82</sup> A further question which presents itself is, Can this stipulation be considered a contract whereby the company has bound itself as an insurer? These companies are not insurers un-

<sup>76</sup> See §§ 412-414.

<sup>77</sup> *Tyler v. West*, U. Tel. Co., 60 Ill. 421, 14 Am. Rep. 50. Compare *I. C. R. Co. v. Morrison*, 19 Ill. 136.

<sup>78</sup> See chapter XII.

<sup>79</sup> *Tyler v. West*, U. Tel. Co., 60 Ill. 421, 14 Am. Rep. 50.

<sup>80</sup> See § 249.

<sup>81</sup> See § 285.

<sup>82</sup> *Bartlett v. West*, U. Tel. Co., 62 Me. 209, 16 Am. Rep. 444.

der the common law, and, unless made so either by statute or by a special express contract to that effect, they will be required to exercise only the highest degree of care, and not as insurers of absolute correct transmission of messages under any and all circumstances. They may, as has been seen, bind themselves as insurers, but in order to do so, it must be done by an express contract made by a properly authorized officer of the company.<sup>83</sup> The amount of the risk must also be specified in the contract, and paid at the time of sending the message.<sup>84</sup> So it is very clear that for these reasons these stipulations cannot be considered contracts whereby the companies bind themselves as insurers. Neither can it be said that there is any consideration given by these companies in exchange for the extra charges paid by the sender for repeating the message.<sup>85</sup>

**§ 383. Same continued—duress.**—Telegraph companies have become very important factors in the commercial world, and, in fact, they have become almost matters of necessity without which the progress of our country would be seriously retarded.<sup>86</sup> Being of such vital interest to our commercial welfare, and clothed with many privileges and exemptions not enjoyed by the people at large, they must exercise their business with care and fidelity and not take any advantage of their position over the patrons who seek their services. As has been said, their services are most often employed at a time when the party employing them is not in a position to consider contracts which attempt to exempt them from performing their public duties, and at a time when the employer would be willing to undergo almost any risk to accomplish the purpose for which the message is to be sent. To give the companies the power to enforce these stipulations would not only have a tendency to destroy and hamper the objects for which they were incorporated, but it would also give them the power to take advantage of their situation, and be able to enforce a contract induced by a species of moral duress.<sup>87</sup> The weight of authority, for these reasons, seems to be opposed to upholding such stipulation.<sup>88</sup>

<sup>83</sup> See § 364.

<sup>84</sup> *Tyler v. West. U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 50.

<sup>85</sup> *West. U. Tel. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279; *Candee v. West. U. Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452.

<sup>86</sup> *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 130.

<sup>87</sup> "If it be a contract, the sender entering into it was under a species of moral duress. His necessities compelled him to resort to the telegraph as the only means through which he could speedily transact the business in hand, and was compelled to submit to such conditions as the company, in

<sup>88</sup> See note 88 on following page.

§ 384. When requested to be repeated—question of fact.—In those jurisdictions in which it is held that telegraph companies may exempt themselves from losses caused by errors made in the transmission of messages, unless the same is ordered repeated, it is a question of fact to be decided by a jury as to whether or not the company was ordered to repeat the message. In a certain case deciding this point, when it appeared that on receipt of the dispatch the plaintiff, the addressee, went at once to the operator and requested him to ask the sender whether certain words were “five six” or “five sixty,” it was held that this amounted to a request by the plaintiff to have the message repeated, and that it was im-

their corporate greed, might impose and sign such papers as the company might present. Credentials, rules and regulations, such as the company is authorized by statute to establish, cannot be understood to embrace such regulations as shall deprive a party of the use of their instrumentality, save by coming under most onerous and unjust conditions.” *Tyler v. West. U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 51. In *Gillis v. West. U. Tel. Co.*, 61 Vt. 461, 17 Atl. 736, 4 L. R. A. 611, note, 15 Am. St. Rep. 917, the court said: “Telegraph companies do not deal with their employers on equal terms. There is a necessity for their employment. \* \* \* Neither the commercial world nor the general public can dispense with their services. It is therefore just and reasonable that they should not be allowed to take advantage of their situation, and of the necessities of the public, to exact exemption from that measure of duty that the law imposes upon them, and that public policy imposes.” See, also, *Dorgan v. West. U. Tel. Co.*, 1 Am. L. T. Rep., N. S. 406; *West. U. Tel. Co. v. Griswold*, 37 Ohio St. 311, 41 Am. Rep. 500; *Marr v. West. U. Tel. Co.*, 85 Tenn. 529, 3 S. W. 496.

<sup>88</sup> *West. U. Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744; *American U. Tel. Co. v. Daughtery*, 89 Ala. 191, 7 South. 660; *West. U. Tel. Co. v. Graham*, 1 Colo. 230, 9 Am. Rep. 136; *West. U. Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480; *West. U. Tel. Co. v. Meek*, 49 Ind. 53; *West. U. Tel. Co. v. Fenton*, 52 Ind. 1; *West. U. Tel. Co. v. Harris*, 19 Ill. App. 347; *Tyler v. West. U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *West. U. Tel. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279; *Sweatland v. Illinois, etc., Tel. Co.*, 27 Iowa, 433, 1 Am. Rep. 285; *Ayer v. West. U. Tel. Co.*, 79 Me. 493, 1 Am. St. Rep. 353, 10 Atl. 495; *West. U. Tel. Co. v. Lowrey*, 32 Neb. 732, 49 N. W. 707; *Kemp v. West. U. Tel. Co.*, 28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363, stipulation declared invalid by statute; *Brown v. Postal Tel. Cable Co.*, 111 N. C. 187, 16 S. E. 179, 17 L. R. A. 648, 32 Am. St. Rep. 793, overruling *Lassiter v. West. U. Tel. Co.*, 89 N. C. 334; *Marr v. West. U. Tel. Co.*, 85 Tenn. 529, 3 S. W. 496; *Pepper v. West. U. Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699; *Wertz v. West. U. Tel. Co.*, 7 Utah, 446, 27 Pac. 172, 13 L. R. A. 510; *Gillis v. West. U. Tel. Co.*, 61 Vt. 461, 17 Atl. 736, 4 L. R. A. 611, note, 15 Am. St. Rep. 917; *Thompson v. West. U. Tel. Co.*, 64 Wis. 531, 25 N. W. 789, 54 Am. Rep. 644; *Bartlett v. West. U. Tel. Co.*, 62 Me. 209, 16 Am. Rep. 437; *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *Candee v. West. U. Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452; *West. U. Tel. Co. v. Richman (Pa.)* 8 Atl. 171; *Birney v. New York, etc., Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607; *Manville v. West. U. Tel. Co.*, 37 Iowa, 214, 18 Am. Rep. 8; *U. S. Ex. Co. v. Backman*, 28 Ohio St. 155; *Lamb v. Camdens, etc., Co.*, 46 N. Y. 271, 7 Am. Rep. 327; *So. Ex. Co. v. Moon*, 39 Miss. 822.



material whether or not the forms established by the company for the repeating of messages were complied with.<sup>89</sup>

§ 385. **Same continued—binding on sender only.**—The above case was brought by the addressee and not by the sender; it seems that the stipulation as to repeating is not a matter to be considered—except under certain circumstances—when the suit is brought by the addressee. “The receiver can be guided or informed solely by what is delivered to him, and has no opportunity to agree upon any such conditions before delivery.”<sup>90</sup> But whether this is always the case depends upon the view in which the addressee’s right of action is regarded.<sup>91</sup> It was held, in one case, that the express stipulation in the contract of sending binds the receiver as well as the sender,<sup>92</sup> and it is considered by Mr. Thompson, in his work on Electricity, that in so far as the receiver’s right of action rests in contract, he is bound by the agreement entered into by the sender as much so as the sender himself. But, “if the telegraph company, when it delivers an erroneous message to the person to whom it is addressed by the sender, puts itself in the condition of a mere tort-feasor, one guilty of a misfeasance toward a stranger by which that stranger has incurred a loss, then this conclusion (i. e., that the receiver is not bound) is supportable.”<sup>93</sup>

§ 386. **Times within which claims are to be presented.**—The blank forms on which the messages are to be written generally contain stipulations providing that all claims against the company for failure to transmit messages correctly must be presented in writing, and within a certain prescribed time. The language of these stipulations is generally as follows: “The company will not be liable for damages or statutory penalties, in any case, where the claim is not presented in writing within thirty days after the message is filed with the company for transmission.” When the

<sup>89</sup> West. U. Tel. Co. v. Landis (Pa.) 12 Atl. 467.

<sup>90</sup> La Grange v. Southwestern Tel. Co., 25 La. Ann. 383; Tobin v. West. U. Tel. Co., 146 Pa. 375, 20 Atl. 324, 28 Am. St. Rep. 802; Bailly v. West. U. Tel. Co., 227 Pa. 522, 76 Atl. 736, 43 L. R. A. (N. S.) 502, 19 Ann. Cas. 895; West. U. Tel. Co. v. Alford, 110 Ark. 379, 161 S. W. 1027, 50 L. R. A. (N. S.) 94.

<sup>91</sup> Halsted v. Postal Tel. Cable Co., 193 N. Y. 293, 85 N. E. 1078, 19 L. R. A. (N. S.) 1021, 127 Am. St. Rep. 952. Sender acting as agent for sendee, thereby binding the latter. See §§ 385, 416, 425.

<sup>92</sup> Aiken v. West. U. Tel. Co., 5 S. C. 358. See, also, Stone & Company v. Postal Tel. Co., 31 R. I. 174, 76 Atl. 762, 29 L. R. A. (N. S.) 795; Halsted v. Postal Tel. Cable Co., 193 N. Y. 293, 85 N. E. 1078, 19 L. R. A. (N. S.) 1021, 127 Am. St. Rep. 952; West. U. Tel. Co. v. Dant, 42 App. D. C. 398. L. R. A. 1915B, 685, Ann. Cas. 1916A, 1132.

<sup>93</sup> Thompson on Electricity, § 237. See, also, Bailey v. West. U. Tel. Co., 227 Pa. 522, 76 Atl. 736, 43 L. R. A. (N. S.) 502, 19 Ann. Cas. 895.

sender signs these forms, these stipulations enter into and become a part of the contract of sending.<sup>94</sup> There is a difference of opinion as to whether they are reasonable and enforceable, but the better weight of authority is that they are valid stipulations.<sup>95</sup> They do not at all exempt or relieve the company from performing its duties in a faithful, diligent and careful manner, being still held

<sup>94</sup> *Hill v. West. U. Tel. Co.*, 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844; *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; *West. U. Tel. Co. v. Cobbs*, 47 Ark. 344, 1 S. W. 558, 58 Am. Rep. 756; *West. U. Tel. Co. v. Dunfield*, 11 Colo. 335; *West. U. Tel. Co. v. Jones*, 95 Ind. 228, 48 Am. Rep. 713; *West. U. Tel. Co. v. McKibben*, 114 Ind. 511, 14 N. E. 894; *West. U. Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224, note; *Cole v. West. U. Tel. Co.*, 33 Minn. 227, 22 N. E. 385; *Massengale v. West. U. Tel. Co.*, 17 Mo. App. 257; *Young v. West. U. Tel. Co.*, 65 N. Y. 163; *Wolf v. West. U. Tel. Co.*, 62 Pa. 83, 1 Am. Rep. 387; *West. U. Tel. Co. v. Rains*, 63 Tex. 27; *West. U. Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715; *Hartzog v. West. U. Tel. Co.*, 84 Miss. 448, 36 South. 539, 105 Am. St. Rep. 459; *Heimann v. West. U. Tel. Co.*, 57 Wis. 562, 16 N. W. 32; *Beasley v. West. U. Tel. Co. (C. C.)* 39 Fed. 181.

Does not apply to forged message. *Wells v. West. U. Tel. Co.*, 144 Iowa, 605, 123 N. W. 371, 138 Am. St. Rep. 317, 24 L. R. A. (N. S.) 1045.

*Port.*—Binding although the action is in tort instead of contract. *Penn v. West. U. Tel. Co.*, 159 N. C. 306, 75 S. E. 16, 41 L. R. A. (N. S.) 223.

<sup>95</sup> *Alabama.*—*Harris v. West. U. Tel. Co.*, 121 Ala. 519, 25 South. 910, 77 Am. St. Rep. 70; *West. U. Tel. Co. v. Heathcoat*, 149 Ala. 623, 43 South. 117; *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844; *McGehee v. West. U. Tel. Co.*, 169 Ala. 109, 53 South. 205, Ann. Cas. 1912B, 512.

*Arkansas.*—*West. U. Tel. Co. v. Dougherty*, 54 Ark. 221, 15 S. W. 468, 26 Am. St. Rep. 33, 11 L. R. A. 102; *West. U. Tel. Co. v. Moxley*, 80 Ark. 554, 98 S. W. 112; *Lavelle v. West. U. Tel. Co.*, 102 Ark. 607, 145 S. W. 205.

*Colorado.*—*West. U. Tel. Co. v. Dunfield*, 11 Colo. 335, 18 Pac. 34.

*Georgia.*—*West. U. Tel. Co. v. Waxelbaum*, 113 Ga. 1017, 39 S. E. 443, 56 L. R. A. 741; *West. U. Tel. Co. v. James*, 90 Ga. 254, 16 S. E. 83; *Stamey v. West. U. Tel. Co.*, 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95; *Postal Tel. Cable Co. v. Moss*, 5 Ga. App. 503, 63 S. E. 590; *Hill v. West. U. Tel. Co.*, 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166.

*Illinois.*—*West. U. Tel. Co. v. Beck*, 58 Ill. App. 564; *Webbe v. West. U. Tel. Co.*, 64 Ill. App. 331; *West. U. Tel. Co. v. Fairbanks*, 15 Ill. App. 600.

*Indiana.*—*West. U. Tel. Co. v. Trumbull*, 1 Ind. App. 121, 27 N. E. 313; *West. U. Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; *West. U. Tel. Co. v. Meredith*, 95 Ind. 93; *West. U. Tel. Co. v. Jones*, 95 Ind. 228, 48 Am. Rep. 713.

*Iowa.*—*Albers v. West. U. Tel. Co.*, 98 Iowa, 51, 66 N. W. 1040; *Heald v. West. U. Tel. Co.*, 129 Iowa, 326, 105 N. W. 588; *Free v. West. U. Tel. Co.*, 135 Iowa, 69, 110 N. W. 143.

*Kansas.*—*Russell v. West. U. Tel. Co.*, 57 Kan. 230, 45 Pac. 598; *Markley v. West. U. Tel. Co.*, 144 Iowa, 105, 122 N. W. 136, 138 Am. St. Rep. 263.

*Maryland.*—*West. U. Tel. Co. v. Lehman*, 106 Md. 318, 67 Atl. 241, 14 Ann. Cas. 736.

*Massachusetts.*—*Wheelock v. Post. Tel. Cable Co.*, 197 Mass. 119, 83 N. E. 313, 14 Ann. Cas. 188.

*Minnesota.*—*Cole v. West. U. Tel. Co.*, 33 Minn. 227, 22 N. W. 385.

*Mississippi.*—*Clement v. West. U. Tel. Co.*, 77 Miss. 747, 27 South. 603;

to the same responsible duty. Neither does it lead to an affirmation of a right to contract for relief against responsibilities for negligence; nor does it put them in the power of the company to nullify

*Hartzog v. West. U. Tel. Co.*, 84 Miss. 448, 36 South. 539, 105 Am. St. Rep. 459. But see *Dodson v. West. U. Tel. Co.*, 97 Miss. 104, 52 South. 693, stipulations made invalid by statute.

*Missouri*.—*Kendall v. West. U. Tel. Co.*, 56 Mo. App. 192; *Thorp v. West. U. Tel. Co.*, 118 Mo. App. 398, 94 S. W. 554; *Montgomery v. West. U. Tel. Co.*, 50 Mo. App. 591; *Smith-Frazier Boot, etc., Co. v. West. U. Tel. Co.*, 49 Mo. App. 99; *Massengale v. West. U. Tel. Co.*, 17 Mo. App. 257; *Grant v. West. U. Tel. Co.*, 154 Mo. App. 279, 133 S. W. 673.

*New York*.—*Young v. West. U. Tel. Co.*, 65 N. Y. 163.

*North Carolina*.—*Bryan v. West. U. Tel. Co.*, 133 N. C. 603, 45 S. E. 938; *Sykes v. West. U. Tel. Co.*, 150 N. C. 431, 64 S. E. 177; *Lewis v. West. U. Tel. Co.*, 117 N. C. 436, 23 S. E. 319; *Sherrill v. West. U. Tel. Co.*, 109 N. C. 527, 14 S. E. 94; *Penn v. West. U. Tel. Co.*, 159 N. C. 306, 75 S. E. 16, 41 L. R. A. (N. S.) 223; *Forney v. Postal Tel. Cable Co.*, 152 N. C. 494, 67 S. E. 1011; *Barnes v. Postal Tel. Cable Co.*, 156 N. C. 150, 72 S. E. 78.

*Oklahoma*.—*West. U. Tel. Co. v. Hollis*, 28 Okl. 613, 115 Pac. 774. But see *West. U. Tel. Co. v. Crawford*, 29 Okl. 143, 116 Pac. 925, 35 L. R. A. (N. S.) 930.

*Rhode Island*.—*Stone v. Postal Tel. Cable Co.*, 31 R. I. 174, 76 Atl. 762, 29 L. R. A. (N. S.) 795.

*Pennsylvania*.—*Wolf v. West. U. Tel. Co.*, 62 Pa. 83, 1 Am. Rep. 387.

*South Carolina*.—*Aiken v. West. U. Tel. Co.*, 5 S. C. 358; *Eaker v. West. U. Tel. Co.*, 75 S. C. 97, 55 S. E. 129; *Smith v. West. U. Tel. Co.*, 77 S. C. 378, 58 S. E. 6; *Broom v. West. U. Tel. Co.*, 71 S. C. 506, 51 S. E. 259; *Young v. West. U. Tel. Co.*, 65 S. C. 93, 43 S. E. 448; *Hays v. West. U. Tel. Co.*, 70 S. C. 16, 48 S. E. 608, 106 Am. St. Rep. 731, 67 L. R. A. 481, 3 Ann. Cas. 424.

*South Dakota*.—*Kirby v. West. U. Tel. Co.*, 7 S. D. 623, 65 N. W. 37, 30 L. R. A. 621, 624, 46 Am. St. Rep. 765; *Id.*, 4 S. D. 105, 55 N. W. 759, 46 Am. St. Rep. 765, 30 L. R. A. 612.

*Tennessee*.—*Manier v. West. U. Tel. Co.*, 94 Tenn. 442, 29 S. W. 732; *West. U. Tel. Co. v. Greer*, 115 Tenn. 368, 89 S. W. 327, 1 L. R. A. (N. S.) 525; *West. U. Tel. Co. v. Courtney*, 113 Tenn. 482, 82 S. W. 484.

*Texas*.—*Lester v. West. U. Tel. Co.*, 84 Tex. 313, 19 S. W. 256; *Phillips v. West. U. Tel. Co.*, 95 Tex. 638, 69 S. W. 68; *West. U. Tel. Co. v. Culbertson*, 79 Tex. 65, 15 S. W. 219; *West. U. Tel. Co. v. Brown*, 84 Tex. 54, 19 S. W. 336; *West. U. Tel. Co. v. Rains*, 63 Tex. 27; *West. U. Tel. Co. v. Murray*, 29 Tex. Civ. App. 207, 68 S. W. 549; *West. U. Tel. Co. v. Vanway* (Tex. Civ. App.) 54 S. W. 414; *West. U. Tel. Co. v. Hayes* (Tex. Civ. App.) 63 S. W. 171; *West. U. Tel. Co. v. May*, 8 Tex. Civ. App. 176, 27 S. W. 760; *West. U. Tel. Co. v. Jobe*, 6 Tex. Civ. App. 403, 25 S. W. 168, 1036; *West. U. Tel. Co. v. Pells*, 2 Willson, Cas. Ct. App. § 41; *West. U. Tel. Co. v. Ashley* (Tex. Civ. App.) 137 S. W. 1165.

*Utah*.—*Brooks v. West. U. Tel. Co.*, 26 Utah, 147, 72 Pac. 499.

*Wisconsin*.—*Heimmann v. West. U. Tel. Co.*, 57 Wis. 562, 16 N. W. 32.

*United States*.—*Southern Express Company v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556; *Primrose v. West. U. Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; *Whitehill v. West. U. Tel. Co.* (C. C.) 136 Fed. 499; *West. U. Tel. Co. v. Coggin*, 68 Fed. 137, 15 C. C. A. 231; *Finlay v. West. U. Tel. Co.* (C. C.) 64 Fed. 459; *Beasley v. West. U. Tel. Co.* (C. C.) 39 Fed. 181.

In *Stone v. Postal Tel. Cable Co.*, *supra*, the court said: "This regulation printed on the back of the blank forms and quoted in the question, in the



or evade the law;<sup>96</sup> but such stipulations do relieve the company somewhat from being held for some alleged liabilities, about which

circumstances of the defendant's business, is a reasonable one. The argument of the defendant's counsel in that regard appears to the court to be sound. The number of messages received by a telegraph company daily for transmission is so great, particularly in the large cities, that it is impracticable to keep them on file for a long time, so as to have them accessible for examination in case of a complaint regarding service. It is necessary for each office to destroy all original messages after a brief period to avoid encroachment upon its limited working space. Indeed, even if all messages were kept, it would soon become a difficult task to find a particular message after the lapse of many months. Furthermore, the production of the original message would not give full information about the service. Many of the facts are dependent upon the memory of operators and other witnesses, and the passing of time quickly obscures evidence so founded. A rule that provides that, if a customer intends to hold the company responsible for a fault in the service, he must give it notice of his claim within a period sufficiently short to allow the facts to be investigated while fresh and capable of accurate knowledge, is a reasonable rule. Without it the company would suffer from the presentation of stale and fictitious claims, against which it would be unable to defend itself."

A limitation of sixty days within which to give notice of a claim for damages has been upheld as a reasonable regulation, where it appeared that the party claiming damages knew of the company's default more than sixty days before the action was brought, and made no claim therefor in that time. *Sykes v. West. U. Tel. Co.*, 150 N. C. 431, 64 S. E. 177.

This stipulation exempting the company from liability where the claim for damages is not presented within a certain time is not a condition restricting its liabilities for negligence, nor is it in the nature of a provision limiting the time within which an action may be commenced, and therefore having the force and effect of a statute of limitations. *Sykes v. West. U. Tel. Co.*, 150 N. C. 431, 64 S. E. 177; *Forney v. Postal Tel. Cable Co.*, 152 N. C. 494, 67 S. E. 1011.

The Texas statute (Rev. St. 1895, art. 3379, as amended by Laws 1907, c. 129) provides as follows: "No stipulation in any contract requiring notice to be given of any claim for damages as a condition precedent to the right to sue thereon shall ever be valid unless such stipulation is reasonable, and any such stipulation fixing the time within which such notice shall be given at a less period than ninety days, shall be void."

Under this statute it was held in *Taber v. West. U. Tel. Co.*, 104 Tex. 272, 137 S. W. 106, 34 L. R. A. (N. S.) 185, that a stipulation requiring any claim to be made within ninety days after the message is filed with the company for transmission is void. By an earlier construction of the same statute in *West. U. Tel. Co. v. Timmons* (Tex. Civ. App.) 136 S. W. 1169, it was held that the reasonableness of such notice is a question of fact for the jury. And in the still earlier case of *West. U. Tel. Co. v. Smith* (Tex. Civ. App.) 130 S. W. 622, it was held that the stipulation was unreasonable as a matter of law. Again, in *West. U. Tel. Co. v. Douglass* (Tex. Civ. App.) 124 S. W. 488, it was held that under this statute a stipulation that notice of a claim for damages should be given within sixty days was void.

<sup>96</sup> *Harris v. West. U. Tel. Co.*, 121 Ala. 519, 25 South. 910, 77 Am. St. Rep. 70; *West. U. Tel. Co. v. Jones*, 95 Ind. 228, 48 Am. Rep. 713; *West. U. Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; *West. U. Tel. Co. v. Dougherty*, 54 Ark. 221, 15 S. W. 468, 11 L. R. A. 102, 26 Am. St. Rep. 33; *So. Ex. Co. v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556.

it would be unable to make a proper and expedient defense.<sup>97</sup> In order, however, for these stipulations to be reasonable, the time within which the presentation is to be made must be reasonably long to enable the party claiming damages to become aware of the injury and to present his claim properly.<sup>98</sup> Thus it has been held that a stipulation was reasonable which required all claims against the company to be presented within sixty days<sup>99</sup> after the filing of the message for transmission. It has also been held that thirty days,<sup>100</sup> and even twenty days,<sup>101</sup> was a reasonable time to limit the presentation of these claims. But the reasonableness of any particular time may vary according to circumstances.<sup>102</sup> It was held in one case that seven days was a reasonable time to give the injured party for presenting his claim.<sup>103</sup>

§ 387. **Same continued—reasons for rule.**—There is no question that these regulations are enforceable, provided the time in which they are to be made is reasonable.<sup>104</sup> It is a general rule that a common carrier may make and prescribe a certain limited time within which all claims must be presented. These companies are insurers of the goods intrusted to them and can only be relieved of liability for loss caused by the acts of God or the public ene-

<sup>97</sup> *Id.*

<sup>98</sup> *Heimann v. West. U. Tel. Co.*, 57 Wis. 562, 16 N. W. 32.

<sup>99</sup> *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844; *West. U. Tel. Co. v. Dougherty*, 54 Ark. 221, 15 S. W. 468, 11 L. R. A. 102, 26 Am. St. Rep. 33; *Hill v. West. U. Tel. Co.*, 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; *West. U. Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; *West. U. Tel. Co. v. Jones*, 95 Ind. 228, 48 Am. Rep. 713; *Young v. West. U. Tel. Co.*, 65 N. Y. 163; *Sherrill v. West. U. Tel. Co.*, 109 N. C. 527, 14 S. E. 94; *Wolf v. West. U. Tel. Co.*, 62 Pa. 83, 1 Am. Rep. 387; *West. U. Tel. Co. v. Rains*, 63 Tex. 27; *West. U. Tel. Co. v. Brown*, 84 Tex. 54, 19 S. W. 336; *Lester v. West. U. Tel. Co.*, 84 Tex. 313, 19 S. W. 256; *Stone v. Postal Tel. Co.*, 31 R. I. 174, 76 Atl. 762, 29 L. R. A. (N. S.) 795.

<sup>100</sup> *West. U. Tel. Co. v. Dunfield*, 11 Colo. 335, 18 Pac. 34; *Cole v. West. U. Tel. Co.*, 33 Minn. 227, 22 N. W. 385; *Massengale v. West. U. Tel. Co.*, 17 Mo. App. 257; *West. U. Tel. Co. v. Culherson*, 79 Tex. 65, 15 S. W. 219; *West. U. Tel. Co. v. Pells*, 2 Tex. Law R. 246; *Beasley v. West. U. Tel. Co.* (C. C.) 39 Fed. 181; *West. U. Tel. Co. v. Prevatt*, 149 Ala. 617, 43 South. 106; *Herron v. West. U. Tel. Co.*, 90 Iowa, 129, 57 N. W. 696; *West. U. Tel. Co. v. Lehman*, 106 Md. 318, 67 Atl. 241, 14 Ann. Cas. 736; *Martin v. Sunset Tel., etc., Co.*, 18 Wash. 260, 51 Pac. 376; *Grant v. West. U. Tel. Co.*, 154 Mo. App. 279, 133 S. W. 673.

<sup>101</sup> *Aiken v. West. U. Tel. Co.*, 5 S. C. 358; *Heimann v. West. U. Tel. Co.*, 57 Wis. 562, 16 N. W. 32.

<sup>102</sup> *Massengale v. West. U. Tel. Co.*, 17 Mo. App. 257; *Postal Tel. Cable Co. v. Nichols*, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A. (N. S.) 870, 14 Ann. Cas. 369. See, also, § 393.

<sup>103</sup> *Louis v. Great West. R. Co.*, 5 H. & N. 867.

<sup>104</sup> *West. U. Tel. Co. v. Jones*, 95 Ind. 228, 48 Am. Rep. 716. See § 393. See, also, cases in note 95, ante.

my. At common law telegraph companies are not held to the same strict liability. Then, if a common carrier can make and enforce such stipulations, there should be a greater reason why telegraph companies should do so.<sup>105</sup> These stipulations do not operate as a limitation of the time within which suit may be brought, but they are designed merely to give the company notice of the claim, in order that it may be investigated promptly.<sup>106</sup> Messages are usually destroyed after being kept six months, and the company's ability to defend would naturally be affected by a delay in its being informed of a claim. If a sender of a message has sustained a loss by the failure of the company to properly transmit it, he could very easily ascertain this fact within sixty, thirty, twenty days, or even within a shorter time, after the message was filed, and it would be no unreasonable rule to require him to promptly notify the company of this fact in order that the latter might remedy the loss or defend itself for such. The object in transacting business over telegraph lines is to accomplish the desired results in the shortest time possible, and surely the sender of the message would find out very soon after it was filed whether or not the message had accomplished its purpose; and it would be no burden or inconvenience on his part to notify the company that the objects had not been accomplished, to his loss. The presumptions are that, if he fails to notify the company of the improper transmission of the message, the rights acquired under this agreement are waived.<sup>107</sup> Another reason justifying the reasonableness of the provision for notice of the claim is found in the multitude of messages transmitted requiring a speedy knowledge of claims to enable the company to keep an account of its transactions before, by reason of their great number, they cease to be within their recollection and control.<sup>108</sup>

§ 388. **Same continued—statutory penalty—applicable.**—In many states there are statutes which impose a penalty upon telegraph companies for a failure to properly perform their duties, and the question has come up in several instances as to whether these

<sup>105</sup> *Wolf v. West. U. Tel. Co.*, 62 Pa. 83, 1 Am. Rep. 387.

<sup>106</sup> *McGehee v. West. U. Tel. Co.*, 169 Ala. 109, 53 South. 205, Ann. Cas. 1912B, 512; *West. U. Tel. Co. v. Trumbull*, 1 Ind. App. 121, 27 N. E. 315; *West. U. Tel. Co. v. Dougherty*, 54 Ark. 221, 15 S. W. 468, 26 Am. St. Rep. 33, 11 L. R. A. 102; *Sykes v. West. U. Tel. Co.*, 150 N. C. 431, 64 S. E. 177; *Sherrill v. West. U. Tel. Co.*, 109 N. C. 527, 14 S. E. 94; *Southern Express Co. v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556. But see *Pacific Tel. Co. v. Underwood*, 37 Neb. 315, 55 N. W. 1057, 40 Am. St. Rep. 490.

<sup>107</sup> *West. U. Tel. Co. v. Jones*, 95 Ind. 228, 48 Am. Rep. 716.

<sup>108</sup> *Wolf v. West. U. Tel. Co.*, 62 Pa. 83, 1 Am. Rep. 387.



stipulations were applicable to such claims. In some states, as in Arkansas, it has been held that they were not applicable.<sup>109</sup> In Georgia it is held that, while the stipulation does not apply to claims for the statutory penalty, it does apply to all claims for special damages, and operates not only against the sender of a message, but also against the receiver, where the message is in reply to a previous message sent by the receiver.<sup>110</sup> While this is the holding in some states, the preponderance of authority is that these stipulations are as applicable to statutory penalties as they are to any other claims.<sup>111</sup>

**§ 389. Same continued—not to be prosecuted by the public.—**

As was ably said by Judge Elliott on this subject: "The penalty provided by the statute is given to one who contracts with a telegraph company for the transmission of a message, and it is not a penalty recoverable by public prosecution, but is one for which a civil action will lie. Nor is the civil action for the benefit of the public, for the formal right of action and the entire beneficial interests are exclusively in the individual who contracts with the company in the particular instance. The case is therefore entirely unlike public prosecutions for offenses affecting the community at large, which are conducted by public officers and in which individuals have no private interest. Penalties given exclusively to private individuals may be compounded, while penalties prescribed for purely public offenses cannot be, even though part of the penalty be given to the informer."<sup>112</sup> But it has been held that these stipulations were not applicable to an addressee who was attempting to recover the statutory penalty.<sup>113</sup> And in order for the company to take advantage of the plaintiff's failure to present the claim within the required time, it must be specially pleaded.<sup>114</sup>

<sup>109</sup> West. U. Tel. Co. v. Cobbs, 47 Ark. 344, 1 S. W. 558, 58 Am. Rep. 756. See, also, West. U. Tel. Co. v. Sights, 34 Okl. 461, 126 Pac. 234, 42 L. R. A. (N. S.) 419, Ann. Cas. 1914C, 204.

<sup>110</sup> West. U. Tel. Co. v. James, 90 Ga. 254, 16 S. E. 83.

<sup>111</sup> West. U. Tel. Co. v. Jones, 95 Ind. 228, 48 Am. Rep. 713; Barrett v. West. U. Tel. Co., 42 Mo. App. 546; West. U. Tel. Co. v. Meredith, 95 Ind. 93; West. U. Tel. Co. v. Yopst (Ind.) 11 N. E. 16; West. U. Tel. Co. v. Trumbull, 1 Ind. App. 121, 27 N. E. 313; West. U. Tel. Co. v. Greer, 115 Tenn. 368, 89 S. W. 327, 1 L. R. A. (N. S.) 525. Compare Paul v. West. U. Tel. Co., 164 Mo. App. 233, 145 S. W. 99. In West. U. Tel. Co. v. Greer, supra, it was held that a minor is bound by a provision in a contract for the transmission of a telegram that suit must be brought for its breach within sixty days.

<sup>112</sup> West. U. Tel. Co. v. Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224, note.

<sup>113</sup> West. U. Tel. Co. v. McKibben, 114 Ind. 511, 14 N. W. 894.

<sup>114</sup> West. U. Tel. Co. v. Scircle, 103 Ind. 227, 2 N. E. 604.

§ 390. **Stipulation held void as against public policy.**—It is held in some jurisdictions that these stipulations, requiring all claims against telegraph companies to be presented within a certain fixed time, are void, in that they are against public policy and as an attempt to establish limitations which are fixed by the general statutes of limitation.<sup>115</sup> As was said: "It would introduce into the local jurisprudence of every state, territory and country, a species of private statutes of limitation or nonclaim. It would avoid the policy of the state in the matter of the time in which actions, both in tort and contract, should be brought."<sup>116</sup> Another reason why the stipulation is not reasonable is that it furnishes the company a means of avoiding liability for its negligence, in that the injured party may possibly not know of his loss in time to comply with the requirements of the stipulation.<sup>117</sup> In Nebraska it is held that if these stipulations are viewed as a contract between the telegraph company and the sender, they are void, as there is no consideration given.<sup>118</sup> It will be observed, however, that in most of the cases which hold that these stipulations are unreasonable and void, their validity was denied on the ground that they could not be made applicable to actions for the statutory

<sup>115</sup> *Johnston v. West. U. Tel. Co.* (C. C.) 33 Fed. 362; *West. U. Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 18 Ky. Law Rep. 995, 66 Am. St. Rep. 361, 36 L. R. A. 711; *Francis v. West. U. Tel. Co.*, 58 Minn. 252, 59 N. W. 1078, 25 L. R. A. 406, 49 Am. St. Rep. 507; *Pacific Tel. & Tel. Co. v. Underwood*, 37 Neb. 315, 55 N. W. 1057, 40 Am. St. Rep. 490; *Davis v. West. U. Tel. Co.*, 107 Ky. 527, 54 S. W. 849, 41 Ky. Law Rep. 125, 92 Am. St. Rep. 371; *West. U. Tel. Co. v. Kemp*, 44 Neb. 194, 62 N. W. 451, 48 Am. St. Rep. 723; *West. U. Tel. Co. v. Longwill*, 5 N. M. 308, 21 Pac. 339; *West. U. Tel. Co. v. Crawford*, 29 Okl. 143, 116 Pac. 925, 35 L. R. A. (N. S.) 930; *West. U. Tel. Co. v. Sights*, 34 Okl. 461, 126 Pac. 234, 42 L. R. A. (N. S.) 419, Ann. Cas. 1912C, 204, constitutional prohibition.

<sup>116</sup> *West. U. Tel. Co. v. Longwill*, 5 N. M. 308, 21 Pac. 339. But see, contra, *Sykes v. West. U. Tel. Co.*, 150 N. C. 431, 64 S. E. 177; *West. U. Tel. Co. v. Trumbull*, 1 Ind. App. 121, 27 N. E. 313; *West. U. Tel. Co. v. Mellon*, 96 Tenn. 66, 33 S. W. 725.

The statutory time within which an action for damages may be instituted against a company is in no manner shortened by requiring a mere claim therefor to be made within a reasonable time. The action may be brought at any time within the statutory limitation. *Kirby v. West. U. Tel. Co.*, 7 S. D. 623, 65 N. W. 37, 46 Am. St. Rep. 765, 30 L. R. A. 621, 624.

<sup>117</sup> In *Johnston v. West. U. Tel. Co.* (C. C.) 33 Fed. 362, the court said: "Is a stipulation which has the effect to preclude from the right of action the person to whom a prepaid telegram is directed and to whom it has never been delivered, no matter how gross the negligence of the company may be, a reasonable regulation? In the opinion of this court, it is clearly unreasonable and is contrary to public policy."

<sup>118</sup> *Pac. Tel. Co. v. Underwood*, 37 Neb. 315, 40 Am. St. Rep. 480, 55 N. W. 1057.

penalty, or to the addressee.<sup>119</sup> Thus in Indiana it has been held that an addressee of a message, suing to recover damages, is not bound by these stipulations, although the validity in other respects is recognized.<sup>120</sup> In Texas these stipulations are valid so long as the time for filing the claim is not less than ninety days,<sup>121</sup> but if the time is made any number of days less than ninety, they become void.<sup>122</sup> In other states these stipulations are held invalid in that they are prohibited by positive statutory provisions.<sup>123</sup>

§ 391. **When limitation begins to run.**—These limitations within which claims must be presented to the company begin to run from the time specified in the stipulation. They are for the exclusive benefit of the company and are somewhat in the nature of conditions precedent to the bringing of a suit, and in order for the injured party to take advantage of his loss he should ordinarily comply with the terms of the conditions.<sup>124</sup> As they are for the benefit of the company, and must be complied with by the party injured, the former must also be held to their conditions.<sup>125</sup> The principal condition in the stipulation is that the claim must be presented within a certain fixed time. The question, then, which presents itself is, When does the limitation begin to run? In the old blank form, used by these companies for message blanks, the wording of these stipulations was different from that now in use. The old form provided for a presentation within "sixty days after sending the message." Under this form many decisions arose, and it was held in all these that the limitation did not begin to run until after the message was actually sent; so, if there was a total failure to transmit, the limitation would not apply.<sup>126</sup> Under the present forms used by these companies, it is provided that the com-

<sup>119</sup> Johnston v. West. U. Tel. Co. (C. C.) 33 Fed. 362.

<sup>120</sup> West. U. Tel. Co. v. McKibben, 114 Ind. 511, 14 N. E. 894.

<sup>121</sup> Tex. Rev. St. 1895, art. 3379. See question also discussed in note 95, ante.

<sup>122</sup> West. U. Tel. Co. v. Jobe, 6 Tex. Civ. App. 403, 25 S. W. 168, 1036; Taber v. West. U. Tel. Co., 104 Tex. 272, 137 S. W. 106, 34 L. R. A. (N. S.) 185; West. U. Tel. Co. v. Smith (Tex. Civ. App.) 130 S. W. 622.

<sup>123</sup> Dodson v. West. U. Tel. Co., 97 Miss. 104, 52 South. 693; West. U. Tel. Co. v. Sights, 34 Okl. 468, 126 Pac. 234, Ann. Cas. 1914C, 204, 42 L. R. A. (N. S.) 419. See, also, West. U. Tel. Co. v. Eubanks, 100 Ky. 591, 38 S. W. 1068, 36 L. R. A. 711, 66 Am. St. Rep. 361; Davis v. West. U. Tel. Co., 107 Ky. 527, 54 S. W. 849, 92 Am. St. Rep. 371; Pac. Tel. Co. v. Underwood, 37 Neb. 315, 55 N. W. 1057, 40 Am. St. Rep. 490; West. U. Tel. Co. v. Kemp, 44 Neb. 194, 48 Am. St. Rep. 723, 62 N. W. 451.

<sup>124</sup> West. U. Tel. Co. v. Way, 83 Ala. 542, 4 South. 849.

<sup>125</sup> West. U. Tel. Co. v. Trumbull, 1 Ind. App. 121, 27 N. E. 313; West. U. Tel. Co. v. Yopst, 118 Ind. 248, 20 N. E. 222, 2 L. R. A. 224, note.

<sup>126</sup> See note 125, supra, for reference cases. See, also, Sherrill v. West. U. Tel. Co., 109 N. C. 527, 14 S. E. 94.



pany will not be liable for damages or for statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission. There have been but few decisions on these new forms with respect to the time when the limitation begins to run. In these cases it was held that the decisions under the old form were applicable under the new on the ground that these companies could not avail themselves of any provision in a contract which they failed to accept.<sup>127</sup> We think this is the proper construction to be placed on these stipulations.

§ 392. **Same continued—delay in receiving messages—does not modify stipulation.**—The fact that the addressee does not receive the message for some time after it has been transmitted does not modify the stipulation by giving the injured party more time, although the company has negligently delayed the message; provided, however, he has a reasonable time to present the claim after his knowledge of the error.<sup>128</sup> And the mere fact that the exact amount of the damage suffered by the addressee cannot be ascertained within sixty days is no excuse for his failure to present his claim within that time.<sup>129</sup> He should present his claim within the specified time; and, if he should learn after the expiration of the time of other damages, the claim may be so amended as to include these latter damages. The claim should be presented within the limitation, if it should be reasonable in the particular instance, and if the court should instruct the jury that the time does not begin to run until after the error has been learned, or the breach of the company's duty has been known by the injured party, it will be an error.<sup>130</sup> If the complaint shows that the message was never delivered, the action having been instituted by the receiver, it is not demurrable merely because it fails to allege that the claim was made within the limitation.<sup>131</sup>

<sup>127</sup> *West. U. Tel. Co. v. Michelson*, 94 Ga. 436, 21 S. E. 169; *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844, certain time after the "sending" of the message, period does not begin to run until the message is actually started; *West. U. Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; and if there is a total failure to transmit necessary to present claims; *Postal Tel. Cable Co. v. Nichols*, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A. (N. S.) 870, 14 Ann. Cas. 369, from the receipt of notice of nondelivery.

<sup>128</sup> *Heimann v. West. U. Tel. Co.*, 57 Wis. 562, 16 N. W. 32; *Massengale v. West. U. Tel. Co.*, 17 Mo. App. 258; *West. U. Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608, 21 S. W. 638.

<sup>129</sup> *Manier v. West. U. Tel. Co.*, 94 Tenn. 442, 29 S. W. 732.

<sup>130</sup> *West. U. Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608, 21 S. W. 638.

<sup>131</sup> *Sherrill v. West. U. Tel. Co.*, 109 N. C. 527, 14 S. E. 94.

**§ 393. Same continued—unaware of wrong—not binding.—**

While the foregoing rules are generally accepted, yet there are exceptions, as where the time is not reasonable. In order for any rule to be binding, it must be reasonable.<sup>132</sup> *Cessante ratione, et ipse lex*. The length of time given in these stipulations is presumed to be reasonably long to give the injured party ample time to file his claim with the company; but should it appear that he did not become aware of the wrong until after the expiration of the limitation, and this was no fault on his part, or if he does not have a reasonable time to file the claim after he becomes aware of the company's breach of duty, or if for any reason he is unavoidably prevented from presenting his claim before the expiration of the limitation, but does so as soon thereafter as it is in his power, the stipulation is not binding.<sup>133</sup> So it will be seen that each particular case must be considered with respect to its own surrounding circumstances. In many instances the addressee is the only interested party to the business transaction about and for which a message is sent, the sender's duty and interest having been completed at the filing of the message for transmission. In these cases the message may not be sent at all, or it may be negligently delayed in its delivery by the company, of which facts the addressee may have no knowledge whatever until after the expiration of the limitation. Under such circumstances the addressee should surely not be bound.

**§ 394. Compliance with stipulation—what constitutes.—**Having considered the limitation within which all claims for damages against telegraph companies must be presented, and the reasonableness of the same, we shall now set out something of what is necessary to constitute a sufficient compliance with said stipulations. First, the claim should be presented in writing; second, it should set forth in unmistakable terms the nature of the demand; and,

<sup>132</sup> See chapter XIV.

<sup>133</sup> *West. U. Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715; *Sherrill v. West. U. Tel. Co.*, 109 N. C. 527, 14 S. E. 94; *Conrad v. West. U. Tel. Co.*, 162 Pa. 204, 29 Atl. 888, cable message from Philadelphia to Shanghai, where defendant's negligence was not and could not have been discovered in the ordinary course of business within sixty days; *Markley v. West. U. Tel. Co.*, 144 Iowa, 105, 122 N. W. 136, 138 Am. St. Rep. 263. See *Postal Tel. Cable Co. v. Nichols*, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A. (N. S.) 870, 14 Ann. Cas. 369, holding that, where a telegram was filed for transmission on June 12th, and the sender had no knowledge prior to July 11th of the company's failure to deliver the same, and notice of claim was filed on August 17th, the claim was filed in time under a stipulation requiring claims to be presented within sixty days after the message was filed for transmission. But see *Stone v. Postal Tel. Cable Co.*, 31 R. I. 174, 76 Atl. 762; *Heimann v. West. U. Tel. Co.*, 57 Wis. 562, 16 N. W. 32.

third, it should be presented to a proper agent of the company. And first, the presentation of the claim must be in writing. The object in requiring the claim to be in writing, further than for the reason that the stipulations expressly require this is that the officers of the company, who have the power to act on such claims, may have the nature and extent of the claimant's demand directly. The claim agents would not have the opportunity to give the notices proper consideration if they were given orally through the operator; and if the nature of the claim was in dispute, in an action arising out of the claim, the written notice could, and should, be introduced to show the true nature of the demand. Another reason for holding that these claims should be in writing is that, in the great amount of business of these companies, an oral notice would not as likely reach the proper officers of the company, where it should have proper consideration.

§ 395. Same continued—waiver of written claim.—While these companies may require the notice of the claim to be in writing, yet they may waive this right.<sup>134</sup> Notices are generally presented to the local agents, who are impliedly authorized to transact all the business connected with the messages received by them; and, in the capacity of an agent, they may have the power to waive written notices of claims for damages.<sup>135</sup> Thus, where the plaintiff presented an oral claim within sixty days, whereupon the company entered into a correspondence with him and made an offer in settlement in sixty days, the company's right to insist on a written notice was waived.<sup>136</sup> In a case where an agent, instead of objecting to the oral complaint, requests time for investigating the merits of the

<sup>134</sup> West. U. Tel. Co. v. Heathcoat, 149 Ala. 623, 43 South. 117; West. U. Tel. Co. v. Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; Hill v. West. U. Tel. Co., 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; West. U. Tel. Co. v. Stratemier, 6 Ind. App. 125, 32 N. E. 871; Wheelock v. Postal Tel. Cable Co., 197 Mass. 119, 83 N. E. 313, 14 Ann. Cas. 188; Hays v. West. U. Tel. Co., 70 S. C. 16, 48 S. E. 608, 106 Am. St. Rep. 731, 67 L. R. A. 481, 3 Ann. Cas. 424.

<sup>135</sup> An ordinary telegraph operator, as such, has no authority to waive the benefit of the stipulation. Hays v. West. U. Tel. Co., 70 S. C. 16, 48 S. E. 608, 106 Am. St. Rep. 731, 67 L. R. A. 481, 3 Ann. Cas. 424; Young v. West. U. Tel. Co., 65 N. Y. 163; West. U. Tel. Co. v. Rains, 63 Tex. 27. Neither can a messenger make such waiver. West. U. Tel. Co. v. Terrell, 10 Tex. Civ. App. 60, 30 S. W. 70; Given v. West. U. Tel. Co. (C. C.) 24 Fed. 119. The manager of an office, however, on whom the claim might properly have been served, has, ostensibly at least, such authority. Hill v. West. U. Tel. Co., 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; West. U. Tel. Co. v. Heathcoat, 149 Ala. 623, 43 South. 117; West. U. Tel. Co. v. Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; West. U. Tel. Co. v. Stratemier, 6 Ind. App. 125, 32 N. E. 871; Toale v. West. U. Tel. Co., 76 S. C. 248, 57 S. E. 117.

<sup>136</sup> Massengale v. West. U. Tel. Co., 17 Mo. App. 257. See Stone & Co. v. Postal Tel. Cable Co., 35 R. I. 498, 87 Atl. 319, 46 L. R. A. (N. S.) 180.



claim, and after investigating the company refuses to pay anything not upon the grounds of the insufficiency of the demand but upon the nonliability of the company, it was held that this constituted a waiver of the right to demand a written notice.<sup>137</sup> But the promise of an agent, when the complaint is made orally, to look into the matter, is not a waiver of the right.<sup>138</sup> And where the complaint was made to a telegraph operator, who expressed the opinion that there was no liability, he having no authority to represent the company in such matters, it was held that there was no waiver.<sup>139</sup> If a message is written and paid for as a night message, which contains a stipulation to the effect that all claims arising out of the improper transmission shall be presented in thirty days, and it is orally agreed that the message shall not be transmitted until the next morning, this does not of itself waive the right to demand the claim in writing, although the other part of the contract may be changed.<sup>140</sup>

§ 396. **Same continued—nature of the claim.**—The claim should set out fairly the nature and extent of the claimant's demand.<sup>141</sup>

<sup>137</sup> *Hill v. West. U. Tel. Co.*, 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; *West. U. Tel. Co. v. Yopst* (Ind.) 11 N. E. 16.

<sup>138</sup> *Massengale v. West. U. Tel. Co.*, 17 Mo. App. 257; *Stone Co. v. Postal Tel. Cable Co.*, 35 R. I. 498, 87 Atl. 319, 46 L. R. A. (N. S.) 180.

<sup>139</sup> *West. U. Tel. Co. v. Rains*, 63 Tex. 27; *Albers v. West. U. Tel. Co.*, 98 Iowa, 51, 66 N. W. 1040; *Stone Co. v. Postal Tel. Cable Co.*, 35 R. I. 498, 87 Atl. 319, 46 L. R. A. (N. S.) 180.

<sup>140</sup> *West. U. Tel. Co. v. Culberson*, 79 Tex. 65, 15 S. W. 219.

<sup>141</sup> *Postal Tel. Cable Co. v. Moss*, 5 Ga. App. 503, 63 S. E. 590; *West. U. Tel. Co. v. Moxley*, 80 Ark. 554, 98 S. W. 112; *Toale v. West. U. Tel. Co.*, 76 S. C. 248, 57 S. E. 117; *West. U. Tel. Co. v. Courtney*, 113 Tenn. 482, 82 S. W. 484. Compare *West. U. Tel. Co. v. Brown*, 84 Tex. 54, 19 S. W. 336. It is held that notice of the negligence complained of is not sufficient, *Manier v. West. U. Tel. Co.*, 94 Tenn. 442, 29 S. W. 732; *West. U. Tel. Co. v. Moxley*, 80 Ark. 554, 98 S. W. 112; or that to demand an explanation is sufficient, *Toale v. West. U. Tel. Co.*, 76 S. C. 248, 57 S. E. 117; or to notify the company that a claim for damages will be made, *Postal Tel. Cable Co. v. Moss*, 5 Ga. App. 503, 63 S. E. 590. The party injured must base his claim on his own notice, and not on that of another. *Webbe v. West. U. Tel. Co.*, 64 Ill. App. 331; *West. U. Tel. Co. v. Swearingen*, 94 Ark. 336, 126 S. W. 1071; *West. U. Tel. Co. v. Beck*, 58 Ill. App. 564; *Yunker v. West. U. Tel. Co.*, 146 Iowa, 499, 125 N. W. 577; *Brockelsby v. West. U. Tel. Co.*, 148 Iowa, 273, 126 N. W. 1105; *Swain v. West. U. Tel. Co.*, 12 Tex. Civ. App. 385, 34 S. W. 783; *West. U. Tel. Co. v. Kinsley*, 8 Tex. Civ. App. 527, 28 S. W. 831.

*Damages for mental anguish.*—A stipulation requiring notice of claim to be given within sixty days applies to claims for mental anguish in actions brought under the Arkansas statute. *West. U. Tel. Co. v. Moxley*, 80 Ark. 554, 98 S. W. 112; *West. U. Tel. Co. v. Swearingen*, 94 Ark. 336, 126 S. W. 1071; *Lavelle v. West. U. Tel. Co.*, 102 Ark. 607, 145 S. W. 205. See, also, *Whitehill v. West. U. Tel. Co.* (C. C.) 136 Fed. 499. See, also, *Broom v. West. U. Tel. Co.*, 71 S. C. 506, 51 S. E. 259, 4 Ann. Cas. 611; *Lester v. West. U. Tel. Co.*, 84 Tex. 313, 19 S. W. 265, holding regardless of the fact whether the action is in tort or con-

The object of this requirement is to give the company cognizance of facts creating the liability, in order that it may use these for investigating the cause of the loss or injury. It is impossible for these companies to keep up with all the mistakes of their employés, and the injuries arising therefrom; and, while they may be clearly liable for claims presented—and for which they would readily, without suit, indemnify the injured party—yet, if they have no facts on which to base an investigation in order to determine whether they are liable, they would, very probably, be heavily taxed with an expensive litigation. So, if the plaintiff should have good grounds to recover damages, he should impart these facts to the company, in order to avoid litigation; and on these only could he recover.<sup>142</sup> He should also state the extent of the injury;<sup>143</sup> however, he will not be limited to the amount set forth in his claim, for, as said before, the extent of the damages may not be known until after the claim shall have been presented.<sup>144</sup> In a case on this point, a claim was presented by a sender, classifying the damages as “fifty dollars actual damages and five thousand dollars exemplary damages.” At the trial the jury returned a verdict for five hundred dollars actual damages alone. It was held that the plaintiff was not prejudiced by his classification, so the verdict was allowed to stand. The court said: “The claim was for five thousand and fifty dollars in the aggregate, and served in all respects to give the defendant the information stipulated for.”<sup>145</sup>

§ 397. **Must be presented to proper officer.**—As to what will amount to a sufficient presentation of a claim must depend somewhat upon the circumstances of the case. A representation to the resident agent of the company, who made the contract to transmit the message, was held a sufficient presentation,<sup>146</sup> although such agent had no authority to settle the claim. The manager of the company’s office at the place from or to which a message is sent is a proper party to whom a presentation may be made.<sup>147</sup> Where the

tract; *Penn v. West. U. Tel. Co.*, 159 N. C. 306, 75 S. E. 16, 41 L. R. A. (N. S.) 223; *Markley v. West. U. Tel. Co.*, 144 Iowa, 105, 122 N. W. 136, 138 Am. St. Rep. 263; *West. U. Tel. Co. v. Nelson*, 86 Ark. 336, 111 S. W. 274.

<sup>142</sup> *West. U. Tel. Co. v. Murray*, 29 Tex. Civ. App. 207, 68 S. W. 549; *Swain v. West. U. Tel. Co.*, 12 Tex. Civ. App. 385, 34 S. W. 783.

<sup>143</sup> *West. U. Tel. Co. v. Moxley*, 80 Ark. 554, 98 S. W. 112; *West. U. Tel. Co. v. Nelson*, 86 Ark. 336, 111 S. W. 274; *West. U. Tel. Co. v. Murray*, 29 Tex. Civ. App. 207, 68 S. W. 549.

<sup>144</sup> *West. U. Tel. Co. v. Lehman*, 106 Md. 318, 67 Atl. 241, 14 Ann. Cas. 736.

<sup>145</sup> *Manier v. West. U. Tel. Co.*, 94 Tenn. 442, 29 S. W. 732; *West. U. Tel. Co. v. Murray*, 29 Tex. Civ. App. 207, 68 S. W. 549.

<sup>146</sup> *West. U. Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480.

<sup>147</sup> *Hill v. West. U. Tel. Co.*, 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166;

plaintiff informed the operator of a mistake made in sending the message and was referred by him to the main office, where a clerk told him the manager was busy, but took down his complaint in writing and handed it to a person in another room whom he introduced as the attorney of the company, which attorney promised to investigate the matter, and afterwards, in reply to plaintiff's inquiry, wrote a letter rejecting the claim, using paper and envelope with printed headings representing him to be the attorney of the company, this was held a proper presentation.<sup>148</sup> The party on whom the notice is served must have some authority to accept such for the company, and if the plaintiff has any information that a certain employé of the company has no authority to accept claims, then he loses his rights by serving it on such person. Thus, where a written statement of plaintiff's claim was handed by his agent to a receiving clerk of the company, who, after a perusal of it, handed it back, saying he had nothing to do with it, and directing him to the general officers of the company in another part of the building, but nothing more was done until after the time had elapsed, it was held that there had not been a compliance with the condition, so the plaintiff's suit was defeated on that ground.<sup>149</sup> And so it has been held that a notice of claim delivered to a messenger boy, to be by him delivered to the proper agent of the company, is not sufficient compliance with the stipulation.<sup>150</sup>

**§ 398. Commencement of suit—whether sufficient notice.**—It has been held by many courts that the commencement of a suit, within the limitation, against these companies for damages, was not a sufficient compliance with these stipulations, requiring claims to be presented within a certain fixed time.<sup>151</sup> The ground on which these courts based their decisions is that these stipulations are conditions precedent<sup>152</sup> and must be filed before the commencement of a suit; and until they are complied with the injured party has no

West. U. Tel. Co. v. Yopst (Ind.) 11 N. E. 16; Hays v. West. U. Tel. Co., 70 S. C. 16, 48 S. E. 608, 106 Am. St. Rep. 731, 67 L. R. A. 481, 3 Ann. Cas. 424; Markley v. West. U. Tel. Co., 144 Iowa, 105, 122 N. W. 136, 138 Am. St. Rep. 263.

<sup>148</sup> Bennett v. West. U. Tel. Co., 50 Hun, 600, 2 N. Y. Supp. 365.

<sup>149</sup> Young v. West. U. Tel. Co., 65 N. Y. 163.

<sup>150</sup> West. U. Tel. Co. v. Terrell, 10 Tex. Civ. App. 60, 30 S. W. 70.

<sup>151</sup> West. U. Tel. Co. v. McKinney, 2 Willson, Civ. Cas. Ct. App. (Tex.) § 647; West. U. Tel. Co. v. Yopst (Ind.) 11 N. E. 16; West. U. Tel. Co. v. Hays (Tex. Civ. App.) 63 S. W. 171; Id., 29 Tex. Civ. App. 25, 67 S. W. 1072.

<sup>152</sup> West. U. Tel. Co. v. McKinney, 2 Willson, Civ. Cas. Ct. App. (Tex.) § 644; West. U. Tel. Co. v. Yopst (Ind.) 11 N. E. 16.



cause of action.<sup>153</sup> As was said on the subject: "The company was entitled, unless there was a waiver, to a written claim, before the action was instituted, in order to enable it to ascertain the facts, and determine whether it would pay to restrict the claim, \* \* \* for a defendant is not to be harassed by an action until after the stipulated claim has been presented or its presentation waived."<sup>154</sup> Under these rulings it was held that the stipulations would not be sufficiently complied with if a written claim was presented after the commencement of the suit and before the expiration of the limitation, but that this written notice would be a good ground on which to base another suit.<sup>155</sup> In those jurisdictions in which these decisions were rendered, the company could waive this condition and accept the service of a suit as a sufficient notice.

§ 399. **Contrary holding—better view.**—There are other courts which hold that the commencement of a suit before the expiration of a limitation is a sufficient presentation of claim,<sup>156</sup> and we are inclined to think that this is the better view to take of the subject. The object, as said before, in presenting a written notice of the claim to these companies, is to enable them to ascertain whether they are liable for the damages. It is true that it would be better to give a written notice before the commencement of a suit, so that the company might be given an opportunity to settle without expense. The main point is that the company is entitled to notice of plaintiff's claim, and either the filing of the claim or the bringing of suit within the limitation specified in the contract accomplishes this.<sup>157</sup> On the other hand, it seems to us that it could be better informed of these facts by a suit, especially where the rule of pro-

<sup>153</sup> West. U. Tel. Co. v. Hays (Tex. Civ. App.) 63 S. W. 171; West. U. Tel. Co. v. Yopst (Ind.) 11 N. E. 16; West. U. Tel. Co. v. McKinney, 2 Willson, Civ. Cas. Ct. App. (Tex.) § 644.

<sup>154</sup> West. U. Tel. Co. v. Yopst (Ind.) 11 N. E. 16, affirming 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224, note.

<sup>155</sup> West. U. Tel. Co. v. McKinney, 5 Tex. L. Rev. 173.

<sup>156</sup> West. U. Tel. Co. v. Henderson, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; East Tennessee, etc., Railroad Co. v. Bayliss, 74 Ala. 150; Bryan v. West. U. Tel. Co., 133 N. C. 603, 45 S. E. 938; West. U. Tel. Co. v. Mellon, 96 Tenn. 66, 33 S. W. 725; West. U. Tel. Co. v. Cooper, 29 Tex. Civ. App. 591, 69 S. W. 427; West. U. Tel. Co. v. Piner, 9 Tex. Civ. App. 152, 29 S. W. 66; Phillips v. West. U. Tel. Co., 95 Tex. 638, 69 S. W. 63; West. U. Tel. Co. v. Karr, 5 Tex. Civ. App. 60, 24 S. W. 302; West. U. Tel. Co. v. Crawford (Tex. Civ. App.) 75 S. W. 843; Sherrill v. West. U. Tel. Co., 109 N. C. 527, 14 S. E. 94; Smith v. West. U. Tel. Co., 77 S. C. 378, 58 S. E. 6, 12 Ann. Cas. 654; not a condition precedent, but subsequent, West. U. Tel. Co. v. Way, 83 Ala. 542, 4 South. 844; West. U. Tel. Co. v. Piner, *supra*.

<sup>157</sup> See Phillips v. West. U. Tel. Co., (Tex. Civ. App.) 69 S. W. 997; Smith v. West. U. Tel. Co., 77 S. C. 378, 58 S. E. 6, 12 Ann. Cas. 654; West. U. Tel. Co. v. Mellon, 96 Tenn. 66, 33 S. W. 725.

cedure is that the filing of a declaration is the first step to the bringing of a suit,<sup>158</sup> since it is very evident that the facts on which the liability arises are much more fully stated in the latter way, thereby giving the company a better opportunity to make a full investigation of the complaint. We do not wish to be understood as saying that the commencement of a suit is always a better way to settle these matters, but that the bringing of a suit is ordinarily equivalent to a presentation of a notice of claim for damages.

§ 400. **Limiting liability to specific amount.**—Telegraph companies have attempted to limit their liabilities for sending night messages by reducing the charges for transmission. This is done by stipulating in the blank forms that they will not, for the consideration of said reduction, be liable beyond a certain amount. It has been held, with few exceptions,<sup>159</sup> that these stipulations were unreasonable, and, so far as they sought to limit the liability of the company for the consequences of its own negligence, were contrary to public policy and could not be enforced.<sup>160</sup> These companies have a perfect right to make all rules and regulations, and by these they may limit, to a certain extent, their common-law liabilities; however, these rules must, under all circumstances, be reasonable and consistent with public policy.<sup>161</sup> It might be possible that they, as contracts between individuals or between the company and an individual, would be considered reasonable; but the interest the public has in these institutions, and the effect an enforcement of these would have on the public, will make them against public policy, and therefore void; for, where the interest of a few is conflicting with the interest of the public, the former must give way to

<sup>158</sup> If the person sufficiently informs the company of the different facts which a written claim should set out, this is sufficient. *West. U. Tel. Co. v. Greer*, 115 Tenn. 368, 89 S. W. 327, 1 L. R. A. (N. S.) 525; *Postal Tel. Cable Co. v. Moss*, 5 Ga. App. 503, 63 S. E. 590; *West. U. Tel. Co. v. Courtney*, 113 Tenn. 482, 82 S. W. 484; *Phillips v. West. U. Tel. Co.*, 95 Tex. 638, 69 S. W. 63. But a mere summons to answer is held not sufficient. *West. U. Tel. Co. v. Courtney*, *supra*. But see *Bryan v. West. U. Tel. Co.*, 133 N. C. 603, 45 S. E. 938, holding that the service of a summons puts the defendants upon inquiry, and is therefore sufficient.

<sup>159</sup> *Aiken v. West. U. Tel. Co.*, 5 S. C. 358; *Schwartz v. Atlantic, etc., Tel. Co.*, 18 Hun (N. Y.) 158; *Bennett v. West. U. Tel. Co.*, 50 Hun, 600, 2 N. Y. Supp. 365; *Jones v. West. U. Tel. Co. (C. C.)* 18 Fed. 717; *Clement v. West. U. Tel. Co.*, 127 Mass. 463; *West. U. Tel. Co. v. Alford*, 110 Ark. 379, 161 S. W. 1027, 50 L. R. A. (N. S.) 94.

<sup>160</sup> See § 407. See *West. U. Tel. Co. v. Baker* (Ala. App.) 69 South. 246; *West. U. Tel. Co. v. Hearn*, 110 Ark. 176, 161 S. W. 1025, Ann. Cas. 1915D. 378; *Rhyne v. West. U. Tel. Co.*, 164 N. C. 394, 80 S. E. 152; *Leedy v. West. U. Tel. Co.*, 130 Tenn. 547, 172 S. W. 278.

<sup>161</sup> See chapter XIV.

the latter. To permit these companies, therefore, to impose these stipulations would open to them an opportunity to exercise fraud upon the public or give them a chance to become negligent. The amount of damages to which they would be liable would be so trifling that, in many instances, they would rather pay this than to be bothered with the duties assumed. As was said: "The operator may, from stupidity or haste to close for the night, prefer to pay back the trifle paid, and leave the message unsent, or a message may have been carelessly, or even wantonly, thrown into the waste basket, and never sent, or, if sent, it may have been treated in the same manner at the office of reception, and never delivered to a carrier, or, if so delivered, it may have been thrown aside or destroyed by the carrier to save himself labor or trouble. And the sender, under this rule, must be debarred from all remedy beyond a repayment of the few cents paid."<sup>162</sup> Another reason why they are not reasonable and therefore enforceable is that, as said at another place,<sup>163</sup> the sender is not put on equal footing with the company if the stipulation is considered as a contract. In other words, it would be in the nature of a contract made under duress.<sup>164</sup> And it cannot be said that a reduction of the charges for sending would increase the duty of the company to use more care in the transmission of messages.<sup>165</sup>

§ 401. **Same continued—nature of—liquidated damages.**—These stipulations, in this respect, contain clauses to this effect: "In consideration of the reduced rate for which this message is sent, the company shall not be liable beyond the amount paid for transmission," or, "to ten times the amount paid for transmission," or "to fifty times such amount where the message is repeated," or "to twenty per cent. of the amount of damage." All of such stipulations have been held unreasonable. In some jurisdictions, however, it has been held that it was an agreement made between the parties upon a certain sum as liquidated damages.<sup>166</sup> Judge Bonner said, while discussing this point: "We fail to perceive on principle why, in such cases, the parties may not, as they did here, agree upon a sum certain in the nature of liquidated damages for an error or delay arising from a cause other than misconduct, fraud or the want of proper care."<sup>167</sup>

§ 402. **Same continued—insured—same rule.**—In other blanks furnished by these companies, there have been stipulations to the effect that they would not be liable for damages beyond a cer-

<sup>162</sup> True v. International Tel. Co., 60 Me. 9, 11 Am. Rep. 161.

<sup>163</sup> See § 381 et seq.

<sup>164</sup> See § 383.

<sup>165</sup> Gray on Telegraph, § 51.

<sup>166</sup> West. U. Tel. Co. v. Neill, 57 Tex. 289, 44 Am. Rep. 589.

<sup>167</sup> Id.



tain amount, unless the message was ordered to be repeated, or unless an extra charge was given, in consideration of which it would insure a safe and correct transmission of the message.<sup>168</sup> These stipulations have also been held unreasonable and void for the reasons as given above.<sup>169</sup>

§ 403. **Night messages—time to be delivered.**—Telegraph companies generally have two different blank forms to be furnished to their patrons, and these are to be respectively used at the time at which application is made to the company for services. For instance, they have a day message blank and a night message blank. On these two forms are to be found stipulations differing from each other in some respects. As a general rule, the business of these companies at night is not so pressing as during the day, and for this reason they have adopted rules which are inscribed on these forms, to the effect that they will transmit messages during the night at a reduced rate, to be delivered at or by a certain time on the following morning. These stipulations do not exonerate the companies for any negligence in the transmission, or exempt them from liabilities arising from the want of due diligence in a prompt delivery, but they must exercise the same diligence in delivering these messages on the following morning as if the message had been sent as a day message. The stipulations are, therefore, reasonable.<sup>170</sup> It has been held, however, that a stipulation to the effect that, in consideration of reduced rates, the company's duty to deliver shall be deemed fulfilled by a delivery by noon of the succeeding day, is reasonable and valid.<sup>171</sup> This latter stipulation may be, and is, waived by a parol promise to the operator to have the message transmitted and delivered sooner.<sup>172</sup>

§ 404. **Unavoidable interruption—special contract.**—As elsewhere stated, telegraph companies are often interfered with in the transmission of messages by climatic changes;<sup>173</sup> in fact, this is the most serious difficulty with which they have to contend. When the means by which news could be transmitted by electricity

<sup>168</sup> *Brown v. Postal Tel. Cable Co.*, 111 N. C. 187, 16 S. E. 179, 32 Am. St. Rep. 793, 17 L. R. A. 648; *Harkness v. West. U. Tel. Co.*, 73 Iowa. 190, 34 N. W. 811, 5 Am. St. Rep. 672; *West. U. Tel. Co. v. Harris*, 19 Ill. App. 347; *American U. Tel. Co. v. Daughtery*, 89 Ala. 191, 7 South. 660.

<sup>169</sup> *Id.*

<sup>170</sup> *Fowler v. West. U. Tel. Co.*, 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211; *West. U. Tel. Co. v. Van Cleave*, 107 Ky. 464, 54 S. W. 827, 22 Ky. Law, Rep. 53, 92 Am. St. Rep. 366; *West. U. Tel. Co. v. McCoy* (Tex. Civ. App.) 31 S. W. 210; *West. U. Tel. Co. v. White* (Tex. Civ. App.) 149 S. W. 790.

<sup>171</sup> *West. U. Tel. Co. v. McCoy* (Tex. Civ. App.) 31 S. W. 210; *West. U. Tel. Co. v. Van Cleave*, 107 Ky. 464, 54 S. W. 827, 92 Am. St. Rep. 366; *West. U. Tel. Co. v. Johnson*, 107 Ky. 631, 55 S. W. 427. Compare *Hibbard v. West. U. Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 775.

<sup>172</sup> *West. U. Tel. Co. v. Bruner* (Tex.) 19 S. W. 149.

<sup>173</sup> See chapter XII.

were first brought into use, and for sometime thereafter, this difficulty was almost beyond the control of these companies; but after many years of close study by scientists on this subject, these interferences have, to a very great extent, been overcome; yet they are still often prevented from making a correct transmission of messages on account of these interferences. Not only is their business interfered with by these climatic changes, but often they are interrupted in their business by strikes.<sup>174</sup> In order to guard against these unavoidable interferences, and to relieve themselves from a limited amount of liability or any liability at all for failure or delay in the transmission of messages caused by such interferences, they have been forced to make special contracts with the sender of messages, whereby it is agreed that the former will not be liable for losses arising therefrom; and it has been held that these contracts were valid and enforceable, both as to interferences caused by the changes of climate,<sup>175</sup> and also by strikes.<sup>176</sup> But should the operator of the company know at the time the message was received that the wires of the company were being subjected to such interferences, and knew that for this reason the message would necessarily be delayed, it is his duty to notify the sender of such fact; and, on a failure so to do, the contract cannot be used as a defense by the company.<sup>177</sup> Neither could the company use this stipulation as a defense, when the delay was caused by the wire being used to send out train orders.<sup>178</sup>

§ 405. **Over connecting lines—stipulation—exemptions.**—A stipulation to this effect is found on the blanks of these companies: That the company is made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination. As may be seen, by a close observance of this stipulation, the company attempts to exempt itself from liabilities both over its own line and that of the connecting company, in that it represents itself as agent for the sender. As has been seen, a telegraph company may stipulate

<sup>174</sup> See § 362; *Sullivan v. West. U. Tel. Co.*, 82 S. C. 569, 64 S. E. 752, 129 Am. St. Rep. 903, 22 L. R. A. (N. S.) 1214, 17 Ann. Cas. 238.

<sup>175</sup> *Sweatland v. Illinois, etc., Tel. Co.*, 27 Iowa, 433, 1 Am. Rep. 285; *West. U. Tel. Co. v. Graham*, 1 Colo. 237, 9 Am. Rep. 136; *White v. West. U. Tel. Co.* (C. C.) 14 Fed. 710; *Riley v. West. U. Tel. Co.*, 6 Misc. Rep. 221, 26 N. Y. Supp. 532; *West. U. Tel. Co. v. Cohen*, 73 Ga. 522; *West. U. Tel. Co. v. Stiles* (Tex. Civ. App.) 35 S. W. 76.

<sup>176</sup> *Marvin v. West. U. Tel. Co.*, 16 Chic. Leg. N. 416.

<sup>177</sup> *West. U. Tel. Co. v. Birge-Forbes Co.*, 29 Tex. Civ. App. 526, 69 S. W. 181; *Pac. Postal Tel. Cable Co. v. Fleischner*, 66 Fed. 899, 14 C. C. A. 166, 29 U. S. App. 227; *West. U. Tel. Co. v. Bierhaus*, 12 Ind. App. 17, 39 N. E. 881; *West. U. Tel. Co. v. McMorris*, 158 Ala. 563, 48 South. 349, 132 Am. St. Rep. 46.

<sup>178</sup> See note 175, *supra*, for cases.

against losses caused on its own lines, when the same has not been brought about by any negligence on its own part,<sup>179</sup> but this is as far as it can go by stipulation, and any scheme by which it attempts to escape this liability—as that by agency—cannot be upheld; and so far, in this respect, the stipulation is void.<sup>180</sup> These companies may, however, by contract, become the agent of the sender with respect to the connecting lines; and it may, therefore, stipulate against any losses caused by delays or even a failure to transmit over the connecting line, and this, too, notwithstanding that this was caused by the latter's negligence.<sup>181</sup> The initial company has nothing to do with the operation or management of the

<sup>179</sup> See § 368.

<sup>180</sup> Does not protect initial carrier against its own negligence prior to the transfer. *Weatherford, etc., R. R. Co. v. Seals* (Tex. Civ. App.) 41 S. W. 841; *West. U. Tel. Co. v. Seals* (Tex. Civ. App.) 45 S. W. 964; see *Alexander v. West. U. Tel. Co.*, 158 N. C. 473, 74 S. E. 449, 42 L. R. A. (N. S.) 407; nor that of the connecting line after its receipt of the message, *Smith v. West. U. Tel. Co.*, 84 Tex. 359, 19 S. W. 441, 31 Am. St. Rep. 59; *Squire v. West. U. Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157. Compare *Keeting v. West. U. Tel. Co.*, 167 Mo. App. 601, 152 S. W. 95. Such a contract or stipulation does not authorize the transfer of a message to a telephone company if there is a connecting telegraph company, *West. U. Tel. Co. v. McLoud* (Tex. Civ. App.) 24 S. W. 815; nor does it require a telegraph company, where the addressee lives at a distance from its office, to deliver the message by telephone, *Hellams v. West. U. Tel. Co.*, 70 S. C. 83, 49 S. E. 12; *West. U. Tel. Co. v. Stratemeier*, 6 Ind. App. 125, 32 N. E. 871; *West. U. Tel. Co. v. Carew*, 15 Mich. 525; *La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383; *Pacific Tel. Co. v. Underwood*, 37 Neb. 315, 55 N. W. 1057, 40 Am. St. Rep. 490; *De Rutte v. N. Y., etc., Elec. Magnetic Tel. Co.*, 1 Daly (N. Y.) 547, 30 How. Prac. 403; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 751, 6 Am. Rep. 165, reversing 54 Barb. 505, 6 Abb. Prac. (N. S.) 405; *Hellams v. West. U. Tel. Co.*, 70 S. C. 83, 49 S. E. 12; *West. U. Tel. Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500; *Marr v. West. U. Tel. Co.*, 85 Tenn. 529, 3 S. W. 496; *West. U. Tel. Co. v. Munford*, 87 Tenn. 190, 10 S. W. 318, 10 Am. St. Rep. 630, 2 L. R. A. 601; *West. U. Tel. Co. v. Jones*, 81 Tex. 271, 16 S. W. 1006; *Smith v. West. U. Tel. Co.*, 84 Tex. 359, 19 S. W. 441, 31 Am. St. Rep. 59; *West. U. Tel. Co. v. McDonald*, 42 Tex. Civ. App. 229, 95 S. W. 691; *West. U. Tel. Co. v. Sorsby*, 29 Tex. Civ. App. 345, 69 S. W. 122; but initial company must notify sender if terminal line down. *Gulf, etc., R. R. Co. v. Geer*, 5 Tex. Civ. App. 349, 24 S. W. 86; *West. U. Tel. Co. v. Taylor*, 3 Tex. Civ. App. 310, 22 S. W. 532; *West. U. Tel. Co. v. McLeod* (Tex. Civ. App.) 22 S. W. 988; *West. U. Tel. Co. v. Carter* (Tex. Civ. App.) 156 S. W. 332.

<sup>181</sup> *Pacific Tel. Co. v. Underwood*, 37 Neb. 315, 55 N. W. 1057, 40 Am. St. Rep. 490; *West. U. Tel. Co. v. Carew*, 15 Mich. 525; *West. U. Tel. Co. v. Stratemeier*, 6 Ind. App. 125, 32 N. E. 871; *West. U. Tel. Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500; *Hellams v. West. U. Tel. Co.*, 70 S. C. 83, 49 S. E. 12; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *De Rutte v. New York, etc., Elec., etc., Co.*, 1 Daly (N. Y.) 547, 30 How. Prac. 403; *Marr v. West. U. Tel. Co.*, 85 Tenn. 529, 3 S. W. 496; *West. U. Tel. Co. v. Munford*, 87 Tenn. 190, 10 S. W. 318, 10 Am. St. Rep. 630, 2 L. R. A. 601; *West. U. Tel. Co. v. Jones*, 81 Tex. 271, 16 S. W. 1006; *Smith v. West. U. Tel. Co.*, 84 Tex. 359, 19 S. W. 441, 31 Am. St. Rep. 59; *West. U. Tel. Co. v. Sorsby*, 29 Tex. Civ. App. 345, 69 S. W. 122; *West. U. Tel. Co. v. McDonald*, 42 Tex. Civ. App. 229, 95 S. W. 691; *West. U. Tel. Co. v. McLeod* (Tex. Civ. App.) 22 S. W. 988; *Gulf, etc., R. Co. v. Geer*, 5 Tex. Civ. App. 349, 24 S. W. 86; *West. U. Tel. Co. v. Taylor*, 3 Tex. Civ. App. 310, 22 S. W. 532. See *Baxter v. Dominion Tel. Co.*, 37 U. C. Q. B. 470; *Stevenson v. Montreal Tel. Co.*, 16 U. C. Q. B. 530.



connecting line;<sup>182</sup> so to hold it liable for any losses caused over this latter line—and against which it has stipulated—would be unreasonable and therefore void.

§ 406. **Stipulation against cipher messages—valid.**—There is a conflict of opinion as to whether telegraph companies can contract against errors or delays made in the transmission of cipher, or otherwise obscure messages, where the same has been assented to by the sender. Some of the courts hold that the duty of the company to send correctly messages which are written in cipher is the same as that imposed on them to transmit messages which are fully written out and clearly understood by the operator. They cannot contract against losses caused by their own negligence in transmitting messages which are clearly understood by the operator; and these courts hold that they cannot make such a contract even though it be in cipher.<sup>183</sup> Judge Guffy, in rendering a decision on this point, said: "It is often of the utmost importance to the sender or receiver of messages that the same should be in cipher or obscure, because if sent in plain language the contents would often become known and the object in view defeated; hence public policy forbids that appellant should by any contract exempt itself from the

<sup>182</sup> See § 447 et seq.

<sup>183</sup> *West. U. Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 36 L. R. A. 711, 66 Am. St. Rep. 361; *Daughtery v. American U. Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435; *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844; *West. U. Tel. Co. v. Hyer*, 22 Fla. 637, 1 South. 129, 1 Am. St. Rep. 222; *West. U. Tel. Co. v. Blanchard*, 68 Ga. 299, 49 Am. Rep. 480; *West. U. Tel. Co. v. Fatman*, 73 Ga. 285, 54 Am. Rep. 877; *West. U. Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715; *Postal Tel. Cable Co. v. Wells*, 82 Miss. 733, 35 South. 190; *Baily v. West. U. Tel. Co.*, 227 Pa. 522, 76 Atl. 736, 43 L. R. A. (N. S.) 502, 19 Ann. Cas. 895; *American Union Tel. Co. v. Daughtery*, 89 Ala. 191, 7 South. 660; *Dodd Grocery Co. v. Postal Tel. Cable Co.*, 112 Ga. 685, 37 S. E. 981; *Beggs v. Postal Tel. Cable Co.*, 159 Ill. App. 247; *Postal Tel. Cable Co. v. Louisville Cotton Oil Co.*, 136 Ky. 843, 122 S. W. 852, 125 S. W. 266; *Carland v. West. U. Tel. Co.*, 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280; *Postal Tel. Cable Co. v. Robertson*, 36 Misc. Rep. 785, 74 N. Y. Supp. 876; *U. S. Tel. Co. v. Wenger*, 55 Pa. 262, 93 Am. Dec. 751; *West. U. Tel. Co. v. Nagle*, 11 Tex. Civ. App. 539, 32 S. W. 707; *Houston, etc., Tel. Co. v. Davidson*, 15 Tex. Civ. App. 334, 39 S. W. 605; *West. U. Tel. Co. v. Bell*, 24 Tex. Civ. App. 573, 59 S. W. 918; *West. U. Tel. Co. v. Birge-Forbes Co.*, 29 Tex. Civ. App. 526, 69 S. W. 181; *Abeles v. West. U. Tel. Co.*, 37 Mo. App. 554; *Hibbard v. West. U. Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 775; *West. U. Tel. Co. v. Merritt*, 55 Fla. 462, 46 South. 1024, 127 Am. St. Rep. 169; *Tyler v. West. U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 738; *Postal Tel. Cable Co. v. Lathrop*, 131 Ill. 575, 23 N. E. 586, 19 Am. St. Rep. 55, 7 L. R. A. 474; *West. U. Tel. Co. v. Crall*, 38 Kan. 679, 17 Pac. 309, 5 Am. St. Rep. 795; *Candee v. West. U. Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452; *Kirby v. West. U. Tel. Co.*, 4 S. D. 105, 55 N. W. 759, 46 Am. St. Rep. 765, 30 L. R. A. 612; *Pepper v. West. U. Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660; *Marr v. West. U. Tel. Co.*, 85 Tenn. 529, 3 S. W. 496; *West.*

damages resulting from its negligence in transmitting such messages." <sup>184</sup>

§ 407. **Same continued—contrary view.**—While the above is the holding of a goodly number of decisions, based on apparently plausible reasoning, yet the weight of authority—and a better view, we think, in which to consider the subject—is to the contrary.<sup>185</sup> There is a distinction between the two kinds of messages out of which the duty of the company, with respect to the two arises. It is very true that it is as much the duty of the company to ex-

U. Tel. Co. v. Edsall, 74 Tex. 329, 12 S. W. 41, 15 Am. St. Rep. 835; Wertz v. West. U. Tel. Co., 7 Utah, 446, 27 Pac. 172, 13 L. R. A. 510; Shingleur v. West. U. Tel. Co., 72 Miss. 1030, 18 South. 425, 48 Am. St. Rep. 604, 30 L. R. A. 447.

<sup>184</sup> West. U. Tel. Co. v. Eubanks, 100 Ky. 591, 38 S. W. 1068, 66 Am. St. Rep. 368, 36 L. R. A. 711.

<sup>185</sup> Primrose v. West. U. Tel. Co., 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; Cannon v. West. U. Tel. Co., 100 N. C. 300, 6 S. E. 731, 6 Am. St. Rep. 590; Hill v. West. U. Tel. Co., 42 S. C. 367, 20 S. E. 135, 46 Am. St. Rep. 734; West. U. Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772.

In the following cases the sender was permitted to recover nominal damages only: Primrose v. West. U. Tel. Co., 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; West. U. Tel. Co. v. Eubanks, 100 Ky. 591, 38 S. W. 1068, 66 Am. St. Rep. 361, 36 L. R. A. 711; Postal Tel. Cable Co. v. Fleischner, 66 Fed. 899, 14 C. C. A. 166; Hart v. West. U. Tel. Co., 66 Cal. 579, 6 Pac. 637, 56 Am. Rep. 119; White v. West. U. Tel. Co. (C. C.) 5 McCrary, 103, 14 Fed. 710; West. U. Tel. Co. v. Coggin, 68 Fed. 137, 15 C. C. A. 231; West. U. Tel. Co. v. Martin, 9 Ill. App. 587; Shields v. Washington Tel. Co., 9 West. Law J. 283; Shaw v. Postal Tel. Cable Co., 79 Miss. 670, 31 South. 222, 89 Am. St. Rep. 666, 56 L. R. A. 486; Postal Tel. Cable Co. v. Wells, 82 Miss. 733, 35 South. 190; Newsome v. West. U. Tel. Co., 137 N. C. 513, 50 S. E. 279; Fererro v. West. U. Tel. Co., 9 App. D. C. 455, 35 L. R. A. 548; Harrison v. West. U. Tel. Co., 3 Willson, Civ. Cas. Ct. App. § 43; Postal Tel. Cable Co. v. Lathrop, 131 Ill. 575, 23 N. E. 583, 19 Am. St. Rep. 55, 7 L. R. A. 474; West. U. Tel. Co. v. Hall, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479; Postal Tel. Cable Co. v. Barwise, 11 Colo. App. 329, 53 Pac. 252; U. S. Tel. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519; Wheelock v. Postal Tel. Cable Co., 197 Mass. 119, 83 N. E. 313, 14 Ann. Cas. 188; Beaupre v. Pacific Tel. Co., 21 Minn. 155; Hughes v. West. U. Tel. Co., 79 Mo. App. 133; Melson v. West. U. Tel. Co., 72 Mo. App. 111; Smith v. West. U. Tel. Co., 80 Neb. 395, 114 N. W. 288; Cannon v. West. U. Tel. Co., 100 N. C. 300, 6 S. E. 731, 6 Am. St. Rep. 596; Frazier v. West. U. Tel. Co., 45 Or. 414, 78 Pac. 330, 67 L. R. A. 319, 2 Ann. Cas. 396; Fergusson v. Anglo-American Tel. Co., 178 Pa. 377, 35 Atl. 979, 56 Am. St. Rep. 770, 35 L. R. A. 554; Daniel v. West. U. Tel. Co., 61 Tex. 452, 48 Am. Rep. 305; West. U. Tel. Co. v. Adams, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844; West. U. Tel. Co. v. Wilson, 32 Fla. 527, 14 South. 1, 37 Am. St. Rep. 125, 22 L. R. A. 434, overruling West. U. Tel. Co. v. Hyer, 22 Fla. 637, 1 South. 129, 1 Am. St. Rep. 222; Candee v. West. U. Tel. Co., 34 Wis. 471, 17 Am. Rep. 452. The stipulation does not apply where there is an entire failure to transmit the message, and no effort made to do so. West. U. Tel. Co. v. Way, 83 Ala. 542, 4 South. 444.

ercise the same care and diligence in the transmission of one as in the other; but the duty of the company arising out of one may be very greatly lessened by a clearer knowledge of the contents of the message. In other words, there is no question that it requires a much greater degree of care to transmit accurately and correctly a cipher or obscure message than it does one which is clearly and plainly written out. Any operator or interpreter can, with a much greater degree of accuracy, communicate a message or statement when he understands the meaning of it, than he could if the message or statement was not understood. Then, it seems to us that where it does require a much greater degree of care in transmitting cipher messages that the company might relieve itself of some of these responsibilities by a contract to that effect. It is also true that the transmission of a message in cipher is a good scheme by which the nature of the business to be accomplished may be kept secret; but, as elsewhere said, it is the duty of these companies not to divulge the contents of any message intrusted to their care.<sup>186</sup> This duty has been imposed, in many states, by statutes, a violation of which would subject the company and its operators to punishment.<sup>187</sup> This is a duty also imposed on these companies for public policy, a violation of which, in this sense, would subject them to an action *ex delicto* or *ex contractu*.<sup>188</sup> So, it will be clearly seen, there is no plausible reason for holding that these contracts could be made on the ground that the contents of the message may become known. This being the condition of affairs, it seems that a contract could be entered into by which the company could exempt itself for losses caused by errors made—not negligently but after exercising due care—in the transmission of such messages.

§ 408. **Where and when messages accepted.**—Another stipulation usually found on these blanks is that the liability of the company for any loss arising out of or in connection with the transmission of messages does not attach until the message is delivered to and accepted at one of its transmitting offices. This has been held, on good reason, to be a valid stipulation.<sup>189</sup> It is hardly necessary to go into the reason for sustaining this rule, for it is en-

<sup>186</sup> See chapter XXIX.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* See *Penn v. West. U. Tel. Co.*, 159 N. C. 306, 75 S. E. 16, 41 L. R. A. (N. S.) 223, notice of claim.

<sup>189</sup> *Stamey v. West. U. Tel. Co.*, 92 Ga. 613, 44 Am. St. Rep. 95, 18 S. E. 1008. See, also, § 276 et seq.



tirely too clear for argument that the liability of the company should not attach until after the message is received at its place of business. The most essential requirement of this stipulation, however, is, that the message must have been filed in one of the transmitting offices before the error was made; and it matters not so much by whom it was delivered, provided it was accepted by a proper employé of the company.<sup>190</sup> Thus, if the message was delivered to an agent of the company when absent from his office, but the same was duly filed by him on his return, and its delay occurred after such filing, the company cannot, under such circumstances, receive any protection from this stipulation.<sup>191</sup>

§ 409. **Delivery to messenger—valid.**—Another stipulation, closely connected with the one discussed in the preceding section, is that, if a message is sent to one of the transmitting offices of the company by one of its messengers, he acts for that purpose as the agent for the sender.<sup>192</sup> This rule has been held reasonable, even though the message was delivered to one of the company's delivery messengers who was acting in that capacity at that time, provided he did not have authority from the company to receive the message.<sup>193</sup> The duty of these messengers is to deliver the message to the addressee, and when this shall have been done their duty is at an end. As was said: "They are not sent out from the company's office to solicit telegrams, and being engaged in a most subordinate work of the company's service, it is presumed that they are not invested by the company with the powers of receiving the company's charges or fees for the transmission of telegrams."<sup>194</sup> This stipulation affords no protection to the company, if the message delivered by the messenger request a reply, and the company directs the messenger to obtain from the addressee such reply.<sup>195</sup> And the company may waive its rights acquired under the stipulation. Thus, if it has been the custom of the company to consider a

<sup>190</sup> *Planters' Cotton Oil Co. v. West. U. Tel. Co.*, 126 Ga. 621, 55 S. E. 495, 6 L. R. A. (N. S.) 1180, holding that, where plaintiff's agent, in an attempt to deliver a message for transmission, used the telephone, was not sufficient delivery; *West. U. Tel. Co. v. Lillard*, 86 Ark. 208, 110 S. W. 1035, 17 L. R. A. (N. S.) 836, railroad agent may have right to receive messages, proof of.

<sup>191</sup> *West. U. Tel. Co. v. Pruett* (Tex. Civ. App.) 35 S. W. 78.

<sup>192</sup> See § 278.

<sup>193</sup> *Ayres v. West. U. Tel. Co.*, 65 App. Div. 149, 72 N. Y. Supp. 634; *Stamey v. West. U. Tel. Co.*, 92 Ga. 613, 44 Am. St. Rep. 95, 18 S. E. 1008. See § 278.

<sup>194</sup> *Stamey v. West. U. Tel. Co.*, 92 Ga. 613, 44 Am. St. Rep. 98, 18 S. E. 1008.

<sup>195</sup> *Will v. Postal Tel. Cable Co.*, 3 App. Div. 22, 37 N. Y. Supp. 933; *Alexander v. West. U. Tel. Co.*, 158 N. C. 473, 74 S. E. 449, 42 L. R. A. (N. S.) 407. See § 278.

delivery to the messenger a delivery to the company, it cannot obtain protection under this stipulation.<sup>196</sup>

§ 410. **Waiver of stipulation limiting company's liability.**—Stipulations limiting the liability of telegraph companies, or fixing the time and manner of presenting claims or notices, may be waived by the company impliedly by conduct as well as expressly.<sup>197</sup> Thus, where the company received a claim and acted upon it after the expiration of the time, without any objection on that account, it will be presumed that the stipulation has been waived.<sup>198</sup> So also it is required that the claim shall be presented in writing, but if they are received and acted upon, or there is a promise to act upon them without objection by the company on this account, it will be deemed that it has made a waiver of this requirement.<sup>199</sup> And a stipulation limiting the company to a certain sum is waived when the company, in adjusting the damages, agrees to pay the injured party a larger sum than that stated in the contract limiting its liability.<sup>200</sup> But it has been held that an injured party has no right to rely upon the promise of one of the company's agents to waive a provision as to the time within which suit must be brought, when he knows that such agent has no right to adjust such claim without authority from the company.<sup>201</sup>

§ 411. **Burden of proof.**—It may often become of great importance when telegraph companies attempt to exonerate themselves from losses by these stipulations or special contracts, to determine upon whom the burden of proof rests. There is some conflict of authority upon some phases of this subject. But the proposition seems to be pretty well settled that proof of loss caused in the transmission or delivery of messages generally raises a presumption of negligence or fault on the part of the company; and the burden rests upon the latter to explain or account for the loss

<sup>196</sup> *Will v. Postal Tel. Cable Co.*, 3 App. Div. 22, 37 N. Y. Supp. 933; *Alexander v. Tel. Co.*, 158 N. C. 473, 74 S. E. 449, 42 L. R. A. (N. S.) 407. See § 278.

<sup>197</sup> *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 16 S. W. 441; *Hess v. Missouri Pac. R. Co.*, 40 Mo. App. 202; *Merrill v. American Ex. Co.*, 62 N. H. 514; *Glen v. South. Ex. Co.*, 86 Tenn. 594, 8 S. W. 152; *Hudson v. Northern Pac. R. Co.*, 92 Iowa, 231, 60 N. W. 608, 54 Am. St. Rep. 550. See §§ 346, 355. See, also, *West. U. Tel. Co. v. Hearn*, 110 Ark. 176, 161 S. W. 1025, Ann. Cas. 1915D, 378.

<sup>198</sup> *International, etc., R. Co. v. Underwood*, 62 Tex. 21; *Hudson v. Northern Pac. R. Co.*, 92 Iowa, 231, 60 N. W. 608, 54 Am. St. Rep. 550.

<sup>199</sup> *Bennett v. Northern Pac. Ex. Co.*, 12 Or. 49, 6 Pac. 160; *Rice v. Kansas Pac. R. Co.*, 63 Mo. 314; *Atchison, etc., R. Co. v. Temple*, 47 Kan. 7, 27 Pac. 98, 13 L. R. A. 362, note.

<sup>200</sup> *Chicago, etc., R. Co. v. Katzenbach*, 118 Ind. 174, 20 N. E. 709.

<sup>201</sup> *Gulf, etc., R. Co. v. Brown* (Tex. Civ. App.) 24 S. W. 918.

in some way in order that it may be exonerated.<sup>202</sup> If the company claims that the loss or damage occurred from some cause excepted by the stipulation or special contract, the burden is upon the company to show that fact.<sup>203</sup> As we have seen, however, the company is generally liable for its own negligence, even though the loss was from some excepted cause, occasioned by its failure to exercise due care. In many states the burden is upon the company not only to show that the loss was within the terms of the exception, but also that the loss was not caused by any negligence on its part, at least, none which was a proximate cause of the loss. There is some authority which supports the rule that, after the loss is shown to be within the exception, the burden of proof then rests upon the plaintiff to show negligence upon the part of the company.<sup>204</sup> Eminent judges and text-writers approve the former rule, and we are inclined to think that the better reasoning is in favor of it.

§ 412. **Proof of assent to stipulation.**—The message blank furnished by telegraph companies to their customers contains contracts and stipulations which are so arranged therein that the sender, when he affixes his name thereto, is presumed, in the absence of fraud or imposition, to have assented to the terms of the contract, and is bound by all those which are reasonable,<sup>205</sup> even

<sup>202</sup> Compare *Canfield v. Baltimore, etc., R. Co.*, 93 N. Y. 532, 45 Am. Rep. 268; *Grogan v. Adams Ex. Co.*, 114 Pa. 523, 7 Atl. 134, 60 Am. Rep. 360; *Adams Ex. Co. v. Haynes*, 42 Ill. 89; *Mann v. Birchard*, 40 Vt. 326, 94 Am. Dec. 398; *Chapman v. New Orleans, etc., R. Co.*, 21 La. Ann. 224, 99 Am. St. Rep. 722. See chapter XIII.

<sup>203</sup> Compare *Maghee v. Camden, etc., R. Co.*, 45 N. Y. 514, 6 Am. Rep. 124; *Keeney v. Grand Trunk R. Co.*, 47 N. Y. 525. See *McGehee v. West. U. Tel. Co.*, 169 Ala. 109, 53 South. 205, Ann. Cas. 1912B, 512.

<sup>204</sup> See *Kilby v. West. U. Tel. Co.*, 109 N. Y. 231, 16 N. E. 75; *Ayres v. West. U. Tel. Co.*, 65 App. Div. 149, 72 N. Y. Supp. 634. Compare *Little Rock, etc., Co. v. Talbot*, 39 Ark. 523; *Same v. Harper*, 44 Ark. 208; *Witting v. St. Louis, etc., R. Co.*, 101 Mo. 631, 14 S. W. 743, 10 L. R. A. 602, 20 Am. St. Rep. 636; *Smith v. North Carolina R. Co.*, 64 N. C. 235; *Railway Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. 314; *Buck v. Pennsylvania R. Co.*, 150 Pa. 170, 24 Atl. 678, 30 Am. St. Rep. 800.

<sup>205</sup> *Alabama*.—*West. U. Tel. Co. v. Prevatt*, 149 Ala. 617, 43 South. 106.

*Georgia*.—*Hill v. West. U. Tel. Co.*, 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; *Stamey v. West. U. Tel. Co.*, 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95.

*Iowa*.—*Sweatland v. Illinois, etc., Tel. Co.*, 27 Iowa, 433, 1 Am. Rep. 285.

*Kentucky*.—*Camp v. West. U. Tel. Co.*, 1 Metc. (Ky.) 164, 71 Am. Dec. 461.

*Maryland*.—*Birney v. N. Y. etc., Printing Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607.

*Massachusetts*.—*Grinnell v. West. U. Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485; *Redpath v. West. U. Tel. Co.*, 112 Mass. 71, 17 Am. Rep. 69.

*Michigan*.—*Jacob v. West. U. Tel. Co.*, 135 Mich. 600, 98 N. W. 402; *West. U. Tel. Co. v. Carew*, 15 Mich. 525.

*Minnesota*.—*Cole v. West. U. Tel. Co.*, 33 Minn. 227, 22 N. W. 385.



though he did not read or notice them, or was not able to read them.<sup>206</sup> He is presumed to have had notice of these from the fact that they are contained on the blanks. A very common sense rule—and one for the reason of which there is no necessity for argument—is that no statement, agreement or any other kind of writing should be signed until it shall have been read and understood. The rule applies to contracts and regulations of telegraph companies as it does to writings given out by any other corporation or individual.

*Missouri*.—Grant v. West. U. Tel. Co., 154 Mo. App. 279, 133 S. W. 673.

*Nebraska*.—Becker v. West. U. Tel. Co., 11 Neb. 87, 7 N. W. 868, 3 Am. Rep. 356.

*New York*.—Kiley v. West. U. Tel. Co., 109 N. Y. 231, 16 N. E. 75; Young v. West. U. Tel. Co., 65 N. Y. 163; Breese v. U. S. Tel. Co., 48 N. Y. 132, 8 Am. Rep. 526; Pearsall v. West. U. Tel. Co., 44 Hun (N. Y.) 532; Schwartz v. Atlantic, etc., Tel. Co., 18 Hun (N. Y.) 159.

*Pennsylvania*.—Wolf v. West. U. Tel. Co., 62 Pa. 83, 1 Am. Rep. 387; Passmore v. West. U. Tel. Co., 78 Pa. 238.

*South Carolina*.—Young v. West. U. Tel. Co., 65 S. C. 93, 43 S. E. 448; Pinckney v. West. U. Tel. Co., 19 S. C. 73, 45 Am. Rep. 765.

*Tennessee*.—West. U. Tel. Co. v. Courtney, 113 Tenn. 482, 82 S. W. 484; Marr v. West. U. Tel. Co., 85 Tenn. 530, 3 S. W. 496.

*Texas*.—Womack v. West. U. Tel. Co., 58 Tex. 176, 44 Am. Rep. 614; West. U. Tel. Co. v. Edsall, 63 Tex. 668; Anderson v. West. U. Tel. Co., 84 Tex. 17, 19 S. W. 285.

*United States*.—Primrose v. West. U. Tel. Co., 154 U. S. 1, 38 L. Ed. 883, 14 Sup. Ct. 1098; Postal Tel. Cable Co. v. Nicolls, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A. (N. S.) 870, 14 Ann. Cas. 369; Beasley v. West. U. Tel. Co. (C. C.) 39 Fed. 181.

*Infants*.—Stipulations are binding on sender who is an infant. West. U. Tel. Co. v. Greer, 115 Tenn. 368, 89 S. W. 327, 1 L. R. A. (N. S.) 525.

<sup>206</sup> West. U. Tel. Co. v. Henderson, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; West. U. Tel. Co. v. Edsall, 63 Tex. 668; West. U. Tel. Co. v. Prevatt, 149 Ala. 617, 43 South. 106; Cole v. West. U. Tel. Co., 33 Minn. 227, 22 N. W. 385; Grinnell v. West. U. Tel. Co., 113 Mass. 299, 18 Am. Rep. 485; Kiley v. West. U. Tel. Co., 109 N. Y. 231, 16 N. E. 75; Breese v. U. S. Tel. Co., 48 N. Y. 132, 8 Am. Rep. 526; West. U. Tel. Co. v. Edsall, 63 Tex. 668; Beasley v. West. U. Tel. Co. (C. C.) 39 Fed. 181; Postal Tel. Cable Co. v. Nicolls, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A. (N. S.) 870, 14 Ann. Cas. 369. In Illinois it is held that the condition must have been known or assented to. West. U. Tel. Co. v. Lyeon, 60 Ill. App. 124; Webbe v. West. U. Tel. Co., 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 207, reversing 64 Ill. App. 331; Beggs v. Postal Tel. Cable Co., 159 Ill. App. 247.

*Signed by employé of company*.—Where the operator or messenger writes the telegram at the request and dictation of the sender, the former acts as agent for the latter in that particular act, and the sender is bound by the stipulations contained in the blank on which the telegram is written, the same as if he had made it out himself. West. U. Tel. Co. v. Prevatt, 149 Ala. 617, 43 South. 106; West. U. Tel. Co. v. Benson, 159 Ala. 254, 48 South. 712; West. U. Tel. Co. v. Foster, 64 Tex. 220, 53 Am. Rep. 754; Gulf, etc., R. Co. v. Geer, 5 Tex. Civ. App. 349, 24 S. W. 86; West. U. Tel. Co. v. Edsall, 63 Tex. 668; West. U. Tel. Co. v. Jackson, 163 Ala. 9, 50 South. 316; Lavelle v. West. U. Tel. Co., 102 Ark. 607, 145 S. W. 205. See, also, West. U. Tel. Co. v. Simms, 30 Tex. Civ. App. 32, 69 S. W. 464.

So it has been held that it will be presumed the sender understood the contents of the blank and accepted the terms; and he is therefore estopped from denying or disputing the agreement.<sup>207</sup> Neither can he, in absence of misrepresentation or fraud, with full opportunity to be informed of its contents, avoid the contract upon the ground of his negligence or omission to read it, or to avail himself of such information.<sup>208</sup> Fraud will make all contracts voidable, and if there has been any misrepresentation or fraud perpetrated by the company on the sender, of course the contract will not be enforceable. It may seem to be a hard rule to impose such laws upon people who may be too ignorant to read the contents of these blanks, or who may not have had the time to read them. But, as it has often been said, these companies, like all other public institutions, have the right to pass and enforce all reasonable rules and regulations for the betterment of their business;<sup>209</sup> and they may also limit to a certain extent some of their common-law liabilities by stipulations and contracts assented to by their customers. These rules are certain, fixed and universal, and become part of the laws of their institution, and are, in a sense, promulgated to the public by notices on placards conspicuously tacked in their offices and elsewhere, and by notices given in their message blanks. This is the only means by which their regulations and contracts would likely come into the hands of those who should desire to employ them, and it is the duty of the latter—even though it may be some imposition on them—to accept the notice of these in this way; and it is presumed that they have been so accepted and agreed to when the sender has attached his signature to the blank.

§ 413. **Contrary holding.**—It is held in some jurisdictions that the mere fact that the sender affixes his signature does not of itself make the contract binding upon him, unless it is actually brought to his notice, and he signs with full knowledge of its terms.<sup>210</sup> In those states in which this is the holding, the question of knowledge and assent is a question of fact to be left to a jury upon evidence

<sup>207</sup> *Breese v. United States Tel. Co.*, 48 N. Y. 132, 8 Am. Rep. 526; *Belzer v. Dinsmore*, 51 N. Y. 166, 10 Am. Rep. 575; *Womack v. West. U. Tel. Co.*, 58 Tex. 176, 44 Am. Rep. 614.

<sup>208</sup> *Breese v. United States Tel. Co.*, 48 N. Y. 132, 8 Am. Rep. 526; *Soumet v. National, etc.*, 66 Barb. (N. Y.) 284; *Womack v. West. U. Tel. Co.*, 58 Tex. 176, 44 Am. Rep. 614; *Lavelle v. West. U. Tel. Co.*, 102 Ark. 607, 145 S. W. 205.

<sup>209</sup> See chapter XIV.

<sup>210</sup> *Tyler v. West. U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *Brown v. Eastern R. Co.*, 11 Cush. (Mass.) 97; *Illinois Central R. Co. v. Frankenberg*, 54 Ill. 88, 5 Am. Rep. 92; *West. U. Tel. Co. v. Stevenson*, 128 Pa. 442, 15 Am. St. Rep. 687, *Id.*, 128 Pa. 442, 18 Atl. 441, 5 L. R. A. 515, 15 Am. St. Rep. 687.

*aliunde*.<sup>211</sup> As was said on the subject: "Whether he (the sender) had knowledge of its terms and assented to its restrictions is for a jury to determine, as a question of evidence *aliunde*, and all the circumstances attending the giving of the blank are admissible in evidence to enable the jury to determine that fact,"<sup>212</sup> and "slight evidence of acceptance of, or assent to, such regulations, would no doubt suffice, but it is for the jury to determine."<sup>213</sup> While this is the rule in some courts, yet the weight of authority, both court decisions and text-writers, is to the effect as stated heretofore.<sup>214</sup> It will be seen, further, that some of these decisions were rendered in cases where the messages were written out by the sender on paper other than on the blank forms furnished by the company, but were later attached to these forms by the operator.<sup>215</sup>

§ 414. **Special contracts—not applicable.**—The rule first stated, we think, should not be applicable where the contract is special, or one which has been but recently adopted by the company, when its purpose is to exempt it from some of its common-law liabilities.<sup>216</sup> In these instances the sender should be specially referred to these contracts, in order that he may give special consideration to their terms before agreeing to them. It is a rule in the law of contracts that the contracting parties must be equally situated, in order to consider fairly the terms of the contract. In other words, neither should have any advantage over the other by the position held; and nothing should be given out or retained by either party, which would have the tendency to mislead the other. It would be unfair and illegal to attempt to force the terms of such a contract upon senders who had no knowledge of them, or who may not have had an opportunity to consider them fairly and uninfluenced. As was said in the preceding section, those rules therein were binding on

<sup>211</sup> West. U. Tel. Co. v. Stevenson, above cited. See, also, West. U. Tel. Co. v. Hearn, 110 Ark. 176, 161 S. W. 1025, Ann. Cas. 1915D, 378.

<sup>212</sup> Tyler v. West. U. Tel. Co., 60 Ill. 421, 14 Am. Rep. 38, approved by Webbe v. West. U. Tel. Co., 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 209.

<sup>213</sup> Id.

<sup>214</sup> See § 412.

<sup>215</sup> West. U. Tel. Co. v. Stevenson, above cited.

<sup>216</sup> In Webbe v. West. U. Tel. Co., 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 210, the court said: "Some of the cases seem to hold that the printed conditions upon blank forms of telegraphic dispatches, including the one in reference to the limit of sixty days, are mere regulations, and not contracts between the sender of the message and the telegraph company. The force of the distinction thus sought to be made lies in the fact that, if the conditions or stipulations are considered as mere regulations, the assent of the sender to them is not necessary, but that he will be bound if they are brought home to his knowledge; whereas, if they are held to be parts of a contract, the assent of the sender must be shown in order to bind him."



the sender, although he fails or is unable to read them; but if he is unable to read special contracts on the account of his illiteracy, it is the duty of the company to inform him of their terms, or to give him special notice of them, in order that he may get others to read them for him. These contracts and stipulations contained in the message blanks are more especially beneficial to the company, and for this reason no advantage should be taken on account of its position, and no fraud, therefore, should be perpetrated on the public.

**§ 415. Small type—not fraud.**—It very often becomes necessary for these stipulations to be written in small type, otherwise, on account of the number and length of them, the message blanks would be too large, cumbersome and inconvenient. Should, however, this matter be written so as to mislead the sender, but, on the other hand, the same is referred to by larger type, this will not be such an imposition or fraud as will affect the validity of the stipulation.<sup>217</sup> The general method by which the sender is referred to these stipulations is by a notice written out on the front part and at the bottom of the message blank, and in the following words: "Read the notice and agreement on back." So, whenever the sender fills out one of these message blanks, he is presumed to have observed this notice and complied with its request. At the top and on the front of these blanks may also be seen notices referring the sender to certain agreements which are to be accepted by him. Then, turning to the back of these blanks, there may be seen written at the top in large letters a notice that all the stipulations thereunder enter into and become a part of the contract for sending. There is nothing about these blank forms which would have a tendency to mislead any one, but nearly all of them contain notices which point almost directly to each and every stipulation, whether it be written in bold type or in other type not so large.

**§ 416. Assent of addressee.**—One of the most difficult subjects with which we have been so far confronted in this work is whether the assent of the addressee is necessary to make these stipulations binding on him. This subject has been very ably discussed both ways by the most eminent judges and text-writers, who have advanced reasons which appear unanswerable. We shall attempt to set forth the reasons given each way, and then endeavor to harmonize these as far as it is possible. The answer to this question depends upon which ground the court bases the right of recovery. Some of the courts consider that the receiver's right to recover

<sup>217</sup> *Wolf v. West. U. Tel. Co.*, 62 Pa. 83, 1 Am. Rep. 387.

rests entirely upon the contract made by the sender, upon the principle that, where two parties contract for the benefit of a third, such third party may maintain an action for the breach of the agreement in his own right.<sup>218</sup> Whenever it is considered in this light, it necessarily follows that the receiver can assert no rights except such as are embodied in the contract made by the sender, and he is therefore bound by the conditions and stipulations appearing upon the blank upon which the message is sent, and to which the sender has assented.<sup>219</sup>

<sup>218</sup> *Manier v. West. U. Tel. Co.*, 94 Tenn. 448, 29 S. W. 732.

*Binding on third party.*—Where the third party, being neither the sender or receiver, for whose benefit the message is made by others, he would be bound by the stipulations. *Sherrill v. West. U. Tel. Co.*, 109 N. C. 527, 14 S. E. 94; *Whitehill v. West. U. Tel. Co.* (C. C.) 136 Fed. 499.

<sup>219</sup> *West. U. Tel. Co. v. Waxelbaum*, 113 Ga. 1017, 39 S. E. 443, 56 L. R. A. 741; *Stamey v. West. U. Tel. Co.*, 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95; *West. U. Tel. Co. v. James*, 90 Ga. 254, 16 S. E. 83; *Sweatland v. Illinois, etc., Tel. Co.*, 27 Iowa. 433, 1 Am. Rep. 285; *Russell v. West. U. Tel. Co.*, 57 Kan. 230, 45 Pac. 598; *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226; *Massengale v. West. U. Tel. Co.*, 17 Mo. App. 257; *Curtin v. West. U. Tel. Co.*, 16 Misc. Rep. 347, 38 N. Y. Supp. 58; *Aiken v. West. U. Tel. Co.*, 5 S. C. 358; *Manier v. West. U. Tel. Co.*, 94 Tenn. 442, 29 S. W. 732; *West. U. Tel. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *West. U. Tel. Co. v. Culberson*, 79 Tex. 65, 15 S. W. 219. See note to *Camp v. West. U. Tel. Co.*, 71 Am. Dec. 466; *Birkett v. West. U. Tel. Co.*, 103 Mich. 361, 61 N. W. 645, 33 L. R. A. 404, 50 Am. St. Rep. 374; *West. U. Tel. Co. v. Neel*, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847; *Coit v. West. U. Tel. Co.*, 130 Cal. 657, 63 Pac. 83, 80 Am. St. Rep. 153, 53 L. R. A. 678; *Hill v. West. U. Tel. Co.*, 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; *West. U. Tel. Co. v. Van Cleave*, 107 Ky. 464, 54 S. W. 827, 22 Ky. Law Rep. 53, 92 Am. St. Rep. 366; *Clement v. West. U. Tel. Co.*, 77 Miss. 747, 27 South. 603; *Halsted v. Postal Tel. Cable Co.*, 193 N. Y. 293, 85 N. E. 1078, 127 Am. St. Rep. 952, 19 L. R. A. (N. S.) 1021, affirming 120 App. Div. 433, 104 N. Y. Supp. 1016; *Lewis v. West. U. Tel. Co.*, 117 N. C. 436, 23 S. E. 319; *Sherrill v. West. U. Tel. Co.*, 109 N. C. 527, 14 S. E. 94; *Frazier v. West. U. Tel. Co.*, 45 Or. 414, 78 Pac. 330, 67 L. R. A. 319, 2 Ann. Cas. 396; *Broom v. West. U. Tel. Co.*, 71 S. C. 506, 51 S. E. 259, 4 Ann. Cas. 611; *Lester v. West. U. Tel. Co.*, 84 Tex. 313, 19 S. W. 256; *West. U. Tel. Co. v. Hayes* (Tex. Civ. App.) 63 S. W. 171; *Baldwin v. West. U. Tel. Co.* (Tex. Civ. App.) 33 S. W. 890; *West. U. Tel. Co. v. Terrell*, 10 Tex. Civ. App. 60, 30 S. W. 70; *West. U. Tel. Co. v. Sanders* (Tex. Civ. App.) 26 S. W. 734; *West. U. Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608, 21 S. W. 638; *Whitehill v. West. U. Tel. Co.* (C. C.) 136 Fed. 499; *Findlay v. West. U. Tel. Co.* (C. C.) 64 Fed. 459; *Beasley v. West. U. Tel. Co.* (C. C.) 39 Fed. 181; *Stone v. Postal Tel. Co.*, 31 R. I. 174, 76 Atl. 762, 29 L. R. A. (N. S.) 795; *West. U. Tel. Co. v. White* (Tex. Civ. App.) 149 S. W. 790. Some hold that the sendee would be bound whether he sued any contract or in tort. *Broom v. West. U. Tel. Co.*, 71 S. C. 506, 51 S. E. 259, 4 Ann. Cas. 611; *West. U. Tel. Co. v. Van Cleave*, 107 Ky. 464, 54 S. W. 827, 22 Ky. Law Rep. 53, 92 Am. St. Rep. 366. See, also, *Halsted v. Postal Tel. Cable Co.*, 120 App. Div. 433, 104 N. Y. Supp. 1016, affirmed in 193 N. Y. 293, 85 N. E. 1078, 127 Am. St. Rep. 952, 19 L. R. A. (N. S.) 1021; *Stone v. Postal Tel. Cable Co.*, *supra*. A distinction

§ 417. **Same continued—illustrations.**—In an action brought by the receiver of a telegram to recover damages for a failure to promptly deliver the message, according to these decisions, the plaintiff would be governed by the contract as made by the sender in his behalf.<sup>220</sup> In one case it was held that both the addressee and the sender were bound by the stipulations in the message blanks.<sup>221</sup> So it has been held that, in order for the receiver to recover, he must have presented his claim in writing within the limitation.<sup>222</sup> As was said: "The plaintiff had no cause of action independent of the contract made by the sender of the message. Having failed to present his claim within the time required by the contract, he has lost whatever right of action the contract gave him."<sup>223</sup> It has been held, however, that if the blank form on which the message was written, when delivered to the company, contained no stipulations in regard to a certain time within which the claim should be presented, the addressee would not be bound by such stipulation, although this condition may have been in the message blank delivered to him.<sup>224</sup> It has also been held that, when one of these blanks contained a stipulation that the company would not be liable in damages beyond a certain amount for errors made in its transmission, unless the same was ordered to be repeated, the addressee was bound by this condition. In this case the message was delivered to the addressee on a blank containing the same con-

has been suggested between actions based upon a wrongful act, independent of any duty assumed under the contract, and actions based upon nonperformance of a duty assumed by the contract, it being held, however, that in cases of the latter character, as in case of a delay in delivery, the stipulations of the contract are binding upon the addressee. *Russell v. West. U. Tel. Co.*, 57 Kan. 230, 45 Pac. 598. See, also, *Forney v. Postal Tel. Cable Co.*, 152 N. C. 494, 67 S. E. 1011; *Barnes v. Postal Tel. Cable Co.*, 156 N. C. 150, 72 S. E. 78; *Penn v. West. U. Tel. Co.*, 159 N. C. 306, 75 S. E. 16, 41 L. R. A. (N. S.) 223; *Taber v. West. U. Tel. Co.*, 104 Tex. 272, 137 S. W. 106, 34 L. R. A. (N. S.) 135; *West. U. Tel. Co. v. Dant*, 42 App. D. C. 398, Ann. Cas. 1916A, 1132, L. R. A. 1915B, 685.

<sup>220</sup> *Id.*

<sup>221</sup> *Stamey v. West. U. Tel. Co.*, 92 Ga. 613, 44 Am. St. Rep. 95, 18 S. E. 1008; *McGehee v. West. U. Tel. Co.*, 169 Ala. 109, 53 South. 205, Ann. Cas. 1912B, 512. See § 425.

<sup>222</sup> *Manier v. West. U. Tel. Co.*, 94 Tenn. 442, 29 S. W. 732; *Russell v. West. U. Tel. Co.*, 57 Kan. 230, 45 Pac. 598.

<sup>223</sup> *Russell v. West. U. Tel. Co.*, 57 Kan. 230, 45 Pac. 598. See *Penn v. West. U. Tel. Co.*, 159 N. C. 306, 75 S. E. 16, 41 L. R. A. (N. S.) 223; *Taber v. West. U. Tel. Co.*, 104 Tex. 272, 137 S. W. 106, 34 L. R. A. (N. S.) 185; *Lytle v. West. U. Tel. Co.*, 165 N. C. 504, 81 S. E. 759. See cases in note 220, *supra*. But see *West. U. Tel. Co. v. Hearn*, 110 Ark. 176, 161 S. W. 1025, Ann. Cas. 1915D, 378.

<sup>224</sup> *West. U. Tel. Co. v. Hinkle*, 3 Tex. Civ. App. 518, 22 S. W. 1004.



dition, and it was shown that there was no further proof of negligence in the sending of the message other than that resulting simply from the error.<sup>225</sup> The opinions in the above cases have been held differently in other jurisdictions, in which the courts say that the stipulation applies to the sender, and not to the addressee.<sup>226</sup> "The proposition," as was said, "that the defendants are liable, if at all, only in case the message is repeated, as contained in the printed conditions, can be invoked only as against the sender, if against any, for it is his message, his language, that is to be transmitted, and it is only known to the receiver when delivered. He is to be guided or informed by what is delivered to him, and he has no opportunity to agree upon any such condition before delivery."<sup>227</sup>

§ 418. **Same continued—actions in tort.**—Some of the authorities maintain that the right of action which rests in the addressee of a telegram to recover for the negligence of the company does not arise out of the contract made between the sender and the company, but out of tort.<sup>228</sup> In England, the doctrine is, that the receiver of a telegraphic message cannot sue the telegraph company on the ground that the obligation of the company springs entirely from the contract, and that the contract for the transmission of the message is with the sender of it. This doctrine, however, has never prevailed in the United States, but here it is held by all courts that the receiver of a message may maintain an action against the com-

<sup>225</sup> *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226; *West. U. Tel. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *Sweatland v. Illinois, etc., Tel. Co.*, 27 Iowa, 433, 1 Am. Rep. 285; *West. U. Tel. Co. v. Dant*, 42 App. D. C. 398, Ann. Cas. 1916A, 1132, L. R. A. 1915B, 685.

<sup>226</sup> *Tobin v. West. U. Tel. Co.*, 146 Pa. 375, 23 Atl. 324, 28 Am. St. Rep. 802; *New York, etc., Tel. Co. v. Dryburg*, 35 Pa. 298, 78 Am. Dec. 338; *Webbe v. West. U. Tel. Co.*, 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 207, reversing 64 Ill. App. 331. See also, *La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383; *West. U. Tel. Co. v. Baker* (Ala. App.) 69 South. 246; *West. U. Tel. Co. v. Hearn*, 110 Ark. 176, 161 S. W. 1025, Ann. Cas. 1915D, 378; *Rhyne v. West. U. Tel. Co.*, 164 N. C. 394, 80 S. E. 152; *Leedy v. West. U. Tel. Co.*, 130 Tenn. 547, 172 S. W. 278.

<sup>227</sup> *La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383. See also, *Tyler v. West. U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38.

<sup>228</sup> *West. U. Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; *West. U. Tel. Co. v. Fenton*, 52 Ind. 1; *West. U. Tel. Co. v. McKibben*, 114 Ind. 511, 14 N. E. 894; *Webbe v. West. U. Tel. Co.*, 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 207, reversing 64 Ill. App. 331; *West. U. Tel. Co. v. Todd* (Ind. App.) 53 N. E. 194; *Tobin v. West. U. Tel. Co.*, 146 Pa. 375, 23 Atl. 324, 28 Am. St. Rep. 802; *New York, etc., Printing Tel. Co. v. Dryburg*, 35 Pa. 298, 78 Am. Dec. 338; *Markley v. West. U. Tel. Co.*, 144 Iowa, 105, 122 N. W. 136, 138 Am. St. Rep. 263; *Bailey v. West. U. Tel. Co.*, 227 Pa. 522, 76 Atl. 736, 43 L. R. A. (N. S.) 502, 19 Ann. Cas. 895.

pany for a breach of the latter's public duty, or an action on tort.<sup>229</sup> In those jurisdictions where the rule is that the receiver can only maintain his action in tort, it is universally held that the stipulations contained in the original blank or contract are not binding upon the addressee and do not affect his right of action.<sup>230</sup> Under this doctrine, the addressee is not bound by the stipulation in these blanks, where it is required that the claim must be presented in writing within a specified time.<sup>231</sup> Neither will the addressee's right of action be affected by a noncompliance with the stipulation, wherein it is required that, in order to avoid mistakes in the transmission, all messages should be ordered to be repeated; otherwise the company will not be liable in damages beyond a certain amount.<sup>232</sup> It has been said by these courts that, although telegraph companies endeavor to incorporate the stipulations upon their blanks into the message as delivered, they are of no effect upon the receiver of the message, under this rule—considering him as not a party to the contract and whose only right is to sue in tort—for the reason that he does not sign the message; and unless it can be shown that such stipulations were brought to his notice and assented to by him, he is not bound thereby.<sup>233</sup>

§ 419. **The correct view as considered.**—Whenever the fruits and benefits of a contract made between the sender and the telegraph company flow directly and exclusively to the use of the receiver of the message, and the terms of the stipulations contained

<sup>229</sup> *West. U. Tel. Co. v. Dubois*, 128 Ill. 248, 15 Am. St. Rep. 110, 21 N. E. 4.

<sup>230</sup> *McGehee v. West. U. Tel. Co.*, 169 Ala. 109, 53 South. 205, Ann. Cas. 1912B, 512. See cases in note 228, *supra*.

<sup>231</sup> *West. U. Tel. Co. v. McKibben*, 114 Ind. 511, 14 N. E. 894. Crosswell, in his work on the Law Relating to Electricity, § 557, says: "In actions of tort by the addressee of a message, it is difficult to see how any limit of time in which claims must be made against a telegraph company for damages occasioned by error or negligence in sending the message can affect the plaintiff. In such cases the plaintiff has no privity with the sender of the message, but sues solely for the breach of duty by the telegraph company, i. e., the failure of the telegraph company to perform its public duty of transmitting dispatches promptly and with due care, and has nothing to do with the special contract between the sender and the telegraph company, and therefore whatever stipulations the sender may make with the telegraph company should not bind the addressee." *Markley v. West. U. Tel. Co.*, 144 Iowa, 105, 122 N. W. 136, 138 Am. St. Rep. 263. But see *Penn v. West. U. Tel. Co.*, 159 N. C. 306, 75 S. E. 16, 41 L. R. A. (N. S.) 223.

<sup>232</sup> *West. U. Tel. Co. v. Fenton*, 52 Ind. 1; *McGehee v. West. U. Tel. Co.*, 169 Ala. 109, 53 South. 205, Ann. Cas. 1912B, 512.

<sup>233</sup> *West. U. Tel. Co. v. Lycan*, 60 Ill. App. 124; *Webbe v. West. U. Tel. Co.*, 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 207; *McGehee v. West. U. Tel. Co.*, 169 Ala. 109, 53 South. 205, Ann. Cas. 1912B, 512. See note 226, *supra*, for other cases.

therein are not unreasonable with respect to the position in which he stands as receiver, he is bound by all the conditions of such contract just as the sender would be if the latter were receiving the benefits of such a contract. We do not mean to say, however, by this, that the receiver may not some time sue the company in tort; for there may be instances where the addressee should sue the company for a breach of its public duties.<sup>234</sup> But as a general rule, he should sue for the breach of contract made by the sender and the company for his benefit. It follows, therefore, that the receiver is bound by the terms of the stipulations contained in the contract of sending, and it is presumed that the receiver, at the time the sender attaches his signature to the message, gives his assent to the stipulations therein and is bound from that time.<sup>235</sup> It has been expressly held, in one case, that the sender, under such circumstances, acts as agent for the receiver, and that the latter as principal, is bound by all the acts of his agent which fall within the scope of his express or apparent authority.<sup>236</sup> In order, however, to bind the receiver by all the conditions of the contract made by the sender in his behalf, they must be reasonable to him as receiver. As will be clearly seen, the terms of the stipulations contained in these blanks may be reasonable and therefore binding, if considered to have been made by the sender in his own behalf; but they would not be, if viewed in the light that they were entered into by him for the exclusive benefit of the addressee. If, however, the addressee knows of the contract about to be made, or has notice that the message has been sent, the reasonableness of the stipulations would be the same, both to the addressee and the sender;<sup>237</sup> but this is not always the case, and, of course, this fact must be considered in determining the reasonableness and binding effect of them upon the addressee. For instance, if a message which contains business matter for the exclusive benefit of the addressee was delivered to the company without the former's knowledge, but was never sent, whereby he suffers great injury, he will not be precluded from recovering such loss, although the claim, as required in the contract

<sup>234</sup> See *Penn v. West. U. Tel. Co.*, 159 N. C. 306, 75 S. E. 16, 41 L. R. A. (N. S.) 223; *McGehee v. West. U. Tel. Co.*, 169 Ala. 109, 53 South. 205, Ann. Cas. 1912B, 512.

<sup>235</sup> *Penn v. West. U. Tel. Co.*, 159 N. C. 306, 75 S. E. 16, 41 L. R. A. (N. S.) 223.

<sup>236</sup> *Coit v. West. U. Tel. Co.*, 130 Cal. 657, 63 Pac. 83, 80 Am. St. Rep. 153, 53 L. R. A. 678.

<sup>237</sup> *Bailey v. West. U. Tel. Co.*, 227 Pa. 522, 76 Atl. 736, 43 L. R. A. (N. S.) 502, 19 Ann. Cas. 895; *Halsted v. Postal Tel. Cable Co.*, 193 N. Y. 293, 85 N. E. 1078, 127 Am. St. Rep. 954.



for sending, was not presented to the company within the limitations. If he should have had notice of such message having been sent before the expiration of the limitation, a claim should have been presented if there remained a reasonable time to have done so by reasonable diligence on his part.<sup>238</sup> The same reasons would be applicable if the message had been sent but never delivered.<sup>239</sup> Therefore it will be seen that these rules may be reasonable with respect to the sender, but at the same time may not with respect to the addressee. It may be said, however, that if the addressee has received notice by letter or otherwise from the sender that the contract for sending the message had been made, and that this knowledge had been ascertained within a sufficient time to have given him a reasonable opportunity to have complied with the terms of the stipulations, he will be bound by them.

§ 420. **Assent—proof of—what amounts to.**—It has been held that the opportunity of the addressee to know and be familiar with the regulations of the company are primary facts and do not create any conclusive presumption of knowledge, no matter what the opportunity was.<sup>240</sup> In a case on this question the company showed that for a long time it had required messages to be written on a blank containing these stipulations. The plaintiff admitted that he was familiar with the appearance of the blanks, had frequently used them for writing messages, and that a parcel of them was always on his office desk, but averred that he had never read the stipulation and had no knowledge of its terms. It was held that, in the absence of evidence that the terms of the stipulation were brought home to him, it was proper to exclude the blanks from the consideration of the jury.<sup>241</sup> It will be seen, in reading this case, that the message was written out on a blank piece of paper, and in this manner delivered to the company. Of course, if the message had been written on one of the message blanks containing these stipulations, the plaintiff, as said at another place, would be bound by all the conditions therein, although he failed to read them or even had an opportunity to do so.<sup>242</sup> We think that a correct and

<sup>238</sup> *West. U. Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608, 21 S. W. 638. See § 386 et seq.

<sup>239</sup> *Sherrill v. West. U. Tel. Co.*, 109 N. C. 527, 14 S. E. 94; *Herron v. West. U. Tel. Co.*, 90 Iowa, 129, 57 N. W. 696.

<sup>240</sup> *Webbe v. West. U. Tel. Co.*, 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 207; *Merchants' Dispatch, etc., Co. v. Moore*, 88 Ill. 136, 30 Am. Rep. 541; *Pearsall v. West. U. Tel. Co.*, 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662.

<sup>241</sup> *Pearsall v. West. U. Tel. Co.*, 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662.

<sup>242</sup> See § 412.

proper conclusion was arrived at in the above case, and that it is not repugnant to the decision in the case where the message was written on a mutilated blank of the company.<sup>243</sup> In this latter case the opportunity of the plaintiff to know the conditions contained in the message blanks were about the same as that of the plaintiff in the above case.<sup>244</sup> But, in the first place, there was some doubt as to whether the message blank was mutilated at the time the message was written thereon, but, even though it may have been mutilated at this time, we think the court had a correct view of the case in holding that the plaintiff's opportunity was sufficient to give him knowledge of the terms of the stipulation. Part, if not all, of the stipulations were on this message blank, and, if part of these were torn off or mutilated, this fact would not of itself destroy the effect of the stipulation; for that part which remained on the blank would be, if necessary, sufficient to put him on inquiry. We do not think that either of these cases would be affected by the fact that the plaintiff was a stockholder of the company, for it is not presumed that stockholders have any better knowledge of the regulations adopted by the directors of the company than any other person.<sup>245</sup>

**§ 421. Stipulation posted in company's office—not binding.**—Occasionally telegraph companies may see fit to post some of their regulations in conspicuous places in their offices. It has been held that, when this has been done, these regulations enter into and become a part of the contract for sending.<sup>246</sup> But the better rule is that they do not any more become binding on the sender than other stipulations about which he is absolutely ignorant.<sup>247</sup> It would be very unwise to give these companies the power to bind any one in their business with such regulations, because it would have the tendency to give them room to perpetrate fraud or imposition upon their patrons.

**§ 422. Messages written on blanks of another company—binding.**—It has been held that if the message has been written, through mistake, on the blanks of another company, whose terms therein are substantially the same as those of the first company, the plain-

<sup>243</sup> *Kiley v. West. U. Tel. Co.*, 109 N. Y. 231, 16 N. E. 75.

<sup>244</sup> *Pearsall v. West. U. Tel. Co.*, 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662.

<sup>245</sup> *Pearsall v. West. U. Tel. Co.*, 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662.

<sup>246</sup> *Birney v. New York, etc., Printing Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607.

<sup>247</sup> *Carland v. West. U. Tel. Co.*, 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280.

tiff will be bound by such stipulations.<sup>248</sup> It may be said that the contract for sending was not made with the first company, since its name was not on the message blank, but this cannot be asserted with any effective defense. A sound principle of the law of contracts is that, if the agent, through mistake of any kind, writes his principal's name incorrectly, or even uses that of another, but it is intended by him to write his principal's name, or if the contract is made for him and the same is known by the other party, but another's name is inserted instead of his, the contract will be binding, although it shows on its face that it was made between the other parties. In such cases, where the contracting parties are in dispute as to the real parties, parol evidence may be admitted to show this fact. The same rule is applicable here. So, when the message blank of another company should, by mistake, be mingled with those of the contracting company, or if this blank is used for the message sent, but the contract is with the company in whose possession they have become carelessly thrown, the stipulations and conditions contained therein, which are substantially the same as those on its own blanks, will be binding on the patron. It has not been decided, to our knowledge, as to whether any stipulation, other than such as are substantially the same as those contained in the company's own forms, would be binding on the sender, but we think that only such as are substantially the same would be binding; nor do we think that stipulations contained in these forms, used by mistake and not in those of the contracting company, would be binding.<sup>249</sup> All the regulations of these companies must be adopted by its proper officers, at legally called meetings for that purpose. Stipulations in other companies' forms, differing substantially from those of the contracting company, or which are not contained therein at all, have not been adopted in any manner by this company, and cannot, under the circumstances, be enforced by or against it.

<sup>248</sup> West. U. Tel. Co. v. Wixelbaum, 113 Ga. 1017, 56 L. R. A. 741, 39 S. E. 443; United States Tel. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519; Clement v. West. U. Tel. Co., 137 Mass. 463; Young v. West. U. Tel. Co., 65 S. C. 93, 43 S. E. 448; Jacob v. West. U. Tel. Co., 135 Mich. 600, 98 N. W. 402. It is not material what name appears upon the blank, since the intention of the sender is the contract with the company to which the message is delivered for transmission, and the stipulations on the blank used, constituting the contract, and being assented to, are binding upon the sender. West. U. Tel. Co. v. Wixelbaum, *supra*; Young v. West. U. Tel. Co., *supra*.

<sup>249</sup> Where the operator, with the knowledge of the sender, writes the message upon a blank of his own company, the sender will be bound by the stipulations which he never saw, signed, or agreed to. See West. U. Tel. Co. v. Uvalde National Bank (Tex. Civ. App.) 72 S. W. 232.



§ 423. Same continued—knowledge of company's stipulations. It must be remembered, however, that where other companies' forms are used, the sender must have had knowledge of the terms of the conditions contained in those of the transmitting company, before they become binding on him;<sup>250</sup> for almost the same rule in regard to messages being on blank paper is applicable in these cases.<sup>251</sup> If the conditions on these blanks were identically the same in every respect, we think this would not be the case; but if they are similar in nature, the compliance of each only being different, the knowledge which the sender may have of those contained in one could not be asserted against him in the use of the other. For instance, the stipulation in regard to the time within which claims must be presented to the company may, and generally does, vary in the different forms, as to the length of the limitation. Some of these stipulations require the claims to be presented within ninety days after the message shall have been filed for transmission, and others limit the time to sixty and some to thirty and others to twenty days. So it will be seen that the nature of these conditions is similar, yet the compliance of each is different; and a knowledge of the condition of the terms of a stipulation, in this respect, could not be ascertained from the stipulation contained in a blank form not used by the company. The sender would not, however, be placed in the same position if he should write the message on a blank piece of paper.<sup>252</sup> In using the forms of another company he would be referred (and it is presumed that he followed out this reference) to sufficient evidence on the face of the message blank which would put him on inquiry to ascertain the true facts of the condition of terms in the company's blank; but of this evidence he is deprived when merely using the blank paper. We think that this rule should be more particularly applied to cases where it is known by the sender that the blanks are those of another company; and yet this is not absolutely necessary to make it applicable. It is generally the rule of these companies that its own blanks shall be used by parties employing their services, and that the operators shall not accept any message written on other than their own blanks; this will be the case although the sender was ignorant of such a rule.<sup>253</sup>

§ 424. Messages delivered to company by telephone or verbally. As has been said, the sender must have had actual notice of the terms of the stipulations of the company, in order for them to be

<sup>250</sup> See § 277.

<sup>251</sup> See §§ 277, 425.

<sup>252</sup> See § 425.

<sup>253</sup> *Carland v. West. U. Tel. Co.*, 118 Mich. 369, 74 Am. St. Rep. 394, 43 L. R. A. 280, 76 N. W. 762. See § 277.

binding on him, and it is presumed that he had this notice when he attached his signature to the message blanks.<sup>254</sup> It is only when these forms are not used that the question is generally litigated. For instance, this question has come up where the message was accepted by the company by telephone, or when orally given to the operator, and he without the knowledge or direction of the sender writes the message upon one of the company's blanks, the sender will not ordinarily be bound by the stipulations contained thereon,<sup>255</sup> particularly where he did not know of such stipulation or intend or expect the message to be written upon such blank.<sup>256</sup> However, such intention may be shown, thereby changing the rule.

**§ 425. Principal bound by the knowledge of the agent.**—It is a general law of agency that the principal is bound by all the acts of his agent which fall either within the scope of his express authority or that of his apparent authority; and any knowledge of facts pertaining to such acts coming to the agent while exercising this authority is presumed to have been known by the principal, and he is therefore bound by such knowledge. It therefore follows that, if the sender of a message is acting for the receiver, as his agent, and he has knowledge of the terms or conditions contained in the message blanks, the receiver is bound by all these stipulations, although he himself was ignorant of them.<sup>257</sup> There is an exception to this rule, however, as said elsewhere, brought about by the position in which the receiver may stand.<sup>258</sup> For instance, the sender may be acting as the receiver's agent in this particular matter, without the latter having any knowledge of this fact, and the message may be delivered to the company but never transmitted; or the company may fail to deliver it after it has been transmitted. Unless the receiver knew these facts he would not be bound by these stipulations. If the agent acts on any occasion, in the capacity of such, although it is for that particular matter, and he knows of the terms

<sup>254</sup> See § 412.

<sup>255</sup> *Bowie v. West. U. Tel. Co.*, 78 S. C. 424, 59 S. E. 65; *Carland v. West. U. Tel. Co.*, 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280; *West. U. Tel. Co. v. Powell*, 94 Va. 268, 26 S. E. 828; *West. U. Tel. Co. v. Douglass*, 104 Tex. 66, 133 S. W. 877; *West. U. Tel. Co. v. Parham* (Tex. Civ. App.) 152 S. W. 819.

<sup>256</sup> *Bowie v. West. U. Tel. Co.*, 78 S. C. 424, 59 S. E. 65; *West. U. Tel. Co. v. Douglass*, 104 Tex. 66, 133 S. W. 877; *West. U. Tel. Co. v. Timmons* (Tex. Civ. App.) 136 S. W. 1169.

<sup>257</sup> *Clement v. West. U. Tel. Co.*, 137 Mass. 463; *Coit v. West. U. Tel. Co.*, 130 Cal. 657, 63 Pac. 83, 80 Am. St. Rep. 153, 53 L. R. A. 678. See § 416. See *Strong v. West. U. Tel. Co.*, 18 Idaho, 389, 109 Pac. 910, 30 L. R. A. (N. S.) 409, Ann. Cas. 1912A, 55.

<sup>258</sup> See § 419.

of these stipulations, the principal will be bound by them.<sup>259</sup> So, where the operator fills out one of these blanks at the request of the sender, the latter, upon attaching his signature thereto, is bound by the stipulations, notwithstanding his failure to notice them;<sup>260</sup> or, if the message is written out by the sender on a blank piece of paper, and given in this manner to the operator, who transcribes it on these forms and reads the stipulation therein to the sender without his objecting to them, he will be bound by them.<sup>261</sup> The operator acts in these cases in the capacity of agent for the sender. It is otherwise, however, if the sender does not see and does not sign or otherwise agree to these conditions.<sup>262</sup> So, if the message is written on blank paper by the sender and delivered in this style to the operator, who attaches it to one of these message blanks without the authority of the sender, the latter will not ordinarily be bound by these stipulations.<sup>263</sup> It is his duty, when the company attempts to bind him by their terms, to plead and prove *non est factum*.<sup>264</sup> It should be borne in mind that if the plaintiff ascertains a knowledge of the terms of the stipulations or regulations of the company, as they appear on the message blanks furnished by them through his agent or otherwise, and he assents to them, he will be bound; but this knowledge must be brought to the mind of the plaintiff or his agent, while acting as such to the knowledge of the former.<sup>265</sup>

<sup>259</sup> See § 416.

<sup>260</sup> West. U. Tel. Co. v. Edsall, 63 Tex. 668; Gulf, etc., R. Co. v. Geer, 5 Tex. Civ. App. 349, 24 S. W. 86; West. U. Tel. Co. v. Henderson, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148. See, also, §§ 327, 416.

<sup>261</sup> See West. U. Tel. Co. v. Buchanan, 35 Ind. 429, 9 Am. Rep. 744; Clement v. West. U. Tel. Co., 137 Mass. 463.

<sup>262</sup> West. U. Tel. Co. v. Uvalde National Bank (Tex. Civ. App.) 72 S. W. 232; Beasley v. West. U. Tel. Co. (C. C.) 39 Fed. 181, West. U. Tel. Co. v. Powell, 94 Va. 268, 26 S. E. 828.

<sup>263</sup> Harris v. West. U. Tel. Co., 121 Ala. 519, 25 South. 910, 77 Am. St. Rep. 70; West. U. Tel. Co. v. Shumate, 2 Tex. Civ. App. 429, 21 S. W. 109; West. U. Tel. Co. v. Pruett (Tex. Civ. App.) 35 S. W. 78; Anderson v. West. U. Tel. Co., 84 Tex. 17, 19 S. W. 285; Pearsall v. West. U. Tel. Co., 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662; West. U. Tel. Co. v. Arwine, 3 Tex. Civ. App. 156, 22 S. W. 105; Beasley v. West. U. Tel. Co. (C. C.) 39 Fed. 181.

<sup>264</sup> West. U. Tel. Co. v. Hayes (Tex. Civ. App.) 63 S. W. 171.

<sup>265</sup> See West. U. Tel. Co. v. Buchanan, 35 Ind. 429, 9 Am. Rep. 744; Clement v. West. U. Tel. Co., 137 Mass. 463. But see Pearsall v. West. U. Tel. Co., 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662.



## CHAPTER XVII

LIABILITY OF COMPANIES IN PARTICULAR CLASSES OF CASES—  
CONTRACT TO FURNISH MARKET REPORTS AND OTHER NEWS

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§ 426. No duty to collect news—in general.—The duty of telegraph companies, with respect to the nature of intelligence to be sent, is to transmit promptly and correctly only such intelligence as

is general, and that which they are employed to transmit; it is not their duty to *collect* and transmit news, unless a special contract is made to that effect.<sup>1</sup> These companies may, however, enter into a special contract, for a consideration greater in amount than that charged for their general services, to insure the correctness of the message.<sup>2</sup> These contracts may be of two kinds, and in determining the liability of the company this fact should be considered, since they may be liable under one and not under the other. For instance, the company may contract to insure a safe transmission of messages as delivered to it, or it may insure the correctness of the intelligence sent.<sup>3</sup> In other words, these companies may contract to insure the correctness in the transmission of a message, and assume all hazards with which it may come in contact, which gives them the qualities of a common carrier; or they may assume, under a special contract, even a greater responsibility than that of merely insuring a correct transmission, by contracting to transmit the correctness of the intelligence. Under the latter contract, they must not only transmit accurately and correctly, but the other contracting party is guaranteed or insured that the intelligence was correctly *collected* or *received* by the company before its transmission; and it is the latter kind we next discuss.

§ 427. **Market reports, etc.**—Contracts whereby telegraph companies agree to insure the correctness of the intelligence sent are generally such as are made to furnish market reports, stock quotations and other like news.<sup>4</sup> In such contracts, it becomes the duty

<sup>1</sup> See chapter XII.

<sup>2</sup> *Goodsell v. West. U. Tel. Co.*, 130 N. Y. 430, 29 N. E. 969; *West. U. Tel. Co. v. Stevenson*, 128 Pa. 442, 18 Atl. 441, 15 Am. St. Rep. 687, 5 L. R. A. 515. In the first case it appeared that a telegraph company contracted to deliver certain news reports of an average number of words per day, one-third to be transmitted in the daytime and two-thirds at night, to all the places named in a certain schedule, for a gross sum per month, the other party to have the right to substitute other places for those named; and, if the reports were transmitted to "any greater number of places" than were enumerated in such schedule, then an additional payment should be made. The schedule contained 38 different places. It was held that the company was bound, without additional payment, to transmit the day reports to 38 places, and the night reports to 38 places, although the latter places were different from the former.

<sup>3</sup> *Matter of Renville*, 46 App. Div. 37, 61 N. Y. Supp. 549; *Cain v. West. U. Tel. Co.*, 10 Ohio Dec. (Reprint) 72. See, also, *Davis v. Electric Reporting Co.*, 19 Wkly. Notes Cas. (Pa.) 567. See § 358 et seq.

<sup>4</sup> See *West. U. Tel. Co. v. State*, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. (N. S.) 153, 6 Ann. Cas. 880; *Friedman v. Gold, etc., Tel. Co.*, 32 Hun (N. Y.) 4; *Smith v. Gold, etc., Tel. Co.*, 42 Hun (N. Y.) 454; *Davis v. Electric Reporting Co.*, 19 Wkly. Notes Cas. (Pa.) 567. See § 767 et seq.

of these companies *to collect* the news and then to transmit it to the other party; and an error made in either part of this transaction, whereby the other party suffers, will render the company liable for damages.<sup>5</sup> These contracts are extraordinary in their nature, and become much greater in their performance than those ordinarily made in the general course of these companies' public duties. It follows, of course, that the consideration given in return for the extra hazard assumed should be much greater and it seems that the contracts should be more strictly construed than those made in the ordinary manner. The position has been taken in some of the cases arising out of these contracts that these companies should not be liable where the message was incorrectly given to them, and which was no fault on their part; but it is generally held that they become as liable for an error made in one part of the transaction as that made in the other; in fact, the receiving or collection of the news is the more responsible part of their undertaking. So they should be held for errors made in the collection of the news independent of the question as to how the error was made.<sup>6</sup>

§ 428. **Same continued—organized for collecting news.**—In some instances telegraph companies are organized for the express purpose of collecting news, but when this is the case they are possessed of the same general powers, and subject to the same obligations, as ordinary telegraph companies.<sup>7</sup> Thus they may adopt and enforce reasonable rules and regulations with respect to the use of their instruments,<sup>8</sup> and provide that the messages shall not

<sup>5</sup> Bank of New Orleans v. West. U. Tel. Co., 27 La. Ann. 49; Turner v. Hawkeye Tel. Co., 41 Iowa, 458, 20 Am. Rep. 605.

<sup>6</sup> Gray on Tel. 31; Turner v. Hawkeye Tel. Co., 41 Iowa, 458, 20 Am. Rep. 605; Bank of New Orleans v. West. U. Tel. Co., 27 La. Ann. 49. In this last case the company's defense was that the error in the reports was caused by the working of the gold stock indicator in their office in New York from which they received their information. It was held that this did not release them from liability, since they had contracted to deliver to plaintiffs correct information, which they should have obtained, without relying wholly on the indicator.

*Contract to furnish correct reports.*—If a company contracts to furnish correct market reports, its failure to do so is a breach of its contract, irrespective of whether it did or did not exercise ordinary care. West. U. Tel. Co. v. Bradford, 52 Tex. Civ. App. 392, 114 S. W. 686.

<sup>7</sup> Inter-Ocean Pub. Co. v. Associated Press, 184 Ill. 438, 56 N. E. 822, 75 Am. St. Rep. 184, 48 L. R. A. 568, must not discriminate, but serve all impartially. See, also, chapter X.

<sup>8</sup> West. U. Tel. Co. v. State, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. (N. S.) 153, 6 Ann. Cas. 880. They may refuse to furnish service to those who refuse to comply with their reasonable rules and regulations. Shepard v. Gold, etc., Tel. Co., 38 Hun (N. Y.) 338.



be given out to nonsubscribers. It is generally provided in these contracts made with subscribers that "these reports are furnished to subscribers for their own private use in their own business exclusively. It is stipulated that subscribers will not sell or give up copies of the reports in whole or in part, nor permit any outside party to copy them for use or publication. Under this rule, subscriptions by one party for the benefit of himself and others at their joint expense will not be received."<sup>9</sup> It has been held that these stipulations were reasonable and did not conflict with any duty the company owed to the public.<sup>10</sup> And it has been further held that, if the subscriber should furnish such report to another firm of which he was a member, the company would be justified in removing its machine from his office.<sup>11</sup> These companies are exercising a public function and must therefore perform such duties as are imposed upon other corporations of a public character.<sup>12</sup> They cannot, therefore, discriminate between their subscribers, but are under obligation to discharge their duties to one the same as to another, and may be enjoined from refusing to continue serving a subscriber who has complied with all their reasonable regulations.<sup>13</sup> They are not, however, under any obligation to furnish

<sup>9</sup> *Shepard v. Gold, etc., Tel. Co.*, 38 Hun (N. Y.) 338.

<sup>10</sup> *Shepard v. Gold, etc., Tel. Co.*, 38 Hun (N. Y.) 338. But a regulation that the company shall be authorized to remove its instrument whenever, in its judgment, there has been any violation of the conditions of the contract by the subscriber is unreasonable. *Smith v. Gold, etc., Tel. Co.*, 42 Hun (N. Y.) 454, 2 Am. Elec. Cas. 373.

<sup>11</sup> *Shepard v. Gold, etc., Tel. Co.*, 38 Hun (N. Y.) 338.

<sup>12</sup> *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 56 N. E. 822, 75 Am. St. Rep. 184, 48 L. R. A. 568; *West. U. Tel. Co. v. State*, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. (N. S.) 153.

<sup>13</sup> *Smith v. Gold, etc., Tel. Co.*, 42 Hun (N. Y.) 454; *West. U. Tel. Co. v. State*, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. (N. S.) 153, 6 Ann. Cas. 880; *Friedman v. Gold, etc., Tel. Co.*, 32 Hun (N. Y.) 4, 1 Am. Elec. Cas. 621; *Davis v. Electric Reporting Co.*, 19 Wkly. Notes Cas. (Pa.) 567. See, also, *Metropolitan, etc., Co. v. Chicago Board of Trade (C. C.)* 15 Fed. 847, 11 Biss. 531.

*Mandamus—injunction.*—On a question whether or not a telegraph company can be compelled to furnish market reports to a person with whom it has no contract, there is some confusion in these decisions, but when an attempt is made to complete the furnishing of such quotations for a bucket shop, the decisions are substantially agreed that the courts will not aid such a business, either by mandamus or by injunction. *Sterrett v. Philadelphia, etc., Tel. Co.*, 18 Wkly. Notes Cas. (Pa.) 77, 18 Phila. 317. Other cases also have denied injunction to prevent a telegraph company from cutting off its market quotations from a bucket shop on the ground that its business is in the nature of gambling, which is contrary to public policy. *Smith v. West. U. Tel. Co.*, 84 Ky. 664, 2 S. W. 483; *Bryant v. West. U. Tel. Co. (C. C.)* 17 Fed. 825; *Sullivan v. Postal Tel. Co.*, 123 Fed. 411, 61 C. C. A. 1; *Central Stock & Grain Exchange v. Board of Trade*, 196 Ill. 396, 63 N. E.

these reports to a gambling place, although they may have contracted to do so, as they can be under no obligation to further an illegal undertaking.<sup>14</sup>

§ 429. **Gambling transactions—messages in regard to.**—While a telegraph company may not refuse to transmit or deliver messages relating to “futures”<sup>15</sup> or similar gambling transactions,<sup>16</sup> or escape a statutory penalty for failing to transmit such messages, yet the amount of damages to be recovered for an error made in the transmission of such are only nominal and cannot exceed the amount paid for their transmission.<sup>17</sup> There is a distinction between real gambling and dealing in what is commonly called “futures”;<sup>18</sup> and this distinction gives those dealing in the latter a

740, affirming 98 Ill. App. 212; *Griffin v. West. U. Tel. Co.*, 8 Ohio Dec. 572; *Bradley v. West. U. Tel. Co.*, 8 Ohio Dec. 707; *West. U. Tel. Co. v. State*, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. (N. S.) 153, 6 Ann. Cas. 880.

<sup>14</sup> In *Smith v. West. U. Tel. Co.*, 84 Ky. 664, 2 S. W. 483, the court said: “These reports were the essence, the very sinew, of appellant’s gambling business, and without the prompt supply of which his business was a failure. Can the appellee be compelled to continue the supply? We think not. Not upon the ground that the appellee is the innocent victim of an illegal enterprise; not that it has been entrapped into aiding a gambling business, for it says that it was willing to furnish the reports as long as the terms of the contract suited it; but upon the ground that appellant was engaged in a gambling enterprise, which is contrary to law, good morals, and public policy. It is for the sake of the law and the best interests of society that we relieve the appellee from continuing to furnish to appellant the reports.” The appellant is engaged in running a “bucket shop.” *West. U. Tel. Co. v. State*, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. (N. S.) 153, 6 Ann. Cas. 880; *Bradley v. West. U. Tel. Co.*, 8 Ohio Dec. (Reprint) 707; *Bryant v. West. U. Tel. Co.* (C. C.) 17 Fed. 825.

<sup>15</sup> *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95, dealing in futures not being illegal.

<sup>16</sup> A telegraph company cannot ordinarily refuse messages containing reports of horse races which the addressee may illegally use when received in conducting a pool room. *Com. v. West. U. Tel. Co.*, 112 Ky. 355, 67 S. W. 59, 23 Ky. Law Rep. 1633, 99 Am. St. Rep. 299, 57 L. R. A. 614. But see *Louisville v. Wehmhoff*, 116 Ky. 812, 76 S. W. 876, 79 S. W. 201, 25 Ky. Law Rep. 995, 1924.

<sup>17</sup> *Cothran v. West. U. Tel. Co.*, 83 Ga. 25, 9 S. E. 836, overruling *West. U. Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480, in this respect. See, also, *Melchert v. American U. Tel. Co.* (C. C.) 11 Fed. 194.

<sup>18</sup> In *Kirkpatrick v. Bonsall*, 72 Pa. 155, the court said: “We must not confound gambling, whether it be in corporate stocks, or merchandise, with what is commonly termed speculation. Merchants speculate on the future prices of that in which they deal, and buy and sell accordingly. In other words, they think of and weigh—that is, speculate upon—the probabilities of the coming market, and act upon this lookout into the future in their business transactions; in this they often exhibit high mental grasp and great knowledge of business, and of the affairs of the world. Their speculations display talent and forecast, but they act upon their conclusions and buy and sell in a *bona fide* way. Such speculation cannot be denounced. But when ventures

right similar to that enjoyed in the transmission of ordinary messages. It is presumed in the "future" contracts that there is to be a delivery of the goods;<sup>19</sup> but in gambling there is a wager outright for a loss or a gain.<sup>20</sup> These companies are under no obligations to accept messages for transmission which are purely gambling messages, for to do so would be contrary to law, good morals,

are made upon the terms of prices alone, if no *bona fide* intent to deal in the article, but merely to risk the difference between the rise and fall of its price, no money or capital is invested in the purchase, but so much only is required as will cover the difference—a margin, as it is figuratively termed—then the bargain represents, not a transfer of property, but a mere stake or wager upon its future price. The difference requires the ownership of only a few thousands of dollars, while the capital to complete an actual purchase or sale may be hundreds of thousands or millions. Hence ventures upon prices invite men of small means to enter into transactions far beyond their capital, which they do not intend to fulfill, and thus the apparent business in the particular trade is inflated and unreal, and, like a bubble, needs only to be pricked to disappear, often carrying down the *bona fide* dealing in its collapse. Worse even than this, it tempts men of large capital to make bargains of stupendous proportions and then to manipulate the market to produce the desired price. This, in the language of gambling speculation, is making a corner; that is to say, the article is so engrossed or manipulated as to make it scarce or plenty in the market at the will of the gamblers, and then to place its price within their power. Such transactions are destructive of good morals and fair dealings, and of the best interest of the community. If the articles be stock, corporations are crushed and innocent stockholders ruined to enable the gambler in its price to accomplish his end. If it be merchandise, e. g., grain, the poor are robbed and misery engendered." *Ives v. Boyce*, 85 Neb. 324, 123 N. W. 318, 25 L. R. A. (N. S.) 157; *Wade v. United States*, 33 App. D. C. 29, 20 L. R. A. (N. S.) 347, 17 Ann. Cas. 707; *Anderson v. State*, 2 Ga. App. 1, 58 S. E. 401; *Kneffler v. Com.*, 94 Ky. 359, 22 S. W. 446; *Arenz v. Com.*, 31 Ky. Law Rep. 321, 102 S. W. 238. But see *People v. Todd*, 51 Hun. 446, 4 N. Y. Supp. 25; *People v. Wade*, 13 N. Y. Cr. R. 425, 59 N. Y. Supp. 846, the keeping of bucket shops is in some states specially prohibited by law. The cases arising under such statutes were *Soby v. People*, 134 Ill. 66, 25 N. E. 109; *Weare Comm. Co. v. People*, 209 Ill. 528, 70 N. E. 1076; *People v. Wirsching*, 239 Ill. 522, 88 N. E. 169; *Caldwell v. People*, 67 Ill. App. 367; *State v. Kentner*, 178 Mo. 487, 77 S. W. 522; *State v. Logan*, 84 Mo. App. 584; *State v. McMillan*, 69 Vt. 105, 37 Atl. 278; *State v. Corcoran*, 73 Vt. 404, 50 Atl. 1110. In other states the dealing in futures on margins is declared to be unlawful. *Fortenbury v. State*, 47 Ark. 188, 1 S. W. 58; *State v. Gritzner*, 134 Mo. 512, 36 S. W. 39; *State v. McGinnis*, 138 N. C. 724, 51 S. E. 50; *State v. Duncan*, 16 Lea (Tenn.) 79; *Cothran v. State*, 36 Tex. Cr. R. 196, 36 S. W. 273; *Scales v. State*, 46 Tex. Cr. R. 296, 81 S. W. 947, 108 Am. St. Rep. 1014, 66 L. R. A. 730.

<sup>19</sup> *Fortenbury v. State*, 47 Ark. 188, 1 S. W. 58; *Pixley v. Boynton*, 79 Ill. 351; *Tomblin v. Callen*, 69 Iowa, 229, 28 N. W. 573; *Conner v. Robertson*, 37 La. Ann. 814, 55 Am. Rep. 521; *Clay v. Allen*, 63 Miss. 426; *Kingsbury v. Kirwan*, 77 N. Y. 612; *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225; *Smith v. Bouvier*, 70 Pa. 325; *Appleman v. Fisher*, 34 Md. 540.

<sup>20</sup> *Fortenbury v. State*, 47 Ark. 188, 1 S. W. 58; *Whitesides v. Hunt*, 97 Ind. 191, 49 Am. Rep. 441; *Clay v. Allen*, 63 Miss. 426.



and public policy.<sup>21</sup> But it seems that there is no laudable reason why they should refuse to transmit messages relating to "futures," where that class of business has not been prohibited by statute, although it may be a species of gambling.<sup>22</sup> While they are not gambling contracts, yet they are very speculative and uncertain and for this reason the failure to correctly and promptly transmit them only lays the company liable for nominal damages.<sup>23</sup> We shall discuss later the rights of a party to recover, as a part of his damages, future profits;<sup>24</sup> but suffice it to say here that only such damages can be recovered for the breach of a contract as was contemplated by the parties at the time of making the contract, or such as would flow directly and proximately from such breach. It is universally held that the profits to be made in "future" contracts do not fall within this rule, and are not, therefore, recoverable for losses occurring in the failure to transmit or deliver correctly such messages.<sup>25</sup> Furthermore, the "future" contract may be illegal and void with respect to the parties making it, and thereby unenforceable by either of them. So neither could, therefore, invoke it as a basis for the recovery of substantial damages.<sup>26</sup> It seems, how-

<sup>21</sup> *Smith v. West. U. Tel. Co.*, 84 Ky. 664, 2 S. W. 483, 8 Ky. Law Rep. 672, 2 Am. Elec. Cas. 389; *West. U. Tel. Co. v. State*, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. (N. S.) 153, 6 Ann. Cas. 880; *Bradley v. West. U. Tel. Co.*, 8 Ohio Dec. (Reprint) 707; *Bryant v. West. U. Tel. Co. (C. C.)* 17 Fed. 825. But see *Sterrett v. Philadelphia Local Tel. Co.*, 18 Wkly. Notes Cas. (Pa.) 77.

<sup>22</sup> A statute or ordinance prohibiting company from transmitting information or money in furtherance of gambling contracts, *State v. Harbourne*, 70 Conn. 484, 40 Atl. 179, 66 Am. St. Rep. 126, 40 L. R. A. 607; *Louisville v. Wehmhoff*, 116 Ky. 812, 76 S. W. 876, 79 S. W. 201, 25 Ky. Law Rep. 995, 1924; *Reg v. Osborne*, 27 Ont. 185. See preceding note for other cases.

<sup>23</sup> *Bryant v. West. U. Tel. Co. (C. C.)* 17 Fed. 825; *Cahn v. West. U. Tel. Co. (C. C.)* 46 Fed. 40, affirming 48 Fed. 810, 1 C. C. A. 107; *Smith v. West. U. Tel. Co.*, 84 Ky. 664, 2 S. W. 483; *Morris v. West U. Tel. Co.*, 94 Me. 423, 47 Atl. 926; *West. U. Tel. Co. v. Harper*, 15 Tex. Civ. App. 37, 39 S. W. 599; *West. U. Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479; *West. U. Tel. Co. v. Littlejohn*, 72 Miss. 1025, 18 South. 418.

<sup>24</sup> See chapter XXI.

<sup>25</sup> *Cothran v. West. U. Tel. Co.*, 83 Ga. 25, 9 S. E. 836, overruling *West. U. Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480, in this respect. See, also, *Melchert v. American U. Tel. Co. (C. C.)* 11 Fed. 194.

<sup>26</sup> *Melchert v. Am. U. Tel. Co. (C. C.)* 11 Fed. 194; *Cothran v. West. U. Tel. Co.*, 83 Ga. 25, 9 S. E. 836. The burden of proof is on the company to show that the message related to a "future" contract. *West. U. Tel. Co. v. Hill* (Tex. Civ. App.) 65 S. W. 1123; *Hecker v. West. U. Tel. Co.*, 45 Fla. 363, 34 South. 901.

It would be liable for nominal damages only not exceeding the price of transmission for its negligence. *Clay v. West. U. Tel. Co.*, 81 Ga. 285, 6 S. E. 813, 12 Am. St. Rep. 316; *Smith v. West. U. Tel. Co.*, 84 Ky. 664, 2 S. W. 483; *Morris v. West. U. Tel. Co.*, 94 Me. 423, 47 Atl. 926; *West. U. Tel. Co. v. Littlejohn*, 72 Miss. 1025, 18 South. 418; *West. U. Tel. Co. v.*

ever, that where the action against the company is to recover the statutory penalty, the company cannot defend on the ground that the message which it was negligent in transmitting related to a gambling transaction.<sup>27</sup>

§ 430. **Indecent language not bound to accept.**—Telegraph companies are not under obligation to accept any message for transmission which would subject them to an indictment or to a civil action, and any message which is indecent, obscene or filthy on its face may be rejected by them.<sup>28</sup> But in order for the company to take advantage of this right, the contents of the message should be couched in such indecent language as to show on its face this fact;<sup>29</sup> because, if it is ambiguous, or if there is doubt of its indecency, the sender should have the benefit of the doubt.<sup>30</sup> The reason of this is that, where a dispatch is ambiguous, the law gives the benefit of the ambiguity to the company dealing with it, when sued either civilly or criminally for transmitting the message; and it would therefore be the duty of the company, in deciding whether to transmit, to give the benefit of the doubt to the sender.<sup>31</sup> Thus in the message, "Send me four girls on first train to Francesville, to attend fair," it was attempted to be shown that the company was not liable for a failure to transmit this message, on the ground that its object was indecent, in that its purpose was to have prostitutes attend the fair;<sup>32</sup> but the court held that the language of the message was ambiguous and that the plaintiff should have had the

Harper, 15 Tex. Civ. App. 37, 39 S. W. 599; Cahn v. West. U. Tel. Co. (C. C.) 46 Fed. 40; Id., 48 Fed. 810, 1 C. C. A. 107; West. U. Tel. Co. v. Hall, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479.

<sup>27</sup> Under the Georgia statute which requires that telegraph companies should receive all dispatches either from other lines or from individuals, and "shall transmit the same with impartiality and good faith, and with due diligence under penalty of," etc., the court holds that a telegraph company is denied any power of selection or discrimination. "A dispatch cannot be rejected on account of its subject-matter, unless by sending it, the company would or might subject itself or its servants either to indictment or civil action. This is a rational test and one that may fairly be presumed to coincide with legislative intention. Now, in this state it is neither a crime nor a tort to speculate in futures. It is a gross immorality, and conflicts with the public policy; but it is not indictable nor actionable." Gray v. West. U. Tel. Co., 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95; West. U. Tel. Co. v. Ferguson, 57 Ind. 495.

<sup>28</sup> See §§ 273, 274, and 431.

<sup>29</sup> Gray v. West. U. Tel. Co., 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95; Louisville v. Wehmhoff, 116 Ky. 812, 76 S. W. 876, 79 S. W. 201, 25 Ky. Law Rep. 995, 1924. See § 273.

<sup>30</sup> See § 273.

<sup>31</sup> Gray v. West. U. Tel. Co., 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95.

<sup>32</sup> West. U. Tel. Co. v. Ferguson, 57 Ind. 495.

benefit of the ambiguity.<sup>33</sup> The amount of damages to be recovered for an error made in the transmission of such messages is the same as that to be recovered in a similar error made in a message relating to "futures,"<sup>34</sup> and is founded on the ground that the message is for an unlawful purpose, or an attempt to accomplish something in an illegal manner.

§ 431. **Liable civilly or criminally—indecent language.**—It is not the object of the law to impose upon these companies the duty to transmit any message which would subject them to a penalty,<sup>35</sup> or to a civil<sup>36</sup> or criminal<sup>37</sup> action, and any message whose object is to accomplish such may be rejected by the company.<sup>38</sup> But it is not every message whose object is illegal which will subject the company to a liability;<sup>39</sup> and, if there is any doubt of its illegal purpose, the doubt must be construed in favor of the company.<sup>40</sup> Thus it has been held that these companies will not be held indictable, as being guilty of maintaining a common nuisance, for transmitting information concerning horse races to a pool room, although it appears that the place is resorted to by idle and evil-disposed persons, for selling pools and betting on races, to the common annoyance of all good citizens of the neighborhood.<sup>41</sup>

<sup>33</sup> *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95; *West. U. Tel. Co. v. Ferguson*, 57 Ind. 495.

<sup>34</sup> See § 429.

<sup>35</sup> *West. U. Tel. Co. v. Young*, 138 Ala. 240, 36 South. 374.

<sup>36</sup> *Peterson v. West. U. Tel. Co.*, 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302. See, also, *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95.

<sup>37</sup> *Louisville v. Wehmhoff*, 116 Ky. 812, 76 S. W. 876, 79 S. W. 201, 25 Ky. Law Rep. 995, 1924; *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95.

<sup>38</sup> See §§ 273, 274. As applied to telephone companies, see §§ 258, 259. They may refuse messages not couched in decent language, see *West. U. Tel. Co. v. Lillard*, 86 Ark. 208, 110 S. W. 1035, 17 L. R. A. (N. S.) 836; *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95; *West. U. Tel. Co. v. Ferguson*, 57 Ind. 495, 1 Am. Elec. Cas. 266; although liability cannot be incurred by transmitting them unless they are libelous, *Stockham v. West. U. Tel. Co.*, 10 Kan. App. 580, 63 Pac. 658.

<sup>39</sup> *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95, such as messages pertaining to gambling in futures; *Com. v. West. U. Tel. Co.*, 112 Ky. 358, 67 S. W. 59, 23 Ky. Law Rep. 1633, 99 Am. St. Rep. 299, 57 L. R. A. 615. But see *Louisville v. Wehmhoff*, 116 Ky. 812, 76 S. W. 876, 79 S. W. 201, 25 Ky. Law Rep. 995, 1924, reports of horse racing; *West. U. Tel. Co. v. Ferguson*, 57 Ind. 495, 1 Am. Elec. Cas. 266, procuring woman of bad character.

<sup>40</sup> *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95.

<sup>41</sup> *Com. v. West. U. Tel. Co.*, 112 Ky. 355, 67 S. W. 59, 23 Ky. Law Rep. 1633, 99 Am. St. Rep. 299, 57 L. R. A. 614. But see *Louisville v. Wehmhoff*, 116 Ky. 812, 76 S. W. 876, 79 S. W. 201, 25 Ky. Law Rep. 995, 1924. The transmission



§ 432. **Libel—liable for.**—Any means whereby a writing which is libelous per se is communicated to the party injured is a publication of the libel.<sup>42</sup> So, if a message which is libelous per se, or if it clearly shows on its face statements which would be understood by a man of ordinary intelligence as being a sufficient ground to lay the writer or sender liable for an action of libel, and the company transmits such a message, it will be guilty of a publication of the libel and will be just as liable for damages arising out of it as the writer of the message would be.<sup>43</sup> Thus, where a company accepted and transmitted a message directed to the plaintiff, reading: "Slippery Sam, your name is pants," and signed, "Many Republicans," it was held that the message sufficiently indicated to the company its libelous character, and that plaintiff was entitled to recover damages for the libel.<sup>44</sup> And it was held that the company was guilty of publishing a libel by transmitting a message stating that "the citizens of Wisconsin demonstrated you are an unscrupulous liar," and was liable for all damages arising out of

and delivery of messages containing reports of horse races and other sporting events is in the absence of a statute or ordinance, a legitimate business, and cannot be rendered illegitimate by the fact that the recipient of such reports, without further connivance of the telegraph or telephone company, puts them to an illegal use. *People v. Breen*, 44 Misc. Rep. 375, 89 N. Y. Supp. 998.

<sup>42</sup> *Alabama, etc., R. Co. v. Brooks*, 69 Miss. 168, 13 South. 847, 30 Am. St. Rep. 528; *Adams v. Lawson*, 17 Grat. (Va.) 250, 94 Am. Dec. 455; *Miller v. Butler*, 6 Cush. (Mass.) 71, 52 Am. Dec. 768; *Fogg v. Boston, etc., R. Co.*, 148 Mass. 513, 20 N. E. 109, 12 Am. St. Rep. 583; *Evening Journal Ass'n v. McDermott*, 44 N. J. Law, 430, 43 Am. Rep. 392; *Johnson v. St. Louis Dispatch Co.*, 65 Mo. 539, 27 Am. Rep. 293; *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48, 91 Am. Dec. 672. The publication of a libelous letter is complete when it is received and read. *McCarlie v. Atkinson*, 77 Miss. 594, 27 South. 641, 78 Am. St. Rep. 540. The dictation of a libelous letter to a confidential shorthand writer and the copying of it by him on a typewriting machine, after which it is signed by the person dictating it, is a publication of its contents, so as to entitle the person to whom it is addressed to maintain either libel or slander upon it, although there is no communication of its contents to any other person. *Gambrill v. Schooley*, 94 Md. 48, 48 Atl. 730, 86 Am. St. Rep. 414, 52 L. R. A. 87; *Monson v. Lathrop*, 96 Wis. 386, 71 N. W. 596, 65 Am. St. Rep. 54.

<sup>43</sup> *Monson v. Lathrop*, 96 Wis. 386, 71 N. W. 596, 65 Am. St. Rep. 54; *Peterson v. West. U. Tel. Co.*, 75 Minn. 368, 77 N. W. 985, 74 Am. St. Rep. 502, 43 L. R. A. 581; *Peterson v. West. U. Tel. Co.*, 72 Minn. 41, 74 N. W. 1022, 71 Am. St. Rep. 461, 40 L. R. A. 661; *Peterson v. West. U. Tel. Co.*, 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302; *Domination Tel. Co. v. Silver*, 10 Can. Sup. Ct. 238; *Nye v. West. U. Tel. Co. (C. C.)* 104 Fed. 628; *Grisham v. West. U. Tel. Co.*, 238 Mo. 480, 142 S. W. 271, Ann. Cas. 1913A, 535, 37 L. R. A. (N. S.) 861, presumption of knowledge. See §§ 273, 274. See, also, *West. U. Tel. Co. v. Cashman*, 149 Fed. 367, 81 C. C. A. 5, 9 L. R. A. (N. S.) 140, 9 Ann. Cas. 693, as to measure of damages.

<sup>44</sup> *Peterson v. West. U. Tel. Co.*, 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302; *Id.*, 72 Minn. 41, 74 N. W. 1022, 40 L. R. A. 661, 71 Am. St. Rep. 461; *Id.*, 75 Minn. 368, 77 N. W. 985, 74 Am. St. Rep. 502, 43 L. R. A. 581.

such publication.<sup>45</sup> It is generally held that the libelous matter directed to the party defamed, without having been seen or heard by any other person, will not support a civil action,<sup>46</sup> but this rule cannot apply here, for, if a message is sent to the party defamed by telegraph, the contents of the telegram are necessarily communicated to all the clerks through whose hands it passes.<sup>47</sup> If, however, the message is couched in such language as an ordinary person, ignorant of the circumstances and knowing nothing of the parties, would not suppose it to be defamatory, the company would not be liable,<sup>48</sup> unless it had been informed of the character of the message. Under such circumstances the message may be libelous, and one for which the sender would be liable, yet if the company has no information of its character, or has no means by which it may ascertain this fact, it will not be liable.<sup>49</sup>

§ 433. **Interstate messages.**—A great many cases have grown out of suits brought to recover damages for errors made in the transmission of messages which are sent from one state into another.<sup>50</sup> A question which has presented itself in such cases is whether an action can be maintained for a breach of the company's common-law duty to use proper care to secure a correct and prompt transmission and delivery, where the message falls within the cases of interstate messages? This question has been answered by an almost unanimity of decisions in the affirmative.<sup>51</sup> So it has been held that the sender may recover damages for such breach, although it happened in the state other than that from

<sup>45</sup> *Monson v. Lathrop*, 96 Wis. 386, 71 N. W. 96, 65 Am. St. Rep. 54.

<sup>46</sup> *Spaits v. Poundstone*, 87 Ind. 522, 44 Am. Rep. 773; *Wilcox v. Moon*, 64 Vt. 450, 24 Atl. 244, 33 Am. St. Rep. 936, 15 L. R. A. 760.

<sup>47</sup> *Peterson v. West. U. Tel. Co.*, 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302. *Id.*, 72 Minn. 41, 74 N. W. 1022, 40 L. R. A. 661, 71 Am. St. Rep. 461; *Id.*, 75 Minn. 368, 77 N. W. 985, 74 Am. St. Rep. 502, 43 L. R. A. 581. But there is no publication where the person transmitting the message is not the company's agent and the message is merely received by the agent of the company at the point of destination and delivered in an envelope to the addressee. *West. U. Tel. Co. v. Cashman*, 149 Fed. 367, 81 C. C. A. 5, 9 L. R. A. (N. S.) 140, 9 Ann. Cas. 693.

<sup>48</sup> *Nye v. West. U. Tel. Co. (C. C.)* 104 Fed. 628; *Stockham v. West. U. Tel. Co.*, 10 Kan. App. 580, 63 Pac. 658.

<sup>49</sup> *Weir v. Hoss*, 6 Ala. 881; *Mayne v. Fletcher*, 9 Barn. & Co. 382; *Park v. Detroit Free Press Co.*, 72 Mich. 560, 40 N. W. 731, 1 L. R. A. 599, 16 Am. St. Rep. 544; 1 *Strange*, 592; *Price v. Easton*, 4 Barn. & Adol. 433.

<sup>50</sup> See § 375. *West. U. Tel. Co. v. Commercial Milling Co.*, 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815.

<sup>51</sup> *West. U. Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715; *Daugherty v. Am. U. Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435; *West. U. Tel. Co. v. Richman (Pa.)* 8 Atl. 171; *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126. See, also, *Kemp v. West. U. Tel. Co.*, 28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363.

which the message was sent.<sup>52</sup> The receiver of the message may, as held, maintain the suit also, with respect to a civil action, and it does not matter where the breach occurred.<sup>53</sup> The contract for sending the message was made in the state from which it was sent, and there the action should be maintained irrespective of the place or places where the breach occurred. "It is wholly immaterial where the act or omission occurred, whether at the office where it was received, at some intermediate point, or at the office to which it was sent. The contract cannot in such case be said to have been violated at one place any more than at another. It is violated everywhere because it is performed nowhere."<sup>54</sup> This rule only applies where the action is to recover damages for a breach of its public duties or an action for tort, or where it is brought on a statute which is declaratory of the common-law duty, and which further provides that the company shall not contract to limit its liability for the consequences of its negligence.<sup>55</sup> The theory upon which the courts proceed in upholding statutes relating to the transmission and delivery of interstate messages as against the objection that they are unconstitutional regulations of interstate commerce is that such laws do not impede, harass, or cast any new burden upon interstate commerce, but are passed in aid thereof.<sup>56</sup>

<sup>52</sup> *Id.*

<sup>53</sup> *Young v. West. U. Tel. Co.*, 107 N. C. 370, 11 S. E. 1044, 22 Am. St. Rep. 883, 9 L. R. A. 669, note; *Wadsworth v. West. U. Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864. Compare *Carnahan v. West. U. Tel. Co.*, 89 Ind. 526, 46 Am. Rep. 175.

<sup>54</sup> *West. U. Tel. Co. v. Hamilton*, 50 Ind. 181. On other grounds this case was overruled by *West. U. Tel. Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187.

<sup>55</sup> *Kemp v. West. U. Tel. Co.*, 28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363; *West. U. Tel. Co. v. Commercial Milling Co.*, 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815.

<sup>56</sup> *Western U. Tel. Co. v. Commercial Milling Co.*, 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815; *Vermilye v. West. U. Tel. Co.*, 207 Mass. 401, 93 N. E. 635. In *Burgess v. West. U. Tel. Co.*, 92 Tex. 125, 46 S. W. 794, 71 Am. St. Rep. 833, reversing in part *West. U. Tel. Co. v. Burgess* (Tex. Civ. App.) 43 S. W. 1033, it is held that a statute declaring void a stipulation in a contract which fixes at a period less than ninety days the time in which notice of claim of damages shall be given as a condition precedent to the right to sue is not, as applied to interstate messages, a violation of the Interstate Commerce clause of the United States Constitution. The court says: "We see no reason why the legislature of a state may not prohibit its courts from giving effect to unreasonable stipulations in contracts nor why it may not go one step further, and, within just and reasonable bounds, declare certain stipulations unreasonable. It is to be presumed that the legislature in enacting this statute investigated and in good faith determined that by requiring the notice to be given within less than ninety days



**§ 434. Same—recovery of statutory penalty—not applicable.—**

The foregoing rule is different when the statute imposes affirmative duties, and regulates the performance of the business of a telegraph company regarding its interstate messages,<sup>57</sup> or when the action is to recover a statutory penalty imposed on these companies for a violation of their duties. It is a general rule of law that penal statutes cannot be enforced beyond the state creating them, and this rule is applicable in the present instance.<sup>58</sup> One of the reasons for holding to such a rule is that to enforce such statutes would necessarily involve these companies in endless difficulty, in that they would be punished in different ways for the same wrong. As was said: "Unless we adopt the view that the statute only applies to contracts made in this state, we shall be involved in endless difficulty. Any other rule would make the telegraph company amenable to different punishments for the same wrong, for it is quite clear that, if the wrong is punishable by the laws of the place where the contract is made, it would be no answer to a prosecution there to plead a judgment rendered in another forum under a different law."<sup>59</sup> However, a statute which requires telegraph companies having wires wholly or partly within the state to receive dispatches, transmit and deliver them with due diligence, under penalty, may be sustained as a valid exercise of the power of the state in relation to messages by telegraph from points outside of and directed to some point within the state.<sup>60</sup>

many just claims would be defeated and that no legitimate rights of the party liable for the damages would be imperiled if he were required to so frame his contract as to allow at least ninety days for giving the notice. We cannot say that in so doing they have exceeded their power." *West. U. Tel. Co. v. Dant*, 42 App. D. C. 398, Ann. Cas. 1916A, 1132, L. R. A. 1915B, 685.

<sup>57</sup> *West. U. Tel. Co. v. Commercial Milling Co.*, 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815; *West. U. Tel. Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187.

<sup>58</sup> *West. U. Tel. Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187; *Alexander v. West. U. Tel. Co.*, 66 Miss. 161, 5 South. 397, 14 Am. St. Rep. 556, 3 L. R. A. 71. See, also, § 634.

<sup>59</sup> *Carnahan v. West. U. Tel. Co.*, 89 Ind. 526, 46 Am. Rep. 175.

<sup>60</sup> *West. U. Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105; *West. U. Tel. Co. v. Crovo*, 220 U. S. 364, 31 Sup. Ct. 399, 55 L. Ed. 498, interstate commerce is not unconstitutionally regulated by a statute which imposes upon a telegraph company a penalty for negligent failure to transmit within the state as promptly as practicable a message received at an office in the state for transmission to another state. In *Butner v. West. U. Tel. Co.*, 2 Okl. 234, 37 Pac. 1087, an act of the territorial legislature which regulates the order of receipt and transmission of messages and prescribes a penalty for its violation, but which does not attempt to regulate the delivery of messages outside of its territory or of messages sent from without the territory, is not conflict with the constitution. *West. U. Tel. Co. v. Lark*, 95 Ga. 806, 23 S. E. 118; *West. U. Tel. Co. v. Ferris*, 103 Ind. 91, 2 N. E. 240; *West. U. Tel. Co. v.*

So also, as is often the case, where the initial and terminal points of the line are within the same state, but the message is circuitously sent through another in order to reach its destination, the message will not be classed as an interstate message and so governed by the laws applicable to such.<sup>61</sup>

§ 435. **Sunday messages—no duty to send.**—As has been said at another place, telegraph and telephone companies may adopt and enforce reasonable regulations with respect to their office hours,<sup>62</sup> and this embraces the right to regulate their offices hours on Sundays and other holidays.<sup>63</sup> With the exception of works of necessity, it is not the duty of any institution possessed with the principles of a public character to discharge any of its public duties on these days. So it follows that telegraph and telephone companies are not under any obligation to perform any of their common-law duties on Sundays, unless the performance of same is a matter of necessity.<sup>64</sup> Of course, some of their offices are kept open on Sundays, especially where they are at places of some size, in order that they may transmit messages concerning matters of necessity, and about other business matters which they desire to look after.<sup>65</sup> For the reason that some of their offices may be closed on Sundays, by a right acquired under such a regulation, does not prevent the agent at those places from accepting messages for transmission, yet the acceptance is usually conditional; and when this has not been removed and there has been a failure to promptly transmit the message, the company will not be liable.<sup>66</sup> If there were no conditions to the acceptance of a message, hardships and impositions might be imposed on these companies; for a willingness of the

Mellon, 100 Tenn. 429, 45 S. W. 443; West. U. Tel. Co. v. Powell, 94 Va. 268, 26 S. E. 828. See, also, § 634.

<sup>61</sup> Campbell v. Chicago, etc., R. Co., 86 Iowa, 587, 53 N. W. 351, 17 L. R. A. 443; West. U. Tel. Co. v. Furlow (Ark.) 180 S. W. 502.

<sup>62</sup> See § 347, et seq.

<sup>63</sup> West. U. Tel. Co. v. Ford, 77 Ark. 531, 92 S. W. 528; West. U. Tel. Co. v. Van Cleave, 107 Ky. 464, 54 S. W. 827, 22 Ky. Law Rep. 53, 92 Am. St. Rep. 366; Ayres v. West. U. Tel. Co., 65 App. Div. 149, 72 N. Y. Supp. 634; West. U. Tel. Co. v. McConico, 27 Tex. Civ. App. 610, 66 S. W. 592.

<sup>64</sup> Willingham v. West. U. Tel. Co., 91 Ga. 449, 18 S. E. 298; West. U. Tel. Co. v. Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; Thompson v. West. U. Tel. Co., 32 Mo. App. 191; Twin Valley Tel. Co. v. Mitchell, 27 Okl. 388, 113 Pac. 914, Ann. Cas. 1912C, 582, 38 L. R. A. (N. S.) 235; West. U. Tel. Co. v. Hearn, 110 Ark. 176, 161 S. W. 1025, Ann. Cas. 1915D, 378.

<sup>65</sup> Brown v. West. U. Tel. Co., 6 Utah, 219, 21 Pac. 988; Twin Valley Tel. Co. v. Mitchell, 27 Okl. 388, 113 Pac. 914, Ann. Cas. 1912C, 582, 38 L. R. A. (N. S.) 235; West. U. Tel. Co. v. Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224.

<sup>66</sup> See § 349 et seq.

operator at that particular place to accept the message might not be sanctioned, or, more than likely, not known by the operator at the place to which it is to be sent. In other words, it is not the duty of the telegraph operators to know the office hours of other stations,<sup>67</sup> and for this reason the agent may be willing to receive a message to transmit (he may further attempt to transmit the message), yet he may be prevented from doing so because of the fact that the other office, at the place to which the message is to be sent, is closed;<sup>68</sup> so to hold the company liable under such circumstances would be unjust.

§ 436. **Sunday contracts—void.**—Ordinarily, contracts entered into and to be performed on Sunday are void.<sup>69</sup> It was not, however, considered under the common law that such contracts were invalid,<sup>70</sup> and the statutes now do not generally prohibit the making of such contracts; but it is considered that to enforce these would be against public morals, and the contracting parties thereto should not be assisted by the courts in enforcing such. They both are *in pari delicto* and are not in a position to invoke the aid of the law.<sup>71</sup> As has been elsewhere stated, the employment of a telegraph company to transmit intelligence by means of its instruments and facilities is a contract;<sup>72</sup> therefore a contract of this nature made with a telegraph company on Sunday is void and no action can be based upon it.<sup>73</sup> In order to enforce any contract, the grounds upon or the subject-matter about which it is made must be clear of any immorality or illegality. As said, contracts made on Sunday are against public morals, and the grounds upon which

<sup>67</sup> Given v. West. U. Tel. Co. (C. C.) 24 Fed. 119. See also, § 351 et seq.

<sup>68</sup> There is an implied condition that the terminal office is open. Thompson v. West. U. Tel. Co., 32 Mo. App. 191; West. U. Tel. Co. v. Harding, 103 Ind. 505, 3 N. E. 172.

<sup>69</sup> Plaisted v. Palmer, 63 Me. 576; Meador v. White, 66 Me. 90, 22 Am. Rep. 551; Winfield v. Dody, 45 Mich. 355, 7 N. W. 906, 40 Am. Rep. 476; Bradley v. Rea, 103 Mass. 188, 4 Am. Rep. 524; Ryno v. Darby, 20 N. J. Eq. 231; Day v. McAllister, 15 Gray (Mass.) 433; Cranson v. Goss, 107 Mass. 439, 9 Am. Rep. 45; Butler v. Lee, 11 Ala. 885, 46 Am. Dec. 230; Woodman v. Hubbard, 25 N. H. 67, 7 Am. Dec. 310; Brimhall v. Van Campen, 8 Minn. 13 (Gil. 1) 82 Am. Dec. 118.

<sup>70</sup> Bloom v. Richards, 2 Ohio St. 389; Adams v. Gay, 19 Vt. 365; Amis v. Kyle, 2 Yerg. (Tenn.) 31, 24 Am. Dec. 463.

<sup>71</sup> Schneider v. Sansom, 62 Tex. 203, 5 Am. Rep. 521; Ellis v. Hammond, 57 Ga. 179; Cranson v. Goss, 107 Mass. 439, 9 Am. Rep. 45; Levet v. Creditors, 22 La. Ann. 105; Kinney v. McDermot, 55 Iowa. 674, 8 N. W. 656, 39 Am. Rep. 191; Moore v. Kendall, 2 Pin. (Wis.) 99, 52 Am. Dec. 145; Beauchamp v. Comfort, 42 Miss. 97.

<sup>72</sup> See § 270 et seq. See chapter XVIII.

<sup>73</sup> Rogers v. West. U. Tel. Co., 78 Ind. 169, 41 Am. Rep. 558; West. U. Tel. Co. v. Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224, note.



such contracts are made are therefore not such as will justify the maintenance of a suit thereon and are unenforceable.

§ 437. **Same continued—matters of necessity or charity.**—It has never been questioned, where matters of charity or necessity are considered, that the law makes any distinction between Sunday and other days of the week; they are all regarded alike both as regards the validity of contracts and the right to engage in work or labor.<sup>74</sup> So, where a contract is made on Sunday for the sending of a message which concerns matters of necessity or charity, the company will be liable for a failure to transmit such message.<sup>75</sup> This is an exception to the rule that Sunday contracts are invalid. While this is the rule, the difficulty arises in determining what messages relate to matters of charity or necessity.<sup>76</sup> Contracts to transmit messages regarding ordinary business, which can be sent on any week day as well as on Sundays are not within the exception to the general rule that ordinary business shall not be performed on Sunday;<sup>77</sup> but there may be facts which would impress such a message as being one of necessity. The company must be informed, in some manner, of the nature of the message—whether it does or does not concern matters of charity or necessity.<sup>78</sup> This may be done either by the sender giving this information verbally, or the message may contain such facts on its face;<sup>79</sup> and the burden, in any case, is on the sender to prove this fact.<sup>80</sup> If the message shows on its face

<sup>74</sup> *Troewert v. Decker*, 51 Wis. 46, 8 N. W. 26, 37 Am. Rep. 808; *Edgerton v. State*, 67 Ind. 588, 33 Am. Rep. 110; *Pate v. Wright*, 30 Ind. 476, 95 Am. Dec. 705.

<sup>75</sup> *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23; *Burnett v. West. U. Tel. Co.*, 39 Mo. App. 599; *Gulf, etc., Ry. Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269; *Twin Valley Tel. Co. v. Mitchell*, 27 Okl. 388, 113 Pac. 914, Ann. Cas. 1912C, 582, 38 L. R. A. (N. S.) 235; *West. U. Tel. Co. v. Hearn*, 110 Ark. 176, 161 S. W. 1025, Ann. Cas. 1915D, 378.

<sup>76</sup> *West. U. Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224. But the telegraph business generally is not a work of necessity. *Rogers v. West. U. Tel. Co.*, 78 Ind. 169, 41 Am. Rep. 558.

<sup>77</sup> *West. U. Tel. Co. v. Hutcheson*, 91 Ga. 252, 18 S. E. 297; *West. U. Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; *West. U. Tel. Co. v. Yopst (Ind.)* 11 N. E. 16; *Rogers v. West. U. Tel. Co.*, 78 Ind. 169, 41 Am. Rep. 558; *West. U. Tel. Co. v. Henley*, 23 Ind. App. 14, 54 N. E. 775. Compare *Taylor v. West. U. Tel. Co.*, 95 Iowa, 740, 64 N. W. 660; *West. U. Tel. Co. v. McLaurin*, 70 Miss. 26, 13 South. 36. But see *Burnett v. West. U. Tel. Co.*, 39 Mo. App. 599.

<sup>78</sup> *West. U. Tel. Co. v. Yopst (Ind.)* 11 N. E. 16; *Id.*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224, note; *West. U. Tel. Co. v. Hearn*, 110 Ark. 176, 161 S. W. 1025, Ann. Cas. 1915D, 378.

<sup>79</sup> See § 353.

<sup>80</sup> *Troewert v. Decker*, 51 Wis. 46, 8 N. W. 26, 37 Am. Rep. 808; *West. U. Tel. Co. v. Yopst*, 118 Ind. 249, 20 N. E. 222, 3 L. R. A. 224, note.

that its object is to relieve the sick or suffering, to prevent great or irreparable injury to life or property, or if it is intended to secure the presence of a relative at the funeral of a kinsman,<sup>81</sup> or if it is intended for any similar purpose,<sup>82</sup> it may be regarded as one concerning matters of necessity or charity, and the company would generally be informed of such fact by the face of the message.

§ 438. **Same continued—illustrations.**—A message addressed to a physician, notifying him of the illness of the sendee's daughter and requesting him to come at once, sufficiently shows the necessity of its being sent at once.<sup>83</sup> A message to a person notifying him of the death of his father and requesting his attendance at the funeral involves such a moral necessity that a contract for its transmission may be valid, although made on Sunday.<sup>84</sup> A husband, absent from home, sent to his wife a message by telegraph explaining his protracted absence, and announcing the time of his return. It was held that the sending of such a message involved a moral necessity, and the contract was therefore valid; nor was such a contract rendered illegal by the fact that the sender might as well have sent it on the preceding Saturday, but failed to do so through inadvertence.<sup>85</sup> So also a message reading, "Bettie and baby dead, come to C. tonight to my help," sent by a person whose wife and child had just died, asking his father to come to his assistance, is one of necessity, and shows such necessity on its face.<sup>86</sup> In another case it appeared that the sender, the plaintiff in the case, was a stenographer, who had been engaged to make a report of a certain trial and to furnish notes of the evidence for a bill of exceptions. The time for filing such a bill was limited, and plaintiff, after working assiduously, furnished the report two days before the expiration of the time. It was necessary that the attorney managing the case should at once be informed, so that he might secure the signature of the judge before the term expired. He therefore sent the attorney this message, "Bring forty dollars if you want record," offering it for transmission on Sunday. The court allowed plaintiff to recover, holding that the message related to a matter of necessity,

<sup>81</sup> *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23; *West. U. Tel. Co. v. Griffin*, 1 Ind. App. 46, 27 N. E. 113; *Gulf, etc., R. Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269.

<sup>82</sup> See illustrations in following section of the text.

<sup>83</sup> *West. U. Tel. Co. v. Griffin*, 1 Ind. App. 46, 27 N. E. 113; *Brown v. West. U. Tel. Co.*, 6 Utah, 219, 21 Pac. 988.

<sup>84</sup> *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23.

<sup>85</sup> *Burnett v. West. U. Tel. Co.*, 39 Mo. App. 559.

<sup>86</sup> *Gulf, etc., R. Co. v. Levy*, 59 Tex. 543, 46 Am. Rep. 269.

and, there being a complete failure to send, the company could not urge that the message did not exhibit on its face the necessity.<sup>87</sup>

§ 439. **Statutory penalty—applicable.**—This rule is applicable whether the suit is brought for the purpose of recovering damages, or the statutory penalty imposed on these companies for a failure to promptly transmit a message. Thus, if the message is accepted by the operator on Sunday, but it does not show on its face that its contents concern matters of charity or necessity, and this fact has not been given to the operator in other ways, the company will not be liable for damages or for a statutory penalty imposed on it for a failure to promptly transmit the message;<sup>88</sup> but should the operator be informed of the necessity of its immediate transmission, the company would be liable.<sup>89</sup> If, however, the action is brought to recover, either the statutory penalty or the damages arising out of the breach of contract wherein the company has failed to promptly transmit and deliver a message concerning matters of necessity, and it is shown that the terminal office was closed, the company will not be liable, provided it is not located at a place whose size necessitates it to be opened. It seems, however, that if the receiving operator ascertain this fact, he should use reasonable diligence to inform the sender, in order that the latter may make other arrangements.<sup>90</sup>

§ 440. **Messages which may not be genuine.**—In the absence of notice of facts or circumstances which would suggest or arouse suspicion in the mind of a person of ordinary caution of false impersonation or of want of authority, the exercise of reasonable care by a telegraph operator to receive messages from those only who have authority to send them does not require him to investigate the

<sup>87</sup> See note 52.

<sup>88</sup> *Willingham v. West. U. Tel. Co.*, 91 Ga. 449, 18 S. E. 298; *West. U. Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844; *Rogers v. West. U. Tel. Co.*, 78 Ind. 169, 41 Am. Rep. 558; *Thompson v. West. U. Tel. Co.*, 32 Mo. App. 191; *West. U. Tel. Co. v. Henley*, 23 Ind. App. 14, 54 N. E. 775. See *Bassett v. West. U. Tel. Co.*, 48 Mo. App. 556, under statute will be liable regardless whether messages relate to matters of charity and necessity.

<sup>89</sup> *West. U. Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 322, 3 L. R. A. 224; *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23; *Arkansas, etc., R. Co. v. Lee*, 79 Ark. 448, 96 S. W. 148; *West. U. Tel. Co. v. Eskridge*, 7 Ind. App. 208, 33 N. E. 238; *West. U. Tel. Co. v. Griffin*, 1 Ind. App. 46, 27 N. E. 113; *West. U. Tel. Co. v. McLaurin*, 70 Miss. 26, 13 South. 36; *Burnett v. West. U. Tel. Co.*, 39 Mo. App. 599; *Gulf, etc., R. Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269; *Jones v. Roach*, 21 Tex. Civ. App. 301, 51 S. W. 549; *Brown v. West. U. Tel. Co.*, 6 Utah. 219, 21 Pac. 988. See *Taylor v. West. U. Tel. Co.*, 95 Iowa, 740, 64 N. W. 660.

<sup>90</sup> See § 356.



identity or authority of those who present them,<sup>91</sup> whether the messages are in writing, or are spoken directly or over the telephone by unfamiliar voices.<sup>92</sup> He may take it for granted that those who present them have the right to send them. A care which would delay messages presented to the operator by a person, or by a voice unknown to him, until he could inquire and ascertain the identity and authority of the persons who present them would not be ordinary, but extraordinary, care, for it would be a care which persons of ordinary caution and intelligence do not exercise in similar situations. It would not be reasonable, but unreasonable, care, because it would prevent the speedy transmission of messages and thwart the main purpose of telegraphy. But a telegraph company must avoid being made an instrument of fraud or deception, and must therefore exercise reasonable care to transmit only genuine and authorized messages.<sup>93</sup> And so notice of facts and circumstances which would put a person of ordinary caution upon

<sup>91</sup> *West. U. Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; *West. U. Tel. Co. v. Meyer*, 61 Ala. 158, 32 Am. Rep. 1; *Havelock Bank v. West. U. Tel. Co.*, 141 Fed. 522, 72 C. C. A. 580, 4 L. R. A. (N. S.) 181, 5 Ann. Cas. 515; *State Bank of Commerce v. West. U. Tel. Co.*, 19 N. M. 211, 142 Pac. 156, L. R. A. 1915A, 120.

<sup>92</sup> *Elwood v. West. U. Tel. Co.*, 45 N. Y. 549, 6 Am. Rep. 140; *West. U. Tel. Co. v. Totten*, 141 Fed. 533, 72 C. C. A. 591; *Citizens' Nat. Bank v. West. U. Tel. Co.*, 159 Iowa, 720, 139 N. W. 552, Ann. Cas. 1915D, 243. In *Havelock v. West. U. Tel. Co.*, 141 Fed. 522, 72 C. C. A. 580, 4 L. R. A. (N. S.) 181, 5 Ann. Cas. 515, the operator of defendant received the message by telephone and testified that he did not know the voice of the person who gave him the telegram, but took it for granted that it was the voice of some one who had the right to send it. He also testified that he knew the cashier of the bank whose name was given as that of the sender and that the voice was not his. It was held that these facts were sufficient to warrant a direct verdict for the defendant on the ground that there was no negligence. Among other things, the court said: "The great purpose of telegraphy is the quick transmission of messages from senders to addressees: \* \* \* The telephone furnishes the most speedy and convenient means of communicating these messages from the senders to the offices of the telegraph companies and from these offices to the addressees of the messages; for this reason its use for this purpose has become general throughout the land. The persons who operate the telephone are not generally the business men or officers of corporations in whom the authority to send the telegrams is vested in the first instance, but young men and women to whom this authority is delegated by parol frequently through several intermediaries. An inquiry and decision by telegraph operators of the identity and authority of those who speak the messages over the telephone are utterly incompatible with their rapid receipt and transmission. \* \* \* The truth is that the great majority of private citizens and public officials alike are honest and truthful and that the entire civic fabric rests upon the fundamental principle that they are so."

<sup>93</sup> *Elwood v. West. U. Tel. Co.*, 45 N. Y. 549, 6 Am. Rep. 140; *West. U. Tel. Co. v. Totten*, 141 Fed. 533, 72 C. C. A. 591; *Wells v. West. U. Tel. Co.*, 144 Iowa, 605, 123 N. W. 371, 138 Am. St. Rep. 317, 24 L. R. A. (N. S.) 1045.

inquiry is notice of all the facts to which a reasonably diligent inquiry would lead. And whenever facts or circumstances come to the notice of a telegraph company, or of its operator, which would arouse the suspicion of a person of ordinary prudence and intelligence in a like situation, and would suggest to his mind that the party who presents the message is not authorized to send it, the exercise of reasonable care requires them either to investigate and ascertain his authority before transmitting it,<sup>94</sup> or to communicate the facts and circumstances and the suspicion to the addressee at or before the delivery of the message.<sup>95</sup>

§ 441. **Forged and fraudulent messages.**—Crimes may be committed by means of the telegraph, as through other similar agencies; and when it is shown that the company aids in the commission of a crime by carelessly or negligently discharging its duties, it will be liable for all damages arising out of such criminal act.<sup>96</sup> This fact is more clearly shown by losses occurring in the transmission of forged and fraudulent messages.<sup>97</sup> So, where a message of this nature is accepted and transmitted over a company's line, and the same is delivered to the addressee, who accepts it in good faith—believing it to be uncontaminated with such fraudulent purposes—and thereby complies with its objects to his injury, the company will be liable for all losses flowing directly therefrom, if it can be made to appear that the latter's agent, by the exercise of ordinary care, might have detected and prevented such fraud.<sup>98</sup> It is as much the duty of telegraph op-

<sup>94</sup> *State Bank of Commerce v. West. U. Tel. Co.*, 19 N. M. 211, 142 Pac. 156, L. R. A. 1915A, 120; *West. U. Tel. Co. v. Totten*, 141 Fed. 533, 72 C. C. A. 591; *Elwood v. West. U. Tel. Co.*, 45 N. Y. 549, 6 Am. Rep. 141; *Bank v. West. U. Tel. Co.*, 159 Iowa, 720, 139 N. W. 552, Ann. Cas. 1915D, 243.

<sup>95</sup> *West. U. Tel. Co. v. Totten*, 141 Fed. 533, 72 C. C. A. 591; *Bank of Havelock v. West. U. Tel. Co.*, 141 Fed. 522, 72 C. C. A. 580, 4 L. R. A. (N. S.) 181, 5 Ann. Cas. 515; *Elwood v. West. U. Tel. Co.*, 45 N. Y. 549, 6 Am. Rep. 140; *McCord v. West. U. Tel. Co.*, 39 Minn. 181, 39 N. W. 315, 12 Am. St. Rep. 636, 1 L. R. A. 143; *Pacific Postal Tel.-Cable Co. v. Bank of Palo Alto*, 109 Fed. 369, 48 C. C. A. 413, 54 L. R. A. 711; *May v. West. U. Tel. Co.*, 112 Mass. 90; *State Bank of Commerce v. West. U. Tel. Co.*, 19 N. M. 211, 142 Pac. 156, L. R. A. 1915A, 120.

<sup>96</sup> See § 273 et seq.

<sup>97</sup> See *Elwood v. West. U. Tel. Co.*, 45 N. Y. 549, 6 Am. Rep. 140; *West. U. Tel. Co. v. National Bank* (Tex. Civ. App.) 72 S. W. 232, affirmed in 97 Tex. 219, 77 S. W. 603, 65 L. R. A. 805, 1 Ann. Cas. 573; *Pacific Postal Tel. Cable Co. v. Palo Alto Bank*, 109 Fed. 369, 48 C. C. A. 413, 54 L. R. A. 711.

<sup>98</sup> *State Bank of Commerce v. West. U. Tel. Co.*, 19 N. M. 211, 142 Pac. 156, L. R. A. 1915A, 120; *Citizens' National Bank v. West. U. Tel. Co.*, 159 Iowa, 720, 139 N. W. 552, Ann. Cas. 1915D, 243, question for jury; *Havelock Bank v. West. U. Tel. Co.*, 141 Fed. 522, 72 C. C. A. 580, 5 Ann. Cas. 515, 4 L. R. A. (N. S.) 181; *West. U. Tel. Co. v. Totten*, 141 Fed. 533, 72 C. C. A. 591; *West. U. Tel. Co. v. Schriver*, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678;

erators, while acting in the capacity of agent for these companies, to prevent crimes from being committed through the instrumentality of their lines as it is for persons acting in similar positions, or when they stand in a fiduciary relation toward the person on whom the crime or fraud is attempted to be perpetrated; and any suspicious acts, made at the time of the attempted crime, which would lead a man of ordinary understanding to believe a crime or fraud was being perpetrated,<sup>99</sup> and with which he then fails to interfere, his negligence in failing to prevent such will be presumed, and he or his principal will, therefore, be liable for the damages arising from such acts. So, if at the time the message is delivered to the operator there are circumstances attending the request to transmit which would give the operator reasonable ground to suspect that a fraud was about to be committed, his negligence in not attempting to prevent same will be presumed.<sup>100</sup>

*Wells v. West. U. Tel. Co.*, 144 Iowa, 605, 123 N. W. 371, 138 Am. St. Rep. 317, 24 L. R. A. (N. S.) 1045, question for the jury; *Postal Tel. Cable Co. v. Traders State Bank* (Tex. Civ. App.) 150 S. W. 745; *Bank of California v. West. U. Tel. Co.*, 52 Cal. 280; *McCord v. West. U. Tel. Co.*, 39 Minn. 181, 39 N. W. 315, 12 Am. St. Rep. 636, 1 L. R. A. 143; *Magouirk v. West. U. Tel. Co.*, 79 Miss. 632, 31 South. 206, 89 Am. St. Rep. 663; *Elwood v. West. U. Tel. Co.*, 45 N. Y. 549, 6 Am. Rep. 141; *Pacific Postal Tel. Co. v. Palo Alto Bank*, 109 Fed. 369, 48 C. C. A. 413, 54 L. R. A. 711; *Kagy v. West. U. Tel. Co.*, 37 Ind. App. 73, 76 N. W. 792, 117 Am. St. Rep. 278; *West. U. Tel. Co. v. National Bank* (Tex. Civ. App.) 72 S. W. 232, affirmed in 97 Tex. 219, 77 S. W. 603, 65 L. R. A. 805, 1 Ann. Cas. 573.

*Nature of action* is a tort for a false representation in the nature of a false warranty, and not an action on a contract. *West. U. Tel. Co. v. Schriver*, supra. As to election of remedies, see *Wells v. West. U. Tel. Co.*, supra. As to estoppel, see *Wells v. West. U. Tel. Co.*, supra.

<sup>99</sup> *West. U. Tel. Co. v. Meyer*, 61 Ala. 158, 32 Am. Rep. 1.

<sup>100</sup> In the case of *Elwood v. West. U. Tel. Co.*, 45 N. Y. 549, 6 Am. Rep. 140, it appeared that the plaintiffs, B. & Co., were brokers, doing business at P., in Pennsylvania. On August 12th they received this telegram: "From Erie, Pa., dated August 12th. Forwarded from Fittersville, 12 M. received Aug. 12th. To P. & Co., P., Pa.: Keystone Bank will pay the check of T. F. McC. to the amount of twenty thousand dollars (\$20,000.00) Keystone Bank." The plaintiff observed that the name of the officer of the bank had been omitted, and a second message was then received with the addition of words "J. J. Town, cashier of Keystone Bank." Near the close of the day, McC. presented himself at the plaintiff's banking house and drew ten thousand dollars on the faith of the telegram, leaving an equal sum to his credit. It appeared that the telegram was fraudulent; that McC. himself had presented the telegram at Titusville for transmission; that the operator knew McC. by that name; and that he showed no authority from the cashier when he offered the message for transmission. It was held that the company was liable to the plaintiffs for the loss sustained by them, since the operator had been guilty of negligence in not detecting so palpable a fraud. *State Bank of Commerce v. West. U. Tel. Co.*, 19 N. M. 211, 142 Pac. 156, L. R. A. 1915A, 120.



**§ 442. Same continued—negligence must be proximate cause.—**

In order to hold the company liable for losses caused by its operator's negligently permitting a forged or fraudulent message to be transmitted, it must be shown that such negligence was the proximate cause of the injury,<sup>101</sup> although it may be clear that, except for the negligence of the operator, the loss would not have happened.<sup>102</sup> In other words, there must be a connection between the wrong alleged and the resulting injury; in the contemplation of law, they stand related to each other as cause and effect so as to give a right of action against the wrongdoer and make him chargeable with the loss.<sup>103</sup> It is not every breach of duty which will be a sufficient ground on which to base an action; for, while it may be a causing cause which brings about a loss for injury, yet it may not be the direct, natural or proximate cause of such injury. The proximate cause of the injury may be one of the results of the breach of the operator's duties; but this may be acted upon by other intermediate causes which would effect the breach, as being a remote or indirect cause of the injury, and which fact would relieve the company from liability.<sup>104</sup> In a case in which this point was at issue it appeared that the sender transmitted a message to the plaintiff, asking for a loan of \$500. By mistake the message was transmitted as asking for \$5,000. The money was sent and the original sendee, overcome by cupidity, absconded with it. It was held that the company was not liable, since the injury did not result as a proximate cause of its negligence. The court said in this case: "The plaintiff parted with his money by reason of the message, believing it to have been sent by Brown. He was willing to trust him with \$5,000, and the mistake of the company did not induce the confidence which the plaintiff had in his integrity. \* \* \* The embezzlement could not reasonably have been expected, and did not naturally flow from the wrong of the defendant."<sup>105</sup>

**§ 443. Same continued—operator author of forged message.—**

Not only is a telegraph company liable in damages for injuries caused

See *Postal Tel. Cable Co. v. Traders' State Bank* (Tex. Civ. App.) 150 S. W. 745; *Bailey v. West. U. Tel. Co.*, 227 Pa. 522, 76 Atl. 736, 43 L. R. A. (N. S.) 502, 19 Ann. Cas. 895; *Strong v. West. U. Tel. Co.*, 18 Idaho, 389, 109 Pac. 910, 30 L. R. A. (N. S.) 409, Ann. Cas. 1912A, 55. But see *Wells v. West. U. Tel. Co.*, 144 Iowa, 605, 123 N. W. 371, 138 Am. St. Rep. 317, 24 L. R. A. (N. S.) 1045. See, also, *Citizens' National Bank v. West. U. Tel. Co.*, 159 Iowa, 720, 139 N. W. 552, Ann. Cas. 1915D, 243.

<sup>101</sup> *Lowery v. West. U. Tel. Co.*, 60 N. Y. 198, 19 Am. Rep. 154.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> See chapter XIII.

<sup>105</sup> *Lowery v. West. U. Tel. Co.*, 60 N. Y. 198, 19 Am. Rep. 154.

by the transmission of a forged or fraudulent message whose author is some one not connected with the company, but it is also liable when the message was fraudulently made and sent by its own operators.<sup>106</sup> The ground on which these companies have attempted to exonerate themselves from liability in such cases is that the maxim *respondeat superior* does not apply, because the operator in sending the message was not acting for the company, but for himself and about his own business, and should be treated as having transcended his authority and not acting in furtherance of the company's business. The general rule, with few exceptions, that the liability of masters for wrongs of their servants, is not confined solely to those classes of cases where the acts complained of are done in the course of the employment and in the furtherance of the master's business or interest.<sup>107</sup> There are

<sup>106</sup> *Pacific Postal Tel. Cable Co. v. Palo Alto Bank*, 109 Fed. 369, 48 C. C. A. 413, 54 L. R. A. 711; *McCord v. West. U. Tel. Co.*, 39 Minn. 181, 39 N. W. 315, 1 L. R. A. 143, note, 12 Am. St. Rep. 636. In the last case the local agent of the telegraph company, who was also the local agent for the express company, sent a dispatch to merchants in a neighboring city requesting them to forward money to their correspondent at the former place to be used in buying grain; he forged the name of the agent employed by the addressee to purchase wheat for them. The dispatch was duly received, and the money in good faith forwarded by express; but the local agent intercepted the package and converted the money. It was held that the telegraph company must answer to the addressee for the loss, the proximate cause thereof having been the willful wrong of the company's agent. The court said: "If the corporation fails in the performance of its duty (as to sending messages) through the negligence or fraud of the agent whom it has delegated to perform it, the master is responsible. It was the business of the agent to send dispatches of a similar character. Such acts were within the scope of his employment, and the plaintiff could not know the circumstances that made the particular act wrongful and unauthorized. As for him, therefore, it must be deemed the act of the corporation." In *Magouirk v. West. U. Tel. Co.*, 79 Miss. 632, 31 South. 206, 89 Am. St. Rep. 663, an agent of the defendant sent this message: "Mr. G. Ellisville. Be sure to go to Heidelberg. Am on excursion"—and forged plaintiff's name to it. Plaintiff was an unmarried woman and the addressee an unmarried man with whom she had but a slight acquaintance. After sending the message, the agent boasted of having sent it and paraded its contents before the public. It was held that his acts were within the scope of his employment and that the company was liable to plaintiff for the mortification and injury occasioned to her. It was also held that the plaintiff might show the agent's habits as to the use of intoxicants as indicating his unfitness for the position he held. See, also, *New York, etc., Printing Tel. Co. v. Dryburg*, 35 Pa. 298, 78 Am. Dec. 338; *Pacific Postal Tel. Cable Co. v. Palo Alto Co.*, 109 Fed. 369, 48 C. C. A. 413, 54 L. R. A. 711; *Bank of California v. West. U. Tel. Co.*, 52 Cal. 280; *Postal Tel. Cable Co. v. State Bank (Tex. Civ. App.)* 150 S. W. 745; *Wells v. West. U. Tel. Co.*, 144 Iowa, 605, 123 N. W. 371, 138 Am. St. Rep. 317, 24 L. R. A. (N. S.) 1045.

<sup>107</sup> *McCord v. West. U. Tel. Co.*, 39 Minn. 181, 39 N. W. 315, 1 L. R. A. 143n, 12 Am. St. Rep. 638. Compare *Mott v. Consumers' Ice Co.*, 73 N. Y. 543; *Fishkill Savings Institution v. Nat. Bank*, 80 N. Y. 162, 36 Am. Rep. 599; *Potulni v. Saunders*, 37 Minn. 517, 35 N. W. 379.

certain duties which the master, when exercising a public function, owes to the public. One of these is, he must abstain from committing such acts as will become an injury to the public; so, if the master's servant, while in the discharge of his general duties as such, should, by his own act, occasion a violation of such duty, the master will be liable, whether the duty be founded in contract or be a common-law duty growing out of the relation in which the master stands.<sup>108</sup> The wrongful act of the agent is the proximate cause of the injury, and the fact that the addressee may have relied upon the confidence and reliability of the sender, whose name was forged and fraudulently attached to the telegram, will not be such contributory negligence as to prevent him from recovering, although, if he had not been misled by such wrongful act, the rule would be otherwise. But in these cases, where the message has been forged by the company's operator, he is misled. If it were the business of the operator to send messages of similar character, and the injured party had been in the habit of accepting them in good faith, he could not know the circumstances in any particular case that would make the particular act wrongful and unauthorized. As to him, therefore, the acts would be misleading and should be considered as flowing directly from the company.<sup>109</sup>

§ 444. **Same continued—subagent, forgery of.**—The above rule is applicable where the message is forged by a subagent of the company who was appointed by one of the company's operators having no authority to make such appointment. In a case on this point, the subagent sent a false message purporting to come from the cashier of a bank, directing another bank to pay a fictitious person a sum of money; he then impersonated the fictitious person, and obtained the money. No negligence on the part of the bank was shown. It was held that the company was responsible to the bank for the amount thus obtained. The court reasoned that, although a principal is not bound by a contract made in his name by a subagent appointed by his agent without authority, yet he is responsible for the negligence of such subagent, if the agent who appointed him was at the time acting in the business of his principal and the subagent was transacting such business.<sup>110</sup>

§ 445. **Same continued—no bar to action ex delicto—injured party.**—It has been attempted to be shown that where an injury has

<sup>108</sup> Shearman & Redfield on Neg. (4th Ed.) §§ 149, 150, 154; Taylor on Corp. (2d Ed.) § 145; Pacific Postal Tel. Cable Co. v. Bank of Palo Alto, 109 Fed. 369, 48 C. C. A. 413, 54 L. R. A. 714.

<sup>109</sup> Shearman & Redfield on Neg. (4th Ed.) §§ 149, 150, 154; Taylor on Corp. (2d Ed.) § 145.

<sup>110</sup> Bank of California v. West. U. Tel. Co., 52 Cal. 280.



occurred by the negligent transmission of a forged or fraudulent draft sent by means of a telegraph company, the injured party<sup>111</sup> should first seek his remedy against the indorser of the draft by an action *ex contractu*; but it is generally held that he may seek his remedy against the company for the breach of its duty toward him, or by an action *ex delicto*, although one of the indorsers of the note is solvent and amply able to indemnify him for his loss.<sup>112</sup> As was said by Gresham, J., by way of illustration of this rule: "If a railroad train is wrecked by the carelessness of a drunken engineer, the injured passengers have two remedies; one against the engineer for the tort, and the other against the company on the contract. In an action by the passenger in such a case against the engineer, the latter would not be allowed to plead against all but nominal damages that the passenger had a remedy against the solvent carrier."<sup>113</sup>

§ 446. **Amount of damages.**—Having considered the liability of the telegraph companies for damages occurring in the transmission of forged or fraudulent messages, the question which necessarily follows is, What damages can be recovered in such cases? The general rule is that the addressee can recover only such actual damages as he may have sustained in the particular case.<sup>114</sup> In other words, he can recover in damages the amount of money of which he was defrauded, less that which he may have recovered from the

<sup>111</sup> *Liability to addressee.*—A telegraph company which negligently transmits or delivers a forged message is liable to the addressee. See cases cited in note 98, *supra*.

*Liability to stranger.*—It has been held that an undisclosed principal might sue a telegraph company for a forged telegram. *Wells v. West. U. Tel. Co.*, 144 Iowa, 605, 123 N. W. 371, 138 Am. St. Rep. 317, 24 L. R. A. (N. S.) 1045, disapproving *West. U. Tel. Co. v. Schriver*, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678, which is the subsequent appeal of the case reported in 129 Fed. 344, 66 C. C. A. 96.

<sup>112</sup> *Strause v. West. U. Tel. Co.*, 8 Biss. 104, Fed. Cas. No. 13,531; *Hasbrouck v. West. U. Tel. Co.*, 107 Iowa, 160, 77 N. W. 1034, 70 Am. St. Rep. 181; *Bank of Cal. v. West. U. Tel. Co.*, 52 Cal. 280; *Wells v. West. U. Tel. Co.*, 144 Iowa, 605, 123 N. W. 371, 138 Am. St. Rep. 317, 24 L. R. A. (N. S.) 1045. See note 98, *supra*.

<sup>113</sup> *Strause v. West. U. Tel. Co.*, 8 Biss. 104, Fed. Cas. No. 13,531; *Wells v. West. U. Tel. Co.*, 144 Iowa, 605, 123 N. W. 371, 138 Am. St. Rep. 317, 24 L. R. A. (N. S.) 1045.

<sup>114</sup> *Wells v. West. U. Tel. Co.*, 144 Iowa, 605, 123 N. W. 371, 138 Am. St. Rep. 317, 24 L. R. A. (N. S.) 1045; *Pacific Postal Tel. Cable Co. v. Palo Alto Bank*, 109 Fed. 369, 48 C. C. A. 413, 54 L. R. A. 714. See *State Bank of Commerce v. West. U. Tel. Co.*, 19 N. M. 211, 142 Pac. 156, L. R. A. 1915A, 120; *Kagy v. West. U. Tel. Co.*, 37 Ind. App. 73, 76 N. E. 792, 117 Am. St. Rep. 278; *Elwood v. West. U. Tel. Co.*, 45 N. Y. 549, 6 Am. Rep. 140; *Lowery v. West. U. Tel. Co.*, 60 N. Y. 198, 19 Am. Rep. 154; *Strause v. West. U. Tel. Co.*, 8 Biss. 104, Fed. Cas. No. 13,531.

defrauder. Therefore he cannot recover from the company the fees which he has paid an attorney for collecting that from the defrauder, nor the costs which may have accrued in its collection.<sup>115</sup> As before said, the addressee may refuse to prosecute the defrauder or his confederate but enforce his remedy against the telegraph company.<sup>116</sup> If this should be the course pursued, the amount of which he was defrauded could be recovered. The fact that he has pursued this course will not prevent the company from recovering from the defrauder the amount which it has paid to the addressee.<sup>117</sup>

**§ 447. Connecting lines—passage over—initial line—general rule.**—By the analogy to the principle governing the liability of common carriers of goods, the general rule is that a telegraph company is not bound by law to accept and transmit messages beyond the terminus of its own line.<sup>118</sup> In the absence of any agreement,<sup>119</sup> either express or clearly implied, for transmission beyond its own line, the common-law duty of an independent company is performed when it safely transmits the message over its own line and delivers it promptly and correctly to the connecting line, and it is not therefore liable for any errors or delays occurring on the other line.<sup>120</sup> If, in such case, the message is to be delivered by the initial line to a connecting line for further transmission, the former is considered as a forwarding agent and is not liable for the defaults of the subsequent line or lines.<sup>121</sup> It may be said here, however, that the whole duty of the initial company is not always performed by merely tendering the message promptly and correctly to the connecting line. If the latter should refuse to accept the message, it is the duty of the initial company to make a reasonable effort to inform the sender of this fact.<sup>122</sup> It is the general rule, with some exceptions, that the connecting line should accept the message

<sup>115</sup> *Pacific Postal Tel. Cable Co. v. Palo Alto Bank*, 109 Fed. 369, 48 C. C. A. 413, 54 L. R. A. 714.

<sup>116</sup> See § 445.

<sup>117</sup> *Pacific Postal Tel. Cable Co. v. Palo Alto Bank*, 109 Fed. 369, 48 C. C. A. 413, 54 L. R. A. 711.

<sup>118</sup> *Leonard v. New York, etc., Elec. Mag. Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *De Rutte v. New York, etc., Elec. Mag. Tel. Co.*, 1 Daly (N. Y.) 547, 30 How. Prac. 403; *Smith v. West. U. Tel. Co.*, 84 Tex. 359, 19 S. W. 441, 31 Am. St. Rep. 59; *Stevenson v. Montreal Tel. Co.*, 16 U. C. Q. B. 530.

<sup>119</sup> See §§ 365 and 405.

<sup>120</sup> *West. U. Tel. Co. v. Carew*, 15 Mich. 525; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *Gulf, etc., R. Co. v. Baird*, 75 Tex. 256, 12 S. W. 539; *Smith v. West. U. Tel. Co.*, 84 Tex. 359, 19 S. W. 441, 31 Am. St. Rep. 59. Compare *Blodgett v. Abbott*, 72 Wis. 516, 40 N. W. 491, 7 Am. St. Rep. 873; *McLaren v. Detroit, etc., R. Co.*, 23 Wis. 138; *St. Louis, etc., R. Co. v. Marrs*, 60 Ark. 637, 31 S. W. 42.

<sup>121</sup> See § 405.

<sup>122</sup> See § 283.

under agreement of the original contract of sending,<sup>123</sup> but should the message be accepted conditionally, with respect to such agreement,<sup>124</sup> it is the duty of the initial company to inform the sender of this fact.<sup>125</sup> It is within the discretion of the sender to choose the connecting company over whose lines he may desire the message to be transmitted, and when such selection has been made it is the duty of the initial company to deliver the message to this line.<sup>126</sup>

§ 448. **Same continued—English rule.**—The rule in England, with respect to the liability of the initial company for losses occurring on connecting lines, is different from that generally held in the United States.<sup>127</sup> It is held in England that, where a common carrier accepts good which, in order to reach their destination, must necessarily be transported over other lines, the initial carrier, in the absence of an agreement to that effect, is liable for all losses not caused by the act of God or the public enemy which may be incurred either over its own or the connecting carrier's lines.<sup>128</sup> The ground on which they so hold is that the connecting lines are operating in the capacity of agent toward the initial line, and that the latter is bound for all acts of its agent. There are some of our states which have theoretically adopted this rule,<sup>129</sup> and in these it may be held that telegraph companies, where these are classed as common carriers, accepting messages to be transmitted over connecting lines, are liable for all errors or delays made over the latter. It is held, however, under this rule, that the carrier may by an agreement limit its liability to its own line.<sup>130</sup> On the blank forms used by these companies there is usually a stipulation that the initial company is to act as agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination. This stipulation has been held to be reasonable and is binding on the sender when he attaches his

<sup>123</sup> See § 365.

<sup>124</sup> See § 365.

<sup>125</sup> See §§ 283, 291.

<sup>126</sup> See § 462.

<sup>127</sup> *Stevenson v. Montreal Tel. Co.*, 16 U. C. Q. B. 530.

<sup>128</sup> *Muschamp v. Lancaster, etc., R. Co.*, 5 Jur. 656; *Watson v. Ambergurt, etc., R. Co.*, 15 Jur. 450.

<sup>129</sup> *Mobile, etc., R. Co. v. Copeland*, 63 Ala. 219, 35 Am. Rep. 13; *Illinois Central R. Co. v. Frankenberg*, 54 Ill. 88, 5 Am. Rep. 92; *East Tenn., etc., R. Co. v. Rogers*, 6 Heisk. (Tenn.) 143, 19 Am. Rep. 589. Congress has passed an act making the initial common carrier of goods liable. See Act to Regulate Commerce (Feb. 4, 1887, c. 104, § 20, 24 Stat. 386, as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [Comp. St. 1913, § 8592]).

<sup>130</sup> *West. U. Tel. Co. v. Carew*, 15 Mich. 525; *McCarn v. Int., etc., R. Co.*, 84 Tex. 352, 19 S. W. 547, 31 Am. St. Rep. 51, 16 L. R. A. 39; *West. U. Tel. Co. v. Simms*, 30 Tex. Civ. App. 32, 69 S. W. 464; *Gulf, etc., R. Co. v. Geer*, 5 Tex. Civ. 349, 24 S. W. 86.



signature to the message.<sup>131</sup> This being the case, it is seldom that the English rule can be enforced against the telegraph companies.<sup>132</sup>

§ 449. **Accept all the charges—rule not changed.**—It is generally the case, when messages are sent over connecting lines in order to reach their destination, that the initial company receives from the sender all the charges for transmitting the message over the entire route. In fact, another arrangement could not be so conveniently used. This does not, however, make the initial company liable for any errors made over the connecting line.<sup>133</sup> There are others, however, holding a contrary view.<sup>134</sup> With respect to the collection of the charges by the initial company for the connecting lines, the former acts in the capacity of agent for the latter. These charges are collected by the initial company and held until a settlement is made with the connecting lines, when they are divided among them in the proportion each of these lines bear to the entire line over which the message is transmitted. This is the general rule by which the charges are divided; and it may be safely said that the initial company acts only as agent for the others in the collection of the charges, and is not therefore liable for the errors of the others.

§ 450. **Initial company—diligence to deliver to other line.**—As said in a previous section, the initial company has not performed all of its duties by delivering the message to the connecting line, but it must further exercise due diligence in making a prompt delivery to this company; and any loss arising out of such delay will subject the former to the loss.<sup>135</sup> Thus, where the company undertakes to transmit the message to the terminus of its line, and there forward it by mail, a delay of three days in mailing it is negligence for which it will be liable.<sup>136</sup> The initial company will be liable if

<sup>131</sup> See §§ 365 and 405; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165, reversing 54 Barb. 505; *Leonard v. New York, etc., Elec. Mag. Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *West. U. Tel. Co. v. Munford*, 87 Tenn. 190, 10 S. W. 318, 10 Am. St. Rep. 630, 2 L. R. A. 601; *Stevenson v. Montreal Tel. Co.*, 16 U. T. Q. B. 530. See, also, *West. U. Tel. Co. v. Strate-meier*, 6 Ind. App. 125, 32 N. E. 871.

<sup>132</sup> *West. U. Tel. Co. v. Carew*, 15 Mich. 525; *McCarn v. Int., etc., R. Co.*, 84 Tex. 352, 19 S. W. 547, 31 Am. St. Rep. 51, 16 L. R. A. 39; *West. U. Tel. Co. v. Simms*, 30 Tex. Civ. App. 32, 69 S. W. 464; *Gulf, etc., R. Co. v. Geer*, 5 Tex. Civ. App. 349, 24 S. W. 86.

<sup>133</sup> *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165.

<sup>134</sup> *De Rutte v. New York, etc., Elec. Mag. Tel. Co.*, 1 Daly (N. Y.) 547, 30 How. Prac. 403; *West. U. Tel. Co. v. Shumate*, 2 Tex. Civ. App. 429, 21 S. W. 109.

<sup>135</sup> *West. U. Tel. Co. v. Seals* (Tex. Civ. App.) 45 S. W. 964.

<sup>136</sup> *West. U. Tel. Co. v. McIlvoy*, 107 Ky. 633, 55 S. W. 428.

a delay on its part causes a greater delay on the connecting line.<sup>137</sup> It is further the duty of the initial company to exercise a reasonable effort to inform the sender that the connecting company refuses to accept the message, or that its lines are out of working order.<sup>138</sup>

§ 451. **Same continued—telephone—same rule applied.**—The above rule applies to telephone companies where they carry on long-distance services.<sup>139</sup> Thus, if a telephone company accepts a message for transmission and it becomes necessary for the message to be communicated over other lines in order to reach its destination, the initial company must promptly and correctly deliver the message to the connecting line,<sup>140</sup> and, after this has been done, it will not be liable for any errors occurring over the connecting lines. But it was held in one case, where the operator at the terminus of the initial line was also the operator of the connecting line—or, in other words, when the same party was the common operator of the initial and the connecting line at the place of their connection—that for an error caused on the latter line by his negligence the former company will be liable.<sup>141</sup> When the telephone is not doing long-distance service, it is not its duty, in the first place, to accept a message whose destination is beyond its terminus;<sup>142</sup> but should such a message be accepted, and the connecting line refuse to accept the message, the former will not be liable for such nonacceptance.

§ 452. **Special contract—may become liable by.**—While the general law rule is that a telegraph company is only liable for such errors as may occur on its own line, yet it may contract so as to

<sup>137</sup> *Weatherford, etc., R. Co. v. Seals* (Tex. Civ. App.) 41 S. W. 841.

<sup>138</sup> *West. U. Tel. Co. v. Sorsby*, 29 Tex. Civ. App. 345, 69 S. W. 122. See § 283.

<sup>139</sup> See *Cumberland Tel., etc., Co. v. Atherton*, 122 Ky. 154, 91 S. W. 257, 28 Ky. Law Rep. 1100. See § 318.

<sup>140</sup> Where a request is made for a certain number or telephone, the company's duty is discharged by making the proper connection, see § 256; and it is not responsible for the identity of the party answering, see *McLeod v. Pacific Tel. Co.*, 52 Or. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. (N. S.) 810, 18 L. R. A. (N. S.) 954, 16 Ann. Cas. 1239; although it might be liable for negligently giving the wrong connection, see *McLeod v. Pacific Tel. Co.*, supra. See, also, §§ 256, 318.

<sup>141</sup> *Southwestern Tel., etc., Co. v. Taylor*, 26 Tex. Civ. App. 79, 63 S. W. 1076.

<sup>142</sup> See § 318; *Southwestern Tel., etc., Co. v. Gotcher*, 93 Tex. 114, 53 S. W. 686. It is the duty to furnish a means of communication and to find and notify persons for whom calls are made, *Southwestern Tel. Co. v. Gotcher*, supra; *Southwestern Tel. Co. v. Flood*, 51 Tex. Civ. App. 340, 111 S. W. 1061; and it will be liable not to do so, *McLeod v. Pacific Tel. Co.*, 52 Or. 22, 94 Pac. 568, 95 Pac. 1005, 15 L. R. A. (N. S.) 810, 18 L. R. A. (N. S.) 954, 16 Ann. Cas. 1239; or where it brings a different person than one desired, *McLeod v. Pacific Tel. Co.*, 52 Or. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. (N. S.) 810, 18 L. R. A. (N. S.) 954, 16 Ann. Cas. 1239.

bind itself for the negligence of connecting lines as well as for its own,<sup>143</sup> even though the extra terminal connecting line extends into another state or country.<sup>144</sup> This proposition, although well settled, was at first closely questioned on the ground that contracts for liability beyond its terminus, specified in the charter, were *ultra vires*.<sup>145</sup> If, therefore, a telegraph company should contract to transmit a message beyond its terminus, it will be liable for all damages caused by any delay, or by any errors made on the connecting line, just the same as if the error was made on its own line.<sup>146</sup>

§ 453. **Same continued—who may contract.**—The courts hold that the agent's authority to receive goods for carriage implies authority to contract for extraterminal liability.<sup>147</sup> The rule of telegraph companies is in this respect similar to these holdings.<sup>148</sup> In other words, where a telegraph company carries on a general telegraphic business, it may make a contract to send the message to its destination, and in the absence of the proof to the contrary, the manager or agent of the office of a telegraph company will be presumed to have authority to make such a contract. Any other holding would be contrary to good reason. As said before, these contracts are matters of convenience to the general public, in that the sender is not compelled to make contracts with the connecting lines, but may accomplish his purpose by making one contract for the entire route. Then, if the company has this right and it is a matter of convenience to the public, surely the company should delegate the authority to some of its agents, conveniently situated

<sup>143</sup> *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 458, 20 Am. Rep. 605. See, also, *Crouch v. Great Western Railway*, 2 Hurl. & N. 491; *Great Western Railway Co. v. Crouch*, 3 Hurl. & N. 183; *Grand Trunk R. Co. v. McMillan*, 16 Can. Sup. Ct. R. 543, 42 Am. & Eng. R. Cas. 468; *West. U. Tel. Co. v. Strate-meier*, 6 Ind. App. 125, 32 N. E. 871. See, also, *West. U. Tel. Co. v. Carter*, 24 Tex. Civ. App. 80, 58 S. W. 198; *American Ex. Co. v. Postal Tel. Cable Co.*, 97 Neb. 701, 151 N. W. 240.

<sup>144</sup> *West. U. Tel. Co. v. Carter*, 24 Tex. Civ. App. 80, 58 S. W. 198. See, also, *Burtis v. Buffalo, etc., R. Co.*, 24 N. Y. 269; *Phillips v. N. C. Co.*, 78 N. C. 294; *Lindley v. Richmond, etc., R. Co.*, 88 N. C. 547; *McCarn v. Inter., etc., R. Co.*, 84 Tex. 352, 19 S. W. 547, 16 L. R. A. 39, 31 Am. St. Rep. 51.

<sup>145</sup> *Perkins v. Portland, etc., R.*, 47 Me. 573, 74 Am. Dec. 507; *Root v. Great Western R.*, 45 N. Y. 524; *Hill Mfg. Co. v. Boston, etc., R.*, 104 Mass. 122, 6 Am. Rep. 202.

<sup>146</sup> See cases in note 143, *supra*.

<sup>147</sup> *Muschamp v. Lancaster & P. J. R. R. Co.*, 8 M. & W. 421; *Scothorn v. South, etc., R.*, 8 Exch. 341; *Rickerson R. M. Co. v. Grand Rapids, etc., R. Co.*, 67 Mich. 110, 34 N. W. 269; *Taylor v. Maine Cent. R. Co.*, 87 Me. 299, 32 Atl. 905.

<sup>148</sup> *Jones v. Roach*, 21 Tex. Civ. App. 301, 51 S. W. 549.



to the public, and it will be presumed that the operators have this authority.

§ 454. **Connecting lines.**—Having considered to some extent the duties and liabilities of the initial companies, we shall now say something about the duties and liabilities of connecting companies; and first we shall see what is understood by the term “connecting telegraph companies.” A “connecting telegraph company” is one whose lines are situated and extend somewhere, in whole or in part, between the initial line and the place to which a message may be desired to be sent.<sup>149</sup> The line may be entirely between these two, or the point of destination may be on the line of the connecting company. In order for it to be a connecting line, there must be another line intervening between this one and the place at which the message is first tendered for transmission. In other words, there must be a connection between the two lines, and the connecting company must not be on the initial line, or the company first accepting the message for transmission.

§ 455. **Same continued—duty to accept messages tendered.**—It is the duty of the connecting company to accept all messages tendered it by the initial line.<sup>150</sup> It is as much the duty of this company to accept these messages as it is for the initial company to accept them. There have been statutes adopted in some of the states which attempt to enforce this duty, but it is held that these statutes are only declaratory of the common-law duty, and that it is as much the duty of these companies as if no statute had been enacted.<sup>151</sup> It is generally held, however, that this duty only applies where the message is destined to some point on its line, and that it is not the duty of these connecting lines to accept a message whose destination is at some point beyond the terminus of its line.<sup>152</sup> If the company, however, undertakes, as part of its regular business, to transmit messages beyond its terminus, it would be part of its duty to accept all messages of like nature, but

<sup>149</sup> Hutchinson on Carriers (2d Ed.) § 157a.

<sup>150</sup> See § 365.

<sup>151</sup> *U. S. Tel. Co. v. West. U. Tel. Co.*, 56 Barb. (N. Y.) 46; *Baldwin v. U. S. Tel. Co.*, 6 Abb. Prac. N. S. (N. Y.) 405. In the last case it was held that under a statute requiring connecting telegraph companies to receive and forward messages transmitted for the purpose upon each other's line, a company receiving a message to be forwarded, in part, over such connecting line, is to be regarded as authorized to make the contract respecting its transmission for such line; and the receipt by the former company of an entire price for the message is a sufficient consideration for the express or implied obligation resulting against such connecting company.

<sup>152</sup> See § 275.

in doing so it may affix reasonable conditions and limitations to its liabilities.<sup>153</sup>

§ 456. **Same continued—duty of.**—The duties of a connecting line are similar to those of the initial company. Thus, where there is more than one message delivered by the latter to a connecting line, it must accept and transmit each in the regular order of time in which they are received without any discrimination.<sup>154</sup> In some instances, on account of the nature of the message, there may be an exception to this rule, the same as enjoyed by the initial line.<sup>155</sup> It must exercise due diligence in making a prompt and correct transmission of the message, and should use the same diligence to make a prompt delivery of it as the initial line, if the latter's line extends to the point to which it is sent.<sup>156</sup> When it is necessary to transmit the messages over another connecting line, in order to reach its destination, the intermediate or first connecting line should make a prompt delivery of the message to this connecting line.<sup>157</sup> As said,<sup>158</sup> the sender may select the connecting line over which his message should be sent, but if for any reason this line selected refuses to accept, or cannot transmit the message, the connecting company should use reasonable efforts to notify the sender of this fact;<sup>159</sup> and if the information cannot be imparted to him, then it is the duty of the company to select some other suitable route for the transmission of the message.

§ 457. **Liability of connecting lines.**—The liabilities of the connecting company are also somewhat similar to those of the initial lines.<sup>160</sup> The connecting company's liability does not, however, be-

<sup>153</sup> West. U. Tel. Co. v. Way, 83 Ala. 542, 4 South. 844; Pitlock v. Wells, 109 Mass. 452; U. S. Tel. Co. v. West. U. Tel. Co., 56 Barb. (N. Y.) 46; West. U. Tel. Co. v. Taylor, 3 Tex. Civ. App. 310, 22 S. W. 532. In the case of the West. U. Tel. Co. v. Stratemeier, 6 Ind. App. 125, 32 N. E. 871, plaintiff asked the agent whether it had a line and receiving station at a certain point, and upon being informed that it had, he delivered to the agent a message directed to such point, relying entirely on the operator's representations. In an action for failure to deliver such message, it was held that the company was estopped to deny that it had no line or receiving station at the point named.

<sup>154</sup> See § 250.

<sup>155</sup> Id.

<sup>156</sup> West. U. Tel. Co. v. Lyman, 3 Tex. Civ. App. 460, 22 S. W. 656; Martin v. West. U. Tel. Co., 1 Tex. Civ. App. 143, 20 S. W. 860. See § 284 et seq.

<sup>157</sup> Smith v. West. U. Tel. Co., 84 Tex. 359, 19 S. W. 441, 31 Am. St. Rep. 59.

<sup>158</sup> See § 462.

<sup>159</sup> See §§ 283, 291.

<sup>160</sup> Squire v. West. U. Tel. Co., 98 Mass. 232, 93 Am. Dec. 157; Baldwin v. United States Tel. Co., 45 N. Y. 744, 6 Am. Rep. 165, reversing 54 Barb. 505; Leonard v. New York, etc., Elec. Mag. Tel. Co., 41 N. Y. 544, 1 Am.

gin to run until the message has been actually delivered to it.<sup>161</sup> The connecting company cannot, as a rule, be held for the negligence of the initial or of the other connecting lines in the absence of a partnership, express or implied.<sup>162</sup> Thus, if a delay on the first line causes a greater delay on the connecting line, the latter will not be liable.<sup>163</sup> If there is a delay in delivering the message after it has been transmitted, the last line will be liable.<sup>164</sup> But sometimes, because of the relation of principal and agent, and more frequently because of some partnership arrangement existing between the lines, one connecting line has been held liable for the negligence of some of the other lines.<sup>165</sup> If several of these companies have been guilty of negligence in the transmission, that one will be held responsible whose negligence was the proximate cause of the loss complained of.<sup>166</sup> Thus, where the addressee's name is negligently changed by one of the lines, but the error is corrected by another line, the negligence of the first will not be the proximate cause of the loss, if it were not otherwise negligent.<sup>167</sup>

§ 458. **Burden of proof.**—It has been held that, where a loss has occurred in the transportation of goods, it is presumed that

Rep. 446; *West. U. Tel. Co. v. Lyman*, 3 Tex. Civ. App. 460, 22 S. W. 656, holding that a connecting telegraph company is liable to the addressee for its own negligence and that the original contract of transmission was between the transmitting company and the sender of the message; *West. U. Tel. Co. v. Taylor*, 3 Tex. Civ. App. 310, 22 S. W. 532; but not for special damages in the absence of notice of facts which would warrant such in case of failure to discharge duty, *Baldwin v. United States Tel. Co.*, supra. See, also, *Sabine Valley Tel. Co. v. Oliver*, 46 Tex. Civ. App. 428, 102 S. W. 925.

<sup>161</sup> *Missouri Pac. R. Co. v. Wichita, etc., Co.*, 55 Kan. 525, 40 Pac. 899; *Condon v. Marquette, etc., R. Co.*, 55 Mich. 218, 21 N. W. 321, 54 Am. Rep. 367; *Petersen v. Case* (C. C.) 21 Fed. 885; *West. U. Tel. Co. v. Seals* (Tex. Civ. App.) 45 S. W. 964; *Weatherford, etc., R. Co. v. Seals* (Tex. Civ. App.) 41 S. W. 841; *Squire v. West. U. Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157; *Smith v. West. U. Tel. Co.*, 84 Tex. 359, 19 S. W. 441, 31 Am. St. Rep. 59.

<sup>162</sup> *Montgomery, etc., R. Co. v. Moore*, 51 Ala. 394; *Knott v. Raleigh, etc., R. Co.*, 98 N. C. 73, 3 S. E. 735, 2 Am. St. Rep. 321; *Lowenburg v. Jones*, 56 Miss. 688, 31 Am. Rep. 379; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165. See § 459.

<sup>163</sup> *Weatherford, etc., R. Co. v. Seals* (Tex. Civ. App.) 41 S. W. 841. See § 405.

<sup>164</sup> *West. U. Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608, 21 S. W. 638.

<sup>165</sup> *De Rutte v. New York, etc., Elec. Mag. Tel. Co.*, 1 Daly (N. Y.) 547, 30 How. Prac. 403; *West. U. Tel. Co. v. Shumate*, 2 Tex. Civ. App. 429, 21 S. W. 109.

<sup>166</sup> *West. U. Tel. Co. v. Munford*, 87 Tenn. 100, 10 S. W. 318, 2 L. R. A. 601, note, 10 Am. St. Rep. 630; *Baldwin v. United States Tel. Co.*, 45 N.

<sup>167</sup> *West. U. Tel. Co. v. Munford*, 87 Tenn. 190, 10 S. W. 318, 2 L. R. A. 601n, 10 Am. St. Rep. 630.



the loss occurred on the last connecting line.<sup>168</sup> But this rule has been held by many able courts and text-writers to be unsound.<sup>169</sup> The general rule of telegraph companies in this respect is that, where any connecting line is sued, the presumptions are that it was guilty of negligence, and the burden is upon it to show that the delay or error did not occur on its line.<sup>170</sup> The reason for holding to such a rule is that the facts of its guilt or innocence lies more within the knowledge of the company than it does in the sender or the injured party. As said in a former part of this work, it would be an unreasonable rule to require the injured party to show the negligence of the company which lies more peculiarly within the knowledge of the latter.<sup>171</sup> To enforce such a rule would be nothing more nor less than the defeat of every case brought against these companies for losses or injuries. The more reasonable rule, therefore, would be to cast the burden of proof upon the connecting line sued.<sup>172</sup>

**§ 459. Partnership arrangements between the several lines.**—Telegraph companies may have some kind of partnership arrangement, with respect to messages transmitted over their respective lines, and when such is the case each will be liable for the negligence of the other.<sup>173</sup> The difficulty in these cases is proving the partnership. This relation of liability of connecting companies may exist as to third persons without its existence toward each other.<sup>174</sup> But it has been held that the mere fact of one company

Y. 744, 6 Am. Rep. 165, reversing 54 Barb. 505: *Leonard v. New York, etc., Elec. Mag. Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446: *Stevenson v. Montreal Tel. Co.*, 16 U. C. Q. B. 530. See, also, *West. U. Tel. Co. v. Stratemeier*, 6 Ind. App. 125, 32 N. E. 871.

<sup>168</sup> *Tex., etc., R. Co. v. Adams*, 78 Tex. 372, 14 S. W. 666, 22 Am. St. Rep. 56; *Lindley v. Richmond, etc., R. Co.*, 88 N. C. 547; *Savannah, etc., R. Co. v. Harris*, 26 Fla. 148, 7 South. 544, 23 Am. St. Rep. 551; *Beard & Sons v. Ill. Cent. R. Co.*, 79 Iowa, 518, 44 N. W. 800, 18 Am. St. Rep. 381, 7 L. R. A. 280. See Act to Regulate Commerce Feb. 4, 1887, c. 104, § 20, 34 Stat. 386, as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 (Comp. St. 1913, § 8592).

<sup>169</sup> *Missouri Pac. R. Co. v. Breeding*, 4 Willson, Civ. Cas. Ct. (Tex.) § 154, 16 S. W. 184; *Gulf, etc., R. Co. v. Holder*, 10 Tex. Civ. App. 223, 30 S. W. 383; *Evans v. Atlanta, etc., R. Co.*, 56 Ga. 498; *Goodman v. Oregon, etc., R. Co.*, 22 Or. 14, 28 Pac. 894.

<sup>170</sup> *West. U. Tel. Co. v. Munford*, 87 Tenn. 190, 10 S. W. 318, 10 Am. St. Rep. 630, 2 L. R. A. 601.

<sup>171</sup> See chapter XIII.

<sup>172</sup> See chapter XIII. See, also, § 509.

<sup>173</sup> *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *West. U. Tel. Co. v. Lovely* (Tex. Civ. App.) 52 S. W. 563.

<sup>174</sup> *Block v. Fitchburg R. Co.*, 139 Mass. 308, 1 N. E. 348; *Wyman v. Chicago, etc., R. Co.*, 4 Mo. App. 35; *Hood v. N. Y., etc., R. Co.*, 22 Conn. 1; *Brooks v. Grand Trunk R. Co.*, 15 Mich. 332.

regularly receiving messages to be sent over its own and that of another line was not of itself sufficient evidence of a partnership, whereby one would become responsible for the negligence of the other.<sup>175</sup> Yet, where these companies have associated themselves under a contract for a division of the profits, made in the contract for sending, in a certain proportion of the receipts after deducting the expenses incurred in the transmission of the message, they become jointly liable as partners to third persons.<sup>176</sup> But "where the agreement is that each shall bear the expenses of his own route, \* \* \* and the gross receipts shall be divided in proportion to distance, they are partners neither *inter se* nor as to third persons, and incur no joint liability."<sup>177</sup>

§ 460. **Effect of contract of sending on connecting lines.**—If a connecting company is designated as such in the original contract for sending, or if the blank form of the company provides that all stipulations therein shall inure to the benefit of all the connecting lines, then, having accepted the message thereunder without requiring any separate contract, it becomes virtually a party to the contract and is bound by all the undertakings therein and benefited by all the limitations.<sup>178</sup> If, however, no connecting line

<sup>175</sup> *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165, reversing 54 Barb. 505; *West. U. Tel. Co. v. Lovely* (Tex. Civ. App.) 52 S. W. 563. The rule would not be changed if the initial, for convenience, collected the toll and later gave to the connecting line its share thereof, *West. U. Tel. Co. v. Lovely*, supra. But see *De Rutte v. New York, etc., Elec. Mag. Tel. Co.*, 1 Daly (N. Y.) 547, 30 How. Prac. 403; *West. U. Tel. Co. v. Shumate*, 2 Tex. Civ. App. 429, 21 S. W. 109.

<sup>176</sup> *Hutchinson on Carriers* (2d Ed.) § 169; *Hart v. Rensselaer, etc., R. Co.*, 8 N. Y. 37, 59 Am. Dec. 447; *Peterson v. Chicago, etc., R. Co.*, 80 Iowa, 92, 45 N. W. 573. An action to recover a statutory penalty, based on the failure of the last line to deliver a message, cannot be maintained against such line and the initial line jointly, there being no joint default and no claim of a joint conduct of business. *Chandler v. West. U. Tel. Co.*, 94 Ga. 442, 21 S. E. 832; *West. U. Tel. Co. v. Craven* (Tex. Civ. App.) 95 S. W. 633; *Sabine Valley Tel. Co. v. Oliver*, 46 Tex. Civ. App. 428, 102 S. W. 925; *Telephone, etc., Co. v. Jarrell* (Tex. Civ. App.) 138 S. W. 1165.

<sup>177</sup> *West. U. Tel. Co. v. Smith* (Tex. Civ. App.) 26 S. W. 216; *Adams Ex. Co. v. Harris*, 120 Ind. 73, 21 N. E. 340, 7 L. R. A. 214, note, 16 Am. St. Rep. 315; *U. S. Ex. Co. v. Harris*, 51 Ind. 127; *St. Louis, etc., R. Co. v. Weakley*, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104; *Halliday v. St. Louis, etc., R. Co.*, 74 Mo. 159, 41 Am. Rep. 309; *Maghee v. Camden, etc., R. Co.*, 45 N. Y. 514, 6 Am. Rep. 125; *West. R. Co. v. Harwell*, 97 Ala. 341, 11 South. 781.

<sup>178</sup> *West. U. Tel. Co. v. Smith* (Tex. Civ. App.) 26 S. W. 216; *Adams Ex. Co. v. Harris*, 120 Ind. 73, 21 N. E. 340, 7 L. R. A. 214, note, 16 Am. St. Rep. 315; *U. S. Ex. Co. v. Harris*, 51 Ind. 127; *St. Louis, etc., R. Co. v. Weakley*, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104; *Halliday v. St. Louis, etc., R. Co.*, 74 Mo. 159, 41 Am. Rep. 309; *Maghee v. Camden, etc., R. Co.*, 45 N. Y. 514, 6 Am. Rep. 125; *West. R. Co. v. Harwell*, 97 Ala. 341, 11 South. 781. See § 405.

is designated in the message, but the selection is left to the initial company, and the stipulations contained in the blanks used by the first company do not provide that they will inure to the benefit of any other line, the connecting line cannot claim any benefit growing out of the original contract.<sup>179</sup> And it has been held that, where a statute requires connecting companies to accept messages from other lines, the fact that it has complied with the statutes cannot be considered as a ratification of the original contract.<sup>180</sup> It is seldom that the sender exercises the right to select the connecting line, but, when he does, these companies seldom acquire any of the benefits of the original contract, because there are generally to be found stipulations in these contracts which provide that the company will not be liable for delays and errors beyond the terminus of its own line.<sup>181</sup>

§ 461. **Liability for defaults of common agent.**—It occasionally happens that connecting telegraph companies have a common agent or operator, and the question is whether or not they will be jointly liable for his defaults. The question has been answered—and correctly we think—in the affirmative, but they are not liable for each other's faults.<sup>182</sup> We think the fact that he is acting for both companies may be considered, with other circumstances, as tending to show a joint liability or a partnership arrangement, and if they hold him out as having authority to make them jointly liable, he may do so in favor of one who rightfully relies on the apparent authority, although in fact he has no such authority.<sup>183</sup>

§ 462. **Sender's right to select route.**—As said elsewhere, there is generally a stipulation in the message blanks to the effect that the company will not be liable for delays and errors made beyond the terminus of its own line, and will only act as the sender's agent to engage the services of another connecting line.<sup>184</sup> When this is the case, it is the right of the sender to name the route the

<sup>179</sup> *Squire v. West*, U. Tel. Co., 98 Mass. 232, 93 Am. Dec. 157. See, also, *Adams Ex. Co. v. Harris*, 120 Ind. 73, 21 N. E. 340, 7 L. R. A. 214n, 16 Am. St. Rep. 315; *Baneroft v. Merchants', etc., Co.*, 47 Iowa, 262, 29 Am. Rep. 482; *Cent. R., etc., Co. v. Bridger*, 94 Ga. 471, 20 S. E. 349. See § 405.

<sup>180</sup> *Gulf, etc., R. Co. v. Dwyer*, 75 Tex. 572, 12 S. W. 1001, 7 L. R. A. 478, 16 Am. St. Rep. 926; *Same v. Baird*, 75 Tex. 256, 12 S. W. 530.

<sup>181</sup> See § 405.

<sup>182</sup> *Hutchinson on Carriers* (2d Ed.) § 169; *Smith & Elliott v. Mo., etc., R. Co.*, 58 Mo. App. 80. See *Weatherford, etc., R. Co. v. Seals* (Tex. Civ. App.) 41 S. W. 841.

<sup>183</sup> *Midland Railway v. Bromley*, 17 Com. B. 372; *Chicago, etc., R. Co. v. Northern, etc., Co.*, 70 Ill. 217; *Southwestern, etc., Tel. Co. v. Taylor*, 26 Tex. Civ. App. 79, 63 S. W. 1076.

<sup>184</sup> See § 405.



message shall go after it reaches the terminus of the initial line.<sup>185</sup> It was decided in a case on this subject, where the destination could be reached from the company's terminus by two telephone lines,<sup>186</sup> that the sender had the right to indicate which line should be used, although it was the rule of the company that the message should be sent over the nearest line that was open, and that it was negligent in the company to use the other, in consequence of which a delay occurred.<sup>187</sup> Should the sender neglect to exercise the right of selecting the route, or if the route selected cannot for any cause transmit the message, and the company has unsuccessfully attempted to inform the sender of this fact, it should exercise ordinary judgment in selecting a route for the sender and promptly deliver the message to this line with the instruction to forward it on to its destination.<sup>188</sup>

§ 463. Same continued—result of bad selection—initial company—not liable.—The initial company, in the absence of any partnership arrangement, only represents the sender in the capacity of agent so far as to the selection of the connecting route over which the message must necessarily be sent in order to reach its destination.<sup>189</sup> It must comply with the instructions of the sender,<sup>190</sup> and it is not liable for errors made by the latter in the way of a bad selection.<sup>191</sup> So, if the sender has selected a certain route, the initial company will not be liable for any delays in consequence of such selection. The initial company may know it to be a mistake of the sender in making the selection, but it is under no duty

<sup>185</sup> West. U. Tel. Co. v. Turner, 94 Tex. 304, 60 S. W. 432; West. U. Tel. Co. v. Simms, 30 Tex. Civ. App. 32, 69 S. W. 464; West. U. Tel. Co. v. McDonald, 42 Tex. Civ. App. 229, 95 S. W. 691. See West. U. Tel. Co. v. Alford, 110 Ark. 379, 161 S. W. 1027, 50 L. R. A. (N. S.) 94.

<sup>186</sup> *Diverting message to telephone.*—Where a message has been filed for a point to which there is a continuous telegraph line, it should be sent the whole distance by telegraph, although the receiving company does not control the line to destination. And it cannot divert the message to a telephone line at the point of its line nearest the point of destination. West. U. Tel. Co. v. Alford, 110 Ark. 379, 161 S. W. 1027, 50 L. R. A. (N. S.) 94; West. U. Tel. Co. v. McLeod (Tex. Civ. App.) 24 S. W. 815; West. U. Tel. Co. v. Jones, 69 Miss. 658, 13 South. 471, 30 Am. St. Rep. 579.

<sup>187</sup> West. U. Tel. Co. v. Turner, 94 Tex. 304, 60 S. W. 432.

<sup>188</sup> Mitchell v. West. U. Tel. Co., 12 Tex. Civ. App. 262, 33 S. W. 1016; Beasley v. West. U. Tel. Co. (C. C.) 39 Fed. 181.

<sup>189</sup> See § 405.

<sup>190</sup> West. U. Tel. Co. v. Stratemeier, 6 Ind. App. 125, 32 N. E. 871; West. U. Tel. Co. v. Alford, 110 Ark. 379, 161 S. W. 1027, 50 L. R. A. (N. S.) 94.

<sup>191</sup> West. U. Tel. Co. v. Simms, 30 Tex. Civ. App. 32, 69 S. W. 464. The rule would be otherwise if the company does not deliver the message to the line designated. West. U. Tel. Co. v. Turner, 94 Tex. 304, 60 S. W. 432.

to adopt another route when it knows, at the time of sending, that the selected route is not opened.<sup>192</sup>

§ 464. **Same continued—exact extra fee or charges.**—When the sender has selected the route, this necessarily puts the company to some additional expense, and increases their duties to the extent that the wishes of the sender must be carried out; and, while the expense and additional liability of the company have been slightly increased, yet it seems but right that they may require of the sender a small additional charge to cover this.<sup>193</sup> One of the additional expenses incurred in the transmission of such messages is that the name or names of the connecting lines must be transmitted along with the message, and this of course creates an extra trouble and expense.

§ 465. **Liability of companies between themselves—actions.**—As said before, connecting companies may be liable to third persons as partners, when, as between themselves, they are not partners, and any private arrangement made between themselves may bind them without affecting their liability toward third persons.<sup>194</sup> The sender may institute suit, either against the initial company whose liability extends beyond its own terminus,<sup>195</sup> or he may sue the connecting company guilty of the default;<sup>196</sup> but, as between

<sup>192</sup> *West. U. Tel. Co. v. Simms*, 30 Tex. Civ. App. 32, 69 S. W. 464. In *West. U. Tel. Co. v. Sorsby*, 29 Tex. Civ. App. 349, 69 S. W. 122, where the contract made the initial company the agent of the sender without liability to transmit and deliver the message to any connecting line necessary to reach its destination and the connecting line notified the initial company at once that it could not transmit the message immediately because its lines were being repaired, it was held that the initial company was not liable for its failure to transmit the telegram to its destination by mail or by telephone, although it could have done so in time to serve the purpose of the sender, but it was held liable for its failure to notify the sender of the difficulty at once so that he could use the mails or the telephone, it being shown that he could have done so in time to avoid the injury. This case illustrates in an emphatic manner the point that in every contract to send a telegram there is an implied contract to use the telegraph lines, and there is no duty imposed to use any other means of transmitting the message.

<sup>193</sup> *U. S. v. Northern Pac. R. Co.* (C. C.) 120 Fed. 546.

<sup>194</sup> See § 459.

<sup>195</sup> *West. U. Tel. Co. v. Stratemeier*, 6 Ind. App. 125, 32 N. E. 871. See, also, *West. U. Tel. Co. v. Carter*, 24 Tex. Civ. App. 80, 58 S. W. 198.

*Estopped.*—Where the sender of a message inquires if the company has an office at the place of destination and is informed that it has, and thereupon delivers the message and pays for its transmission to such point, the company is estopped in an action for nondelivery to assert that it had no office at such place and that its nondelivery was due to the negligence of a connecting line. *West. U. Tel. Co. v. Stratemeier*, supra.

<sup>196</sup> *Squire v. West. U. Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165, reversing 54 Barb. 505; *Leonard v. New York, etc., Elec. Mag. Tel. Co.*, 41 N. Y. 544, 1 Am.

the companies, the general rule is that each is liable for its own negligence or breach of duty.<sup>197</sup> And while the initial company may have assumed the responsibility for the transmission of the message beyond its own line, and damages may be recovered against it for the default of the connecting line, yet the company which actually caused the injury will be liable to the first for such damages.<sup>198</sup> If the company guilty of the default is duly notified to come into court and defend an action against the initial line for such injury, or, it seems, if it is not expressly notified to defend, but knows that it alone caused the injury and is liable, and is aware of the pendency of such a suit and its right to defend against the initial company for such injury, the judgment against the latter therein will be conclusive against the connecting line to the amount of damages recovered from the initial company.<sup>199</sup> While a contract made by the sender and the initial company to transmit a message over a certain connecting line may be of benefit to the latter, yet it is not a contract for its benefit in such a sense as will give the connecting company a right of action against the initial company for violating the contract, by delivering the message to another connecting line.<sup>200</sup>

Rep. 446; *Smith v. West. U. Tel. Co.*, 84 Tex. 359, 19 S. W. 441, 31 Am. St. Rep. 59; *West. U. Tel. Co. v. Lyman*, 3 Tex. Civ. App. 460, 22 S. W. 656.

*Liability to addressee.*—*West. U. Tel. Co. v. Taylor*, 3 Tex. Civ. App. 310, 22 S. W. 532.

In *Smith v. West. U. Tel. Co.*, supra, it was held that the connecting company was liable for its own negligence notwithstanding a stipulation in the original contract of transmission relieving the transmitting company from liability for defaults of connecting lines.

<sup>197</sup> *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165, reversing 54 Barb. 505; *Leonard v. New York, etc., Elec. Mag. Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *West. U. Tel. Co. v. Munford*, 87 Tenn. 190, 10 S. W. 318, 10 Am. St. Rep. 630, 2 L. R. A. 601; *Stevenson v. Montreal Tel. & Tel. Co.*, 16 U. C. Q. B. 530. See, also, *West. U. Tel. Co. v. Stratemeier*, 6 Ind. App. 125, 32 N. E. 871.

<sup>198</sup> *Missouri Pac. R. Co. v. Twiss*, 35 Neb. 267, 53 N. W. 76, 37 Am. St. Rep. 437; *Chicago, etc., R. Co. v. Northern, etc., Co.*, 70 Ill. 217; *Vermont, etc., R. Co. v. Fitchburg R. Co.*, 14 Allen (Mass.) 462, 92 Am. Dec. 785.

<sup>199</sup> *Missouri Pac. R. Co. v. Twiss*, 35 Neb. 267, 53 N. W. 76, 37 Am. St. Rep. 437. See, also, *Elliott on Roads and Streets*, 656, 657.

<sup>200</sup> *St. Louis, etc., R. Co. v. Missouri Pac. R. Co.*, 35 Mo. App. 272.



## CHAPTER XVIII

## ACTIONS FOR DAMAGES RESULTING FROM NEGLIGENT DELAYS OF TRANSMISSIONS

- § 466. Parties—sender—in general.
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469. Addressee—right of action—in general.
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471. English rule—in general.
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485. Under special statutes—penalty.
486. Addressee's right not affected—by failure to have message repeated.
487. Actions between sender and addressee.
488. What law governs.
489. Contract made where last act of assent was done.
490. Same continued—actions between sender and addressee—contract—where made.
491. Same continued—action where brought.

§ 466. Parties—sender—in general.—After having discussed, at some length, the liabilities of telegraph companies for losses occurring in negligently transmitting or delivering messages, we shall now discuss actions growing out of such negligence. In discussing this subject we shall first take up the rights of certain persons to sue, and then the nature of the action. In commenting on the last subdivision of this subject, we shall consider the rights of the sender to sue. The sender of a message may always maintain an action against a telegraph company to recover damages resulting from a negligent transmission or delay of the message,<sup>1</sup> but the questions with which the courts have been con-

<sup>1</sup> Playford v. United Kingdom, etc., Tel. Co., L. R. 4 A. B. 706, 10 B. & S. 759; Penn v. Telephone Co., 159 N. C. 306, 75 S. E. 16, 41 L. R. A. (N. S.) 223; Mills v. Telephone Co., 88 S. C. 498, 70 S. E. 1040, Ann. Cas. 1912C, 1273;

fronted are, What is the nature of the action to be maintained, and who is the rightful person to be considered as the sender?<sup>2</sup> In many instances the rightful sender is represented in making the contract by an agent. Should the undisclosed principal in the contract bring the action, or is it the duty of the agent who sends the message?

§ 467. **Same continued—sender—action in tort or contract.**—It has been held that a telegraph company was the agent of the sender,<sup>3</sup> and by others that it was the agent of both the sender and sendee,<sup>4</sup> and that either could maintain an action against it for its negligence. Some of the courts have, however, taken the position that the doctrines of agency do not apply, and that in transmitting a message the company is not an agent for either of these parties, but is an independent principal, and one of a public nature.<sup>5</sup> They are institutions incorporated to perform public functions, and in discharging these they must exercise reasonable and ordinary care and diligence; for a failure to do so they will be liable in damages

W. U. Tel. Co. v. Bank, 7 Ala. App. 637, 62 South. 250; Bertuch v. Telephone, etc., Co., 79 Misc. Rep. 10, 139 N. Y. Supp. 289. See McCormick v. W. U. Tel. Co., 79 Fed. 449, 25 C. C. A. 35, 38 L. R. A. 684; Gulf, etc., Tel. Co. v. Richardson, 79 Tex. 649, 15 S. W. 689.

<sup>2</sup> West. U. Tel. Co. v. Brown, 108 Ind. 538, 8 N. E. 171; West. U. Tel. Co. v. Kinney, 106 Ind. 468, 7 N. E. 191; Gulf, etc., Tel. Co. v. Richardson, 79 Tex. 649, 15 S. W. 689, holding a person at whose instance, for whose benefit, and in whose name the message was sent, and who pays for its transmission, is the sender and entitled to sue, although the message was not prepared, or delivered or paid for by him in person.

*Mental anguish—husband—father.*—Under the community laws a husband can recover for mental anguish suffered by the wife. Loper v. West. U. Tel. Co., 70 Tex. 689, 80 S. W. 600; Southwestern Tel., etc., Co. v. Dale (Tex. Civ. App.) 27 S. W. 1059. But a father to whom a message is sent announcing the death of a son cannot be joined as plaintiff with another son who sent the message in an action against the telegraph company for negligent failure to deliver it. Anderson v. West. U. Tel. Co., 84 Tex. 17, 19 S. W. 285.

<sup>3</sup> West. U. Tel. Co. v. Shotter, 71 Ga. 760; West. U. Tel. Co. v. Flint River Lbr. Co., 114 Ga. 576, 40 S. E. 815, 88 Am. St. Rep. 36; Sherrerd v. West. U. Tel. Co., 146 Wis. 197, 131 N. W. 341. But see German Fruit Co. v. West. U. Tel. Co., 137 Cal. 598, 70 Pac. 658, 59 L. R. A. 575; Pegram v. West. U. Tel. Co., 100 N. C. 28, 6 S. E. 770, 6 Am. St. Rep. 557.

<sup>4</sup> N. Y. & W. Printing Tel. Co. v. Dryburg, 35 Pa. 298, 78 Am. Dec. 338.

<sup>5</sup> Alexander v. West. U. Tel. Co., 66 Miss. 161, 5 South. 397, 14 Am. St. Rep. 556, 3 L. R. A. 71; McKee v. West. U. Tel. Co., 158 Ky. 143, 164 S. W. 348, 51 L. R. A. (N. S.) 439; Strong v. West. U. Tel. Co., 18 Idaho, 389, 109 Pac. 910. Ann. Cas. 1912A, 55, 30 L. R. A. (N. S.) 409; Shingleur v. West. U. Tel. Co., 72 Miss. 1030, 18 South. 425, 48 Am. St. Rep. 604, 30 L. R. A. 444; Pepper v. West. U. Tel. Co., 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660. See Eureka Cotton Mills v. West. U. Tel. Co., 88 S. C. 498, 70 S. E. 1040, Ann. Cas. 1912C, 1273; Postal Tel. Cable Co. v. Schaefer, 110 Ky. 907, 62 S. W. 1119. But see Fisher v. West. U. Tel. Co., 119 Ky. 885, 84 S. W. 1179. See also, §§ 487, 762.

to the party thereby injured.<sup>6</sup> So, if a party contracts with one of these companies to transmit a message to a certain place, and it fails to exercise care in the transmission, whereby the sender suffers loss, he may recover damages for such loss.<sup>7</sup> It has been held by some courts that, when a contract was made with one of these companies to send a message and it negligently transmitted or delayed in delivering the message, the company was guilty of a breach of contract and the sender's action should be in contract.<sup>8</sup> But the weight of authority is that the sender may maintain an action for the breach of the contract, or he may proceed against the company for the breach of its public duty or sue in tort.<sup>9</sup>

§ 468. Same continued—message—sent by agent.—The most difficult question which has come up in reviewing this subject is, Who should maintain the suit when the message is sent for an undisclosed principal? It has been generally held by most of the courts that the agent cannot maintain the suit unless he is interested in the contract,<sup>10</sup> but that it is the duty of the principal to bring the action. The person who sends the message, or the person with whom the contract was made, is the proper party to recover damages for its breach; and he may recover in his own name, although the message was signed by another person as his agent.<sup>11</sup> The principal is entitled to all the advantages and benefits of the contract made by his agent; and the fact that the company only contracted with the agent, and had no knowledge that

<sup>6</sup> *Alexander v. West. U. Tel. Co.*, 66 Miss. 161, 5 South. 397, 14 Am. St. Rep. 556, 3 L. R. A. 71; *Strong v. West. U. Tel. Co.*, 18 Idaho, 389, 109 Pac. 910, Ann. Cas. 1912A, 55, 30 L. R. A. (N. S.) 409.

<sup>7</sup> *Gray v. Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301n. See other cases in note 1, *supra*.

<sup>8</sup> See rule in Alabama, note 40, *ante*.

<sup>9</sup> *West. U. Tel. Co. v. Potts*, 120 Tenn. 37, 113 S. W. 789, 19 L. R. A. (N. S.) 479, 127 Am. St. Rep. 991; *Reese v. West. U. Tel. Co.*, 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583; *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95; *Cordell v. West. U. Tel. Co.*, 149 N. C. 402, 63 S. E. 71, 22 L. R. A. (N. S.) 540; *Green v. West. U. Tel. Co.*, 136 N. C. 489, 49 S. E. 165, 103 Am. St. Rep. 955, 67 L. R. A. 985, 1 Ann. Cas. 349; *Woods v. West. U. Tel. Co.*, 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581; *Cogdell v. West. U. Tel. Co.*, 135 N. C. 431, 47 S. E. 490; *West. U. Tel. Co. v. Hill*, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058; *Shingleur v. West. U. Tel. Co.*, 72 Miss. 1030, 18 South. 425, 48 Am. St. Rep. 604, 30 L. R. A. 444, holding that the sender may sue either in contract or in tort, but ordinarily the addressee's right of action is in tort.

<sup>10</sup> *Rose v. United States Tel. Co.*, 34 How. Prac. (N. Y.) 308.

<sup>11</sup> *Young v. West. U. Tel. Co.*, 107 N. C. 370, 11 S. E. 1044, 22 Am. St. Rep. 883, 9 L. R. A. 669n.; *Thompson v. West. U. Tel. Co.*, 107 N. C. 449, 12 S. E. 427; *Daughtery v. American U. Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435. See, also, § 476, and cases cited thereunder.



the plaintiff was in fact the principal, is immaterial,<sup>12</sup> except that it might set up as a defense any matter occurring prior to the disclosure of the principal and which would constitute a defense in a suit by the agent.<sup>13</sup> The principal may sue upon a contract made by his agent without giving notice of his interest, although the other party supposed the agent was acting solely for himself.<sup>14</sup> So a telegraph company need not be informed that the sender of a telegram is acting as the agent for another, where it is not shown that the company would have acted differently had it known of the agency of the sender.<sup>15</sup> But where one party writes a dispatch and gives it to another to send, who, instead of sending it, writes

<sup>12</sup> *Propeller Tow Boat Co. v. West. U. Tel. Co.*, 124 Ga. 478, 52 S. E. 766; *Dodd Gro. Co. v. Postal Tel. Cable Co.*, 112 Ga. 685, 37 S. E. 981; *West. U. Tel. Co. v. Manker*, 145 Ala. 418, 41 South. 850; *Manker v. West. U. Tel. Co.*, 137 Ala. 292, 34 South. 839, overruling *West. U. Tel. Co. v. Allgood*, 125 Ala. 712, 27 South. 1024, and disapproving on this point *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23; *Harkness v. West. U. Tel. Co.*, 73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672; *West. U. Tel. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843; *Milliken v. West. U. Tel. Co.*, 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281; *Gulf Coast, etc., R. Co. v. Todd* (Tex. App.) 19 S. W. 761; *Leonard v. New York, etc., Elec. Mag. Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *Purdom Naval Stores Co. v. West. U. Tel. Co.* (C. C.) 153 Fed. 327; *Telephone Co. v. Olivarri* (Tex. Civ. App.) 136 S. W. 816. See *West. U. Tel. Co. v. Potts*, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. (N. S.) 479; *West. U. Tel. Co. v. Schriver*, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678. See, also, § 476.

*Not agent—unauthorized act of.*—Where one, at the request of another, wired for certain goods desired by the latter, but in doing so does not act as his agent, but is merely seeking to supply himself with the goods in order subsequently to sell the same to the former at a profit, there is no privity between the telegraph company and the latter which will authorize an action by the latter for the negligence in regard to the delivery of the message. *Deslottes v. Baltimore, etc., Tel. Co.*, 40 La. Ann. 183, 3 South. 566. And, where an agent was instructed to send a certain message prepared by the plaintiff, but instead of so doing the former wrote out and sent a different message, and plaintiff's interest therein was not disclosed to the defendant, plaintiff cannot recover for negligence in regard to its transmission or delivery. *Elliott v. West. U. Tel. Co.*, 75 Tex. 18, 12 S. W. 954, 16 Am. St. Rep. 872.

<sup>13</sup> See *Harkness v. West. U. Tel. Co.*, 73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672; *West. U. Tel. Co. v. Kerr*, 4 Tex. Civ. App. 280, 23 S. W. 564. See, also, § 476.

<sup>14</sup> *Foster v. Smith*, 2 Colwell (Tenn.) 474, 88 Am. Dec. 604; *Sharp v. Jones*, 18 Ind. 314, 81 Am. Dec. 359.

<sup>15</sup> *West. U. Tel. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843.

*Rule in Alabama.*—The courts in Alabama have not been in harmony in their decisions upon this question. According to the early rule, there could be no recovery by an undisclosed principle. *West. U. Tel. Co. v. Allgood*, 125 Ala. 712, 27 South. 1024. But the rule was held otherwise in *Manker v. West. U. Tel. Co.*, 137 Ala. 292, 34 South. 839; *West. U. Tel. Co. v. Millsap*, 135 Ala. 415, 33 South. 160, message referring to business matter. But in action to recover mental anguish the latter holding was not sustained in *West. U. Tel.*

another and signs and sends it without notifying the company that it is sent on behalf of the first party, the latter cannot hold the company liable in damages for losses sustained through failure of delivery.<sup>16</sup> There are some instances where the agent may sue in his own name for the breach of a contract made by him for the principal;<sup>17</sup> as where he is interested in the contract to the extent of his commission, or by reason of a special property in the subject-matter.<sup>18</sup> So, a broker may sue a telegraph company in his own name for a breach of contract to transmit an order in his name, in behalf of his principal, for the purchase of gold. In such a case, however, he sues and recovers as trustee for his principal.<sup>19</sup>

§ 469. Addressee—right of action—in general.—One of the most difficult questions with which the courts and text-writers have been confronted, and one which has not been settled with any degree of harmony, is the rights of addressees to maintain suits against telegraph companies for negligently transmitting or delivering a message, or for delivering a forged or fraudulent message, and also the nature of the action to be brought. There are two general rules upon which the rights of the addressee have been based. They are known as the English rule and the American rule. Some of our courts, seemingly becoming confused, have to a certain extent followed both of these rules; and for this reason their decisions are not at all in harmony, nor very clear in their reasons. We shall attempt to describe these rules and the grounds on which each is based, where each has been followed, and, if possible, harmonize the various holdings of the courts.

§ 470. Same continued—grounds on which rules are based.—Before entering into the discussion of either of these rules, it is necessary to discuss the grounds upon which each is based. The general rule recognized everywhere, subject to certain exceptions in some jurisdictions, is that a contract cannot confer rights on

Co. v. Northcutt, 158 Ala. 539, 48 South. 553, 132 Am. St. Rep. 38. In West. U. Tel. Co. v. Brown, 6 Ala. App. 339, 59 South. 329, it was said that a mere beneficiary could not sue either in contract or in tort unless the company had information that it was sent for his benefit.

<sup>16</sup> Elliott v. West. U. Tel. Co., 75 Tex. 18, 12 S. W. 954, 16 Am. St. Rep. 872. See, also, Deslottes v. Baltimore, etc., Tel. Co., 40 La. Ann. 183, 3 South. 566, sender not acting as agent.

<sup>17</sup> The agent may sue where a message is addressed to him personally and the interest of his principal is not disclosed. Lee v. West. U. Tel. Co., 51 Mo. App. 375, where the action was in tort.

<sup>18</sup> Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; Eastern R. Co. v. Benedict, 5 Gray (Mass.) 561, 66 Am. Dec. 384.

<sup>19</sup> United States Tel. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519.

a person who is not a party to it, and accordingly no one can sue for a breach of a contract who is not such party, or who does not derive rights from an original party thereto. This rule is recognized in England almost to its full extent, subject to the exception that if the promisor of the contract stands in the relation of trustee to a third person, the latter may sue in equity. On the other hand, exceptions are made in the United States to contracts which confer a benefit on third persons. In these courts it is generally held that a third person benefited by such contract may sue in law on such contract. These, then, are the grounds upon which these rules have been founded. It is worthy of notice, however, that the early English cases, upon which the American doctrine was founded, have in England been overruled by later decisions, so that they are not at present authority upon the question in that country.

§ 471. **English rule—in general.**—In England the rule is that a third person cannot sue upon a promise for his benefit where he is a stranger both to the promise and the consideration.<sup>20</sup> In some of the early cases decided in that country, it was held that if the third person had an interest in such contract, and stood in a close relation to the party from whom the consideration proceeded, he might be considered a party to the contract and could, therefore, maintain an action thereon.<sup>21</sup> This latter view is no longer the law in that country. The court overruling this said: "The modern cases show that the consideration must move from the party entitled to sue upon the contract. It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued."<sup>22</sup> As said, the English rule recognizes one exception to this general rule. If the contract, although in form with the promisor, is intended to secure some benefit to the third person, so that the latter is entitled to say that he has a beneficial right as a *cestui que trust* under the contract, then the third person may in equity enforce the contract.<sup>23</sup> It is a

<sup>20</sup> 1 Strange, 592; Price v. Easton, 4 Barn. & Adol. 433.

<sup>21</sup> Dutton v. Poole, 2 Lev. 210. In this case a son promised his father to pay one thousand pounds to his sister, in consideration of the father's forbearing to sell a certain wood, which the father intended doing to raise a portion for his daughter. It was held that the daughter might sue upon his promise for her benefit, since "there were such apparent consideration of affection from the father to his children, for whom nature obliges him to provide, that the consideration and the promise to the father may well extend to the children."

<sup>22</sup> Tweddle v. Atkinson, 1 Dest. & S. 393.

<sup>23</sup> Gaudy v. Gaudy, 30 Ch. Div. 57.



question of interpretation as to whether an enforceable trust has been created.<sup>24</sup> It was held, in deciding the enforceability of such trusts, that where a mere agreement was made between two parties, whereby one was to pay a third person, this gave the latter no right of action against the party promising to pay.<sup>25</sup>

§ 472. **Rule applicable to telegraph companies.**—Following the trend of this rule, the general rule in England with respect to contracts made with telegraph companies is that the right of action for negligently transmitting or delaying a message is founded upon the contract of sending made between the sender as one party to the contract, and the telegraph company as the other; and the addressee, not being a party to the contract, cannot sue.<sup>26</sup> In one of the cases tried in that country on this subject, it seems that the plaintiffs carried on a business as merchants at Valparaiso, and were a branch house of a firm at Liverpool. A telegraph company, through the negligence of its agent, misdelivered a telegraphic message to the plaintiffs. The message purported to be from the plaintiffs' Liverpool house, and to be a large order for barley, but in fact it was not from the Liverpool house nor intended for the plaintiffs. The plaintiffs executed the supposed order, and, having suffered a heavy loss in consequence, claimed damages against the company. The court held in this case that they were not entitled to maintain this action, as there was no contract between them and the company. It was also intimated in this case that if there was any fraud perpetrated on the part of the company, the receiver might sue.<sup>27</sup> If the sender, however, is acting as agent for the addressee, the latter may sue, since the contract of sending was made for his benefit, or, rather, it was made for him by his agent.<sup>28</sup>

§ 473. **American rule—in general.**—As was said before, the decisions in the United States followed those early English cases which have long since, in that country, been overruled and are no longer authority in their courts. The English rule, with respect to contracts of private individuals, is recognized in but few of the United States, and in some of these exceptions have been grafted

<sup>24</sup> *Murray v. Flavell*, 2 Ch. Div. 89.

<sup>25</sup> *Gaudy v. Gaudy*, 30 Ch. Div. 57.

<sup>26</sup> *Playford v. United Kingdom Elec. Tel. Co.*, L. R. 4 Q. B. 706, 10 B. & S. 756, 38 L. J. Q. B. 249, 21 L. T. R. (N. S.) 21, 17 Wkly. 968, Allen, Tel. Cas. 437; *Dickson v. Reuter's Tel. Co.*, 3 C. P. D. 1, 47 L. J. C. P. 1, 26 Wkly. 23, affirming 2 C. P. D. 62, 46 L. J. C. P. 197, 35 L. T. R. (N. S.) 197, 25 Wkly. 272. See, also, *Feaver v. Montreal Tel. Co.*, 23 U. C. C. P. 150.

<sup>27</sup> *Dickson v. Reuter's Tel. Co.*, *supra*.

<sup>28</sup> *Playford v. United Kingdom Elec. Tel. Co.*, *supra*.

upon it.<sup>29</sup> The American rule is that a third party has a right of action upon a promise made for his benefit, although he is a stranger both to the promise and to the consideration. It has been held that, in order to make this rule binding, there must be two conditional elements in the contract: First, there must be an intent to benefit the third party; and, second, the promisee must owe some obligation to the third party.<sup>30</sup> If both of these elements do not exist, the third party has no right of action upon the contract. The cases are numerous in holding that an incidental or indirect benefit to a third party is not sufficient to give a right of action to him. There must be an intent on the part of the contracting parties that the third party shall be benefited.<sup>31</sup> Under these holdings, it is not necessary that the third party to be benefited should be named; it must clearly appear, however, that he was intended to be benefited.<sup>32</sup> And it is held, in some jurisdictions, that there must be such an acceptance by the third party to the contract as will release the promisee from any obligations he may be under to the third party.<sup>33</sup> Where the third party sues upon these contracts, he will be subject to the equities that may exist between the original parties to the agreement.<sup>34</sup>

**§ 474. Same continued—with respect to telegraph companies.—**The English rule with respect to private contracts, as stated, is followed to a certain extent in some of our courts, but with respect to contracts made with telegraph companies for transmission of mes-

<sup>29</sup> The states recognizing the English rule in some form are Georgia, Massachusetts, Michigan, New Hampshire, North Carolina, Vermont, Virginia and Wyoming.

<sup>30</sup> *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195; *Townsend v. Rackham*, 143 N. Y. 516, 38 N. E. 731; *Coleman v. Hiler*, 85 Hun, 547, 33 N. Y. Supp. 357; *Embler v. Hartford Steam, etc., Ins. Co.*, 158 N. Y. 431, 53 N. E. 212, 44 L. R. A. 512.

<sup>31</sup> *Thomas Mfg. Co. v. Prather*, 65 Ark. 27, 44 S. W. 218; *Chung Kee v. Davidson*, 73 Cal. 522, 15 Pac. 100; *Savings Bank v. Thornton*, 112 Cal. 255, 44 Pac. 466; *Burton v. Larkin*, 36 Kan. 246, 13 Pac. 398, 59 Am. Rep. 541; *Paducah Lumber Co. v. Paducah, etc., Co.*, 89 Ky. 340, 12 S. W. 554, 7 L. R. A. 77, 25 Am. St. Rep. 536; *Howsmon v. Trenton, etc., Co.*, 119 Mo. 304, 24 S. W. 784, 23 L. R. A. 146, note, 41 Am. St. Rep. 654; *Jefferson v. Asch*, 53 Minn. 446, 55 N. W. 604, 25 L. R. A. 257, note, 39 Am. St. Rep. 618; *Cincinnati, etc., R. Co. v. Bank*, 54 Ohio St. 60, 42 N. E. 700, 31 L. R. A. 653, 56 Am. St. Rep. 700; *Brown v. Markland*, 16 Utah, 360, 52 Pac. 597, 67 Am. St. Rep. 629.

<sup>32</sup> *Chung Kee v. Davidson*, 73 Cal. 522, 15 Pac. 100; *Bristow v. Lane*, 21 Ill. 194; *Burton v. Larkin*, 36 Kan. 246, 13 Pac. 398, 59 Am. Rep. 541; *West. U. Tel. Co. v. Potts*, 120 Tenn. 37, 113 S. W. 789, 19 L. R. A. (N. S.) 479, 127 Am. St. Rep. 991.

<sup>33</sup> *Ramsdale v. Horton*, 3 Pa. 330; *Stone v. Justice*, 9 Phila. (Pa.) 22. It is not the general rule, however. *Bay v. Williams*, 112 Ill. 91, 1 N. E. 340, 54 Am. Rep. 209. The assent will be presumed. *Rogers v. Gosnell*, 58 Mo. 589.

<sup>34</sup> *Dunning v. Leavitt*, 85 N. Y. 30, 39 Am. Rep. 617. See § 468.

sages, it has never been adopted or followed by any of the United States or Canadian courts. It has always been held that, where a telegraph company has negligently transmitted or delayed delivering a message, the receiver or addressee could maintain his action against the company when he could prove actual damages.<sup>35</sup>

<sup>35</sup> *Alabama*.—West. U. Tel. Co. v. Krichbaum, 132 Ala. 535, 31 South. 607; West. U. Tel. Co. v. Manker, 145 Ala. 418, 41 South. 850; Anniston Cordage Co. v. West. U. Tel. Co., 161 Ala. 216, 49 South. 770, 135 Am. St. Rep. 124, 30 L. R. A. (N. S.) 1116; West. U. Tel. Co. v. Jackson, 163 Ala. 9, 50 South. 316; West. U. Tel. Co. v. Anniston Cordage Co., 6 Ala. App. 351, 59 South. 757.

*Arkansas*.—West. U. Tel. Co. v. Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744; West. U. Tel. Co. v. Woodard, 84 Ark. 323, 105 S. W. 579, 13 Ann. Cas. 354.

*California*.—Coit v. West. U. Tel. Co., 130 Cal. 657, 63 Pac. 83, 80 Am. St. Rep. 153, 53 L. R. A. 678; Germain Fruit Co. v. West. U. Tel. Co., 137 Cal. 598, 70 Pac. 658, 59 L. R. A. 575; California Bank v. West. U. Tel. Co., 52 Cal. 280.

*Colorado*.—West. U. Tel. Co. v. Cornwell, 2 Colo. App. 491, 31 Pac. 393.

*District of Columbia*.—Ferreiro v. West. U. Tel. Co., 9 App. D. C. 455, 35 L. R. A. 548.

*Florida*.—West. U. Tel. Co. v. Hyer, 22 Fla. 637, 1 South. 129, 1 Am. St. Rep. 222; International Ocean Tel. Co. v. Saunders, 32 Fla. 434, 14 South. 148, 21 L. R. A. 810.

*Georgia*.—West. U. Tel. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480; Stamey v. West. U. Tel. Co., 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95; Stewart v. Postal Tel. Cable Co., 131 Ga. 31, 61 S. E. 1045, 18 L. R. A. (N. S.) 692, 127 Am. St. Rep. 205. See, also, West. U. Tel. Co. v. Waxelbaum, 113 Ga. 1017, 39 S. E. 443, 56 L. R. A. 741. But see Brooke v. West. U. Tel. Co., 119 Ga. 694, 46 S. E. 826; Richmond Hosiery Mills v. West. U. Tel. Co., 123 Ga. 216, 51 S. E. 290.

*Idaho*.—Strong v. West. U. Tel. Co., 18 Idaho, 389, 109 Pac. 910, Ann. Cas. 1912A, 55, 30 L. R. A. (N. S.) 409.

*Illinois*.—West. U. Tel. Co. v. Hope, 11 Ill. App. 289; West. U. Tel. Co. v. Tyler, 74 Ill. 166, 24 Am. Rep. 279; Webbe v. West. U. Tel. Co., 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 207; West. U. Tel. Co. v. Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109.

*Indiana*.—West. U. Tel. Co. v. Fenton, 52 Ind. 1; West. U. Tel. Co. v. McKibben, 114 Ind. 511, 14 N. E. 894; West. U. Tel. Co. v. Moore, 12 Ind. App. 136, 30 N. E. 874, 54 Am. St. Rep. 515; Telephone Co. v. Biggerstaff, 177 Ind. 168, 97 N. E. 531.

*Iowa*.—Turner v. Hawkeye Tel. Co., 41 Iowa, 458, 20 Am. Rep. 605; Heron v. West. U. Tel. Co., 90 Iowa, 129, 57 N. W. 696; McPeck v. West. U. Tel. Co., 107 Iowa, 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214; Mentzer v. West. U. Tel. Co., 93 Iowa, 752, 62 N. W. 1, 57 Am. St. Rep. 294, 28 L. R. A. 72; Wells v. West. U. Tel. Co., 144 Iowa, 605, 123 N. W. 371, 138 Am. St. Rep. 317, 24 L. R. A. (N. S.) 1045; Younker v. Tel. Co., 146 Iowa, 499, 125 N. W. 577; McNeil v. Postal Tel. Cable Co., 154 Iowa, 241, 134 N. W. 611, 38 L. R. A. (N. S.) 127, Ann. Cas. 1914A, 1294.

*Kansas*.—West. U. Tel. Co. v. Howell, 38 Kan. 685, 17 Pac. 313; West v. West. U. Tel. Co., 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530; West. U. Tel. Co. v. Lawson, 66 Kan. 660, 72 Pac. 283; Russell v. West. U. Tel. Co., 57 Kan. 230, 45 Pac. 598.

*Kentucky*.—West. U. Tel. Co. v. Jump, 8 Ky. Law Rep. 531; Chapman v.



It is not even intimated, either in England or in the United States, but that the sender may maintain an action against a telegraph

West. U. Tel. Co., 90 Ky. 265, 13 S. W. 880, 12 Ky. Law Rep. 265; Jones v. Tel., etc., Co., 140 Ky. 165, 130 S. W. 994.

*Louisiana*.—La Grange v. Southwestern Tel. Co., 25 La. Ann. 383; Graham v. West. U. Tel. Co., 109 La. 1069, 34 South. 91; New Orleans Bank v. West. U. Tel. Co., 27 La. Ann. 49.

*Massachusetts*.—Ellis v. American Tel. Co., 13 Allen, 226.

*Minnesota*.—McCord v. West. U. Tel. Co., 39 Minn. 181, 39 N. W. 315, 12 Am. St. Rep. 636, 1 L. R. A. 143.

*Mississippi*.—Shingleur v. West. U. Tel. Co., 72 Miss. 1030, 18 South. 425, 48 Am. St. Rep. 604, 30 L. R. A. 444; West. U. Tel. Co. v. Allen, 66 Miss. 549, 6 South. 461; Magouirk v. West. U. Tel. Co., 79 Miss. 632, 31 South. 206, 89 Am. St. Rep. 663; Clement v. West. U. Tel. Co., 77 Miss. 747, 27 South. 603; Postal Tel. Cable Co. v. Wells, 82 Miss. 733, 35 South. 190; West. U. Tel. Co. v. Lyon, 93 Miss. 590, 47 South. 344.

*Missouri*.—Lee v. West. U. Tel. Co., 51 Mo. App. 375; Harper v. West. U. Tel. Co., 92 Mo. App. 304; Reed v. West. U. Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492.

*Nebraska*.—West. U. Tel. Co. v. Kemp, 44 Neb. 194, 62 N. W. 451, 48 Am. St. Rep. 723; Kemp v. Western Union Tel. Co., 28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363.

*New Mexico*.—West. U. Tel. Co. v. Longwill, 5 N. M. 308, 21 Pac. 339.

*New York*.—Leonard v. New York, etc., Elec. Mag. Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446; Milliken v. West. U. Tel. Co., 110 N. Y. 403, 18 N. E. 451, 1 L. R. A. 281; Wolfskehl v. West. U. Tel. Co., 46 Hun, 542; De Rutte v. New York, etc., Elec. Mag. Tel. Co., 1 Daly, 547, 30 How. Prac. 403.

*North Carolina*.—Eldred v. West. U. Tel. Co., 132 N. C. 267, 43 S. E. 825; Sherrill v. West. U. Tel. Co., 109 N. C. 527, 14 S. E. 94; Lewis v. West. U. Tel. Co., 117 N. C. 436, 23 S. E. 319; Young v. West. U. Tel. Co., 107 N. C. 370, 11 S. E. 1044, 22 Am. St. Rep. 883, 9 L. R. A. 669; Pegram v. West. U. Tel. Co., 100 N. C. 28, 6 S. E. 770, 6 Am. St. Rep. 557; Hughes v. West. U. Tel. Co., 114 N. C. 70, 19 S. E. 100, 41 Am. St. Rep. 782; Penn v. Telephone Co., 159 N. C. 306, 75 S. E. 16.

*Ohio*.—West. U. Tel. Co. v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500.

*Oklahoma*.—See Butner v. West. U. Tel. Co., 2 Okl. 234, 37 Pac. 1087.

*Oregon*.—McLeod v. Pacific Tel. Co., 52 Or. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. (N. S.) 810, 18 L. R. A. (N. S.) 954, 16 Ann. Cas. 1239.

*Pennsylvania*.—Harris v. West. U. Tel. Co., 9 Phila. 88; Wolf Co. v. West. U. Tel. Co., 24 Pa. Super. Ct. 129; Tobin v. West. U. Tel. Co., 146 Pa. 375, 23 Atl. 324, 28 Am. St. Rep. 802; New York, etc., Ptg. Tel. Co. v. Dryburg, 35 Pa. 298, 78 Am. Dec. 338; Bailey v. West. U. Tel. Co., 227 Pa. 522, 76 Atl. 736, 43 L. R. A. (N. S.) 502, 19 Ann. Cas. 895.

*South Carolina*.—Aiken v. West. U. Tel. Co., 5 S. C. 358; Broom v. West. U. Tel. Co., 71 S. C. 509, 51 S. E. 259, 4 Ann. Cas. 611; Pinckney Bros. v. West. U. Tel. Co., 19 S. C. 71, 45 Am. Rep. 765; Hill v. West. U. Tel. Co., 42 S. C. 267, 20 S. E. 135, 46 Am. St. Rep. 734; Mills v. Telephone Co., 88 S. C. 498, 70 S. E. 1040.

*Tennessee*.—Sadsworth v. West. U. Tel. Co., 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864; West. U. Tel. Co. v. Mellon, 96 Tenn. 66, 33 S. W. 725; Manier v. West. U. Tel. Co., 94 Tenn. 442, 29 S. W. 732.

*Texas*.—West. U. Tel. Co. v. Lyman, 3 Tex. Civ. App. 460, 22 S. W. 656; West. U. Tel. Co. v. Uvalde Natl. Bank, 97 Tex. 219, 77 S. W. 603, 65 L. R. A. 805, 1 Ann. Cas. 573, affirming (Civ. App.) 72 S. W. 232; West. U. Tel. Co. v. Beringer, 84 Tex. 38, 19 S. W. 336; West. U. Tel. Co. v. Adams, 75 Tex.

company for a breach of the contract of sending;<sup>36</sup> and it has been held, in our courts, that these companies are as much responsible for their negligence to a person to whom a message is addressed as they are to the sender.<sup>37</sup> While there is no dispute among the courts as to the rights of the addressee to sue, yet the question which has puzzled the courts the most is as to the nature of the suit to be brought, whether he should sue in contract

531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844; *West. U. Tel. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843; *West. U. Tel. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *Telephone Co. v. Jarrell* (Civ. App.) 138 S. W. 1165.

*Virginia*.—*West. U. Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715; *Connelly v. West. U. Tel. Co.*, 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 619, 56 L. R. A. 653.

*Wisconsin*.—*Fisher v. West. U. Tel. Co.*, 119 Wis. 146, 96 N. W. 545.

*United States*.—*Swan v. West. U. Tel. Co.*, 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153; *Whitehill v. West. U. Tel. Co.* (C. C.) 136 Fed. 499; *Pacific Postal Tel. Cable Co. v. Palo Alto Bank*, 109 Fed. 369, 48 C. C. A. 413, 54 L. R. A. 711; *Findlay v. West. U. Tel. Co.* (C. C.) 64 Fed. 459; *Beasley v. West. U. Tel. Co.* (C. C.) 39 Fed. 181; *Abraham v. West. U. Tel. Co.* (C. C.) 23 Fed. 315; *White v. West. U. Tel. Co.* (C. C.) 14 Fed. 710. Compare *West. U. Tel. Co. v. Wood*, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706; *Telephone Co. v. Burris*, 179 Fed. 92, 102 C. C. A. 386.

*Canada*.—*Bell v. Dominion Tel. Co.*, 25 L. C. Jur. 248, 3 Montreal Leg. N. 406; *Watson v. Montreal Tel. Co.*, 5 Montreal Leg. N. 87. Contra, *Feaver v. Montreal Tel. Co.*, 23 U. C. C. P. 150.

<sup>36</sup> See §§ 466, 467.

<sup>37</sup> *Young v. West. U. Tel. Co.*, 107 N. C. 370, 11 S. E. 1044, 9 L. R. A. 669n, 22 Am. St. Rep. 883; *Wadsworth v. West. U. Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864; *Elwood v. West. U. Tel. Co.*, 45 N. Y. 549, 6 Am. Rep. 140; *Ellis v. Tel. Co.*, 13 Allen (Mass.) 227; *New York, etc., Tel. Co. v. Dryburg*, 35 Pa. 298, 78 Am. Dec. 338; *Markel v. West. U. Tel. Co.*, 19 Mo. App. 80. In the first case cited the court, by Clark, J., said: "The following may be summed up as the reasons assigned therefor: 1. That a telegraph company is a public agency, and responsible, as such, to any one injured by its negligence, or, at least, it is the common agent of sender and receiver, and responsible to each for any injury sustained by them respectively, by its negligence. 2. That in a case like this, the receiver is the beneficiary of the contract, and the injury, if any, caused by the company's negligence must be to him. 3. The message is the property of the party addressed, in an analogy to a consignee of goods; that upon the face of the message, such as this, the sender is the agent of the receiver, and the latter, as the principal, can maintain an action for breach of the contract, or for a tort, if the injury is done him by negligence in performance of the duty contracted for." The following was the message in this case: "To J. T. Young, Newbern, N. C. Come in haste; your wife is at the point of death. J. W. Rice;" *West. U. Tel. Co. v. Potts*, 120 Tenn. 37, 113 S. W. 789, 19 L. R. A. (N. S.) 479, 127 Am. St. Rep. 991; *Gilbert v. Stockman*, 76 Wis. 62, 44 N. W. 85, 20 Am. St. Rep. 23; *Young v. West. U. Tel. Co.*, supra; *Gray v. Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, 56 L. R. A. 301, 91 Am. St. Rep. 707; *Wadsworth v. West. U. Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864; *Strong v. West. U. Tel. Co.*, 18 Idaho, 389, 109 Pac. 910, Ann. Cas. 1912A, 55, 30 L. R. A. (N. S.) 409. See other cases in note 35, supra.

or in tort. The courts have stated various grounds on this doctrine,<sup>38</sup> and we shall now proceed to give some of them.

§ 475. **Addressee beneficial party.**—One ground upon which the courts hold that the addressee may maintain a suit against a telegraph company for its negligence in the transmission of a message is that, where a contract is made by two parties for the benefit of a third person, the latter may sue for a breach of the contract. As may be observed, this reason is founded on the early English cases.<sup>39</sup> The addressee is the beneficiary of such contract and is entitled to sue in his own right for damages, when by the negligence of the company he is deprived of the benefit he would otherwise have derived.<sup>40</sup> It seems that it is not necessary that

<sup>38</sup> West. U. Tel. Co. v. Woodard, 84 Ark. 323, 105 S. W. 579, 13 Ann. Cas. 354; Postal Tel. Cable Co. v. Ford, 117 Ala. 672, 23 South. 684; Fererro v. West. U. Tel. Co., 9 App. D. C. 455, 35 L. R. A. 548; Young v. West. U. Tel. Co., 107 N. C. 370, 11 S. E. 1044, 22 Am. St. Rep. 883, 9 L. R. A. 669; Shingleur v. West. U. Tel. Co., 72 Miss. 1030, 18 South. 425, 48 Am. St. Rep. 604, 30 L. R. A. 444; McLeod v. Pacific Tel. Co., 52 Or. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. (N. S.) 810, 18 L. R. A. (N. S.) 954, 16 Ann. Cas. 1239; Anniston Cordage Co. v. West. U. Tel. Co., 161 Ala. 216, 49 South. 770, 135 Am. St. Rep. 124, 30 L. R. A. (N. S.) 1116; Stewart v. Postal Tel. Cable Co., 131 Ga. 31, 61 S. E. 1045, 18 L. R. A. (N. S.) 692, 127 Am. St. Rep. 205; West. U. Tel. Co. v. Potts, 120 Tenn. 37, 113 S. W. 789, 19 L. R. A. (N. S.) 479, 127 Am. St. Rep. 991; Wadsworth v. West. U. Tel. Co., 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864; West v. West. U. Tel. Co., 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530; West. U. Tel. Co. v. Wilson, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23; West. U. Tel. Co. v. Lacer, 122 Ky. 839, 93 S. W. 34, 5 L. R. A. (N. S.) 751, 121 Am. St. Rep. 502; Strong v. West. U. Tel. Co., 18 Idaho, 389, 109 Pac. 910, Ann. Cas. 1912A, 55, 30 L. R. A. (N. S.) 409. See other cases in note 35, *supra*.

<sup>39</sup> See § 470.

<sup>40</sup> Aiken v. West. U. Tel. Co., 5 S. C. 371; West. U. Tel. Co. v. Hope, 11 Ill. App. 291; West. U. Tel. Co. v. Jones, 81 Tex. 271, 16 S. W. 1006. "A person for whose benefit a promise to another upon a sufficient consideration is made may maintain an action on the contract in his own name against the promisor." Burton v. Larkin, 36 Kan. 246, 13 Pac. 398, 59 Am. Rep. 541; Hendrick v. Lindsay, 93 U. S. 143, 23 L. Ed. 855. This doctrine is denied by the case of West. U. Tel. Co. v. Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109. See, also, West. U. Tel. Co. v. Woodard, 84 Ark. 323, 105 S. W. 579, 13 Ann. Cas. 354; Chapman v. West. U. Tel. Co., 90 Ky. 265, 13 S. W. 880, 12 Ky. Law Rep. 265; West. U. Tel. Co. v. Jump, 8 Ky. Law Rep. 531; McLeod v. Pacific Tel. Co., 52 Or. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. (N. S.) 810, 18 L. R. A. (N. S.) 954, 16 Ann. Cas. 1239; La Grange v. Southwestern Tel. Co., 25 La. Ann. 383; West. U. Tel. Co. v. Coffin, 88 Tex. 94, 30 S. W. 896; West. U. Tel. Co. v. Beringer, 84 Tex. 38, 19 S. W. 336; West. U. Tel. Co. v. Adams, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844; So Relle v. West. U. Tel. Co., 55 Tex. 308, 40 Am. Rep. 805; West. U. Tel. Co. v. Randles (Tex. Civ. App.) 34 S. W. 447; West. U. Tel. Co. v. Cook, 45 Tex. Civ. App. 87, 99 S. W. 1131; Whitehill v. West. U. Tel. Co. (C. C.) 136 Fed. 499; West. U. Tel. Co. v. Wood, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706; Connelly v. West. U. Tel. Co., 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep.



the addressee should have known of the contract at the time it was made. Thus it has been held that the husband of the addressee may sue for a breach of a contract made with the company by a party who has not been previously appointed her agent for that particular purpose;<sup>41</sup> although some courts hold that the company must have had knowledge that the sender was the agent of the addressee.<sup>42</sup> So it seems that the company must

919, 56 L. R. A. 663; *West. U. Tel. Co. v. Potts*, 120 Tenn. 37, 113 S. W. 789, 19 L. R. A. (N. S.) 479, 127 Am. St. Rep. 991; *Anniston Cordage Co. v. West. U. Tel. Co.*, 161 Ala. 216, 49 South. 770, 135 Am. St. Rep. 124, 30 L. R. A. (N. S.) 1116.

*Mental anguish.*—This doctrine is assumed in a great majority of cases in which recovery for mental anguish alone is sought; but the party bringing the action must have a beneficial interest in the message which must be made known to the defendant. *West. U. Tel. Co. v. Jones*, supra; *Sherrill v. West. U. Tel. Co.*, 109 N. C. 527, 14 S. E. 94; *Id.*, 116 N. C. 655, 21 S. E. 429; *Id.*, 117 N. C. 352, 23 S. E. 277; *West. U. Tel. Co. v. Coffin*, supra; *West. U. Tel. Co. v. Adams*, supra; *Loper v. West. U. Tel. Co.*, 70 Tex. 689, 8 S. W. 600; *West. U. Tel. Co. v. Evans*, 5 Tex. Civ. App. 55, 23 S. W. 998; *Texas, etc., Tel. Co. v. Seiders*, 9 Tex. Civ. App. 431, 29 S. W. 258; *West. U. Tel. Co. v. Sweetman*, 19 Tex. Civ. App. 435, 47 S. W. 676; *West. U. Tel. Co. v. Olivarri* (Tex. Civ. App.) 136 S. W. 816; *West. U. Tel. Co. v. Guinn* (Tex. Civ. App.) 130 S. W. 616; *Southwestern Tel., etc., Co. v. Gehring* (Tex. Civ. App.) 137 S. W. 754; *West. U. Tel. Co. v. Clark*, 14 Tex. Civ. App. 563, 38 S. W. 225; *Louisiana, etc., R. Co. v. Reeves*, 95 Ark. 214, 128 S. W. 1051; *West. U. Tel. Co. v. Gilliland* (Tex. Civ. App.) 130 S. W. 212; *West. U. Tel. Co. v. Gahan*, 17 Tex. Civ. App. 657, 44 S. W. 933. See *Curd v. Cumberland Tel., etc., Co.* (Ky.) 119 S. W. 746. But see *Gulf, etc., R. Co. v. Levy*, 59 Tex. 563, 46 Am. Rep. 278; *West. U. Tel. Co. v. Wood*, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706; the latter cases cannot, however, be considered as authority.

*It is not material who paid for the transmission of the message* if it was sent for the benefit of the addressee. *West. U. Tel. Co. v. Beringer*, supra. The message need not be for the sole and exclusive benefit of the addressee. *McLeod v. Pacific Tel. Co.*, supra. It is not sufficient merely that he would be incidentally benefited by carrying out of the contract. *Postal Tel. Cable Co. v. Ford*, 117 Ala. 672, 23 South. 684; *Markel v. West. U. Tel. Co.*, 19 Mo. App. 80.

*Rule in Alabama.*—The rule in Alabama is that the addressee has no right of action, unless it is shown that the person sending the message acted as the addressee's agent. *West. U. Tel. Co. v. Cunningham*, 99 Ala. 314, 14 South. 579; *West. U. Tel. Co. v. Adair*, 115 Ala. 441, 22 South. 73; *West. U. Tel. Co. v. Brown*, 6 Ala. App. 339, 59 South. 329; *West. U. Tel. Co. v. Heathcoat*, 149 Ala. 623, 43 South. 117. It would seem, however, that but slight proof of the relationship of agency between the sendee and the sender is required. *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23; *West. U. Tel. Co. v. Rowell*, 153 Ala. 295, 45 South. 73; *West. U. Tel. Co. v. Robbins*, 3 Ala. App. 234, 56 South. 879.

<sup>41</sup> *West. U. Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920.

<sup>42</sup> *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23.

*Wife of addressee.*—The mere fact that the plaintiff was the wife of addressee is not sufficient to entitle her to recover in the absence of notice

have some notice of the importance of the message and the benefit which the addressee is likely to derive therefrom.<sup>43</sup> It is sufficient, however, if the benefit to be derived appear on the face of the telegram.<sup>44</sup>

§ 476. *Same continued—sender agent of addressee.*—This rule, we think, is particularly applicable when the sender acts as agent for the addressee in making the contract.<sup>45</sup> As was said by Reyer, C. J., in deciding this point: "The rule that a principal is entitled to maintain an action upon a contract<sup>46</sup> made by his agent with a third person, although the agency is not disclosed<sup>47</sup> at the time of making the contract, has many illustrations in the reported cases,

to the company of her interest therein. *Morrow v. West. U. Tel. Co.*, 107 Ky. 517, 54 S. W. 853; *Cranford v. West. U. Tel. Co.*, 138 N. C. 162, 50 S. E. 585; *Holler v. West. U. Tel. Co.*, 149 N. C. 336, 63 S. E. 92, 19 L. R. A. (N. S.) 475; *Rogers v. West. U. Tel. Co.*, 72 S. C. 290, 51 S. E. 773; *Poteet v. West. U. Tel. Co.*, 74 S. C. 491, 55 S. E. 113; *West. U. Tel. Co. v. Carter*, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826; *West. U. Tel. Co. v. Kirkpatrick*, 76 Tex. 217, 13 S. W. 70, 18 Am. St. Rep. 37; *West. U. Tel. Co. v. Proctor*, 6 Tex. Civ. App. 300, 25 S. W. 811; *West. U. Tel. Co. v. Womack*, 9 Tex. Civ. App. 607, 29 S. W. 932; *Weatherford, etc., R. Co. v. Seals* (Tex. Civ. App.) 41 S. W. 841; *West. U. Tel. Co. v. Herring* (Tex. Civ. App.) 146 S. W. 699.

<sup>43</sup> *West. U. Tel. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843; *West. U. Tel. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896; *Butner v. West. U. Tel. Co.*, 2 Okl. 234, 37 Pac. 1087; *International Ocean Tel. Co. v. Saunders*, 32 Fla. 434, 14 South. 148, 21 L. R. A. 810; *McLeod v. Pacific Tel. Co.*, 52 Or. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. (N. S.) 810, 18 L. R. A. (N. S.) 954, 16 Ann. Cas. 1239; *Anniston Cordage Co. v. West. U. Tel. Co.*, 161 Ala. 216, 49 South. 770, 135 Am. St. Rep. 124, 30 L. R. A. (N. S.) 1116. See other cases in note 42, *supra*; *Frazier v. West. U. Tel. Co.*, 45 Or. 415, 78 Pac. 330, 67 L. R. A. 319, 2 Ann. Cas. 396; *West. U. Tel. Co. v. Wood*, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706. But see *Postal Tel. Co. v. Levy* (Tex. Civ. App.) 102 S. W. 134, one member of a firm recipient of a message from another member.

<sup>44</sup> *Martin v. West. U. Tel. Co.*, 1 Tex. Civ. App. 143, 20 S. W. 860.

<sup>45</sup> *Milliken v. West. U. Tel. Co.*, 110 N. Y. 403, 118 N. E. 251, 1 L. R. A. 281; *De Rutte v. New York, etc., Elec. Mag. Tel. Co.*, 1 Daly (N. Y.) 547, 30 How. Prac. 403; *West. U. Tel. Co. v. Cunningham*, 99 Ala. 314, 14 South. 579; *West. U. Tel. Co. v. Rowell*, 153 Ala. 295, 45 South. 73; *Heathcoat v. West. U. Tel. Co.*, 156 Ala. 339, 47 South. 139.

<sup>46</sup> *West. U. Tel. Co. v. Manker*, 145 Ala. 418, 41 South. 850; *West. U. Tel. Co. v. Cornwell*, 2 Colo. App. 491, 31 Pac. 393; *West. U. Tel. Co. v. Rowell*, 153 Ala. 295, 45 South. 73; *Stamey v. West. U. Tel. Co.*, 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95; *Coit v. West. U. Tel. Co.*, 130 Cal. 657, 63 Pac. 83, 80 Am. St. Rep. 153, 53 L. R. A. 678; *Milliken v. West. U. Tel. Co.*, 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281; *De Rutte v. New York, etc., Elec. Mag. Tel. Co.*, 1 Daly (N. Y.) 547, 30 How. Prac. 403.

<sup>47</sup> *West. U. Tel. Co. v. Manker*, 145 Ala. 418, 41 South. 850; *Manker v. West. U. Tel. Co.*, 137 Ala. 292, 34 South. 839, overruling *West. U. Tel. Co. v. Allgood*, 125 Ala. 712, 27 South. 1024, and disapproving on this point *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23, and

and is elementary law.”<sup>48</sup> This principle has been frequently applied in actions against telegraph companies, and is now the settled law of this country with respect to such corporations.<sup>49</sup> While the addressee may sue the company, there is no reason why the agent may not maintain the action in behalf of the addressee.<sup>50</sup>

§ 477. **Action for breach of public duty.**—There are other authorities which base the addressee’s right of action upon the breach of the company’s public duty.<sup>51</sup> While we think this is the correct

*Kennon v. West. U. Tel. Co.*, 92 Ala. 399, 9 South. 200; *Harkness v. West. U. Tel. Co.*, 73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672.

<sup>48</sup> *Milliken v. West. U. Tel. Co.*, 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281.

<sup>49</sup> *Harkness v. West. U. Tel. Co.*, 73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672; *Stewart v. Postal Tel. Cable Co.*, 131 Ga. 31, 61 S. E. 1045, 18 L. R. A. (N. S.) 692, 127 Am. St. Rep. 205; *West. U. Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 644, 16 Am. St. Rep. 920; *Seifert v. West. U. Tel. Co.*, 129 Ga. 181, 58 S. E. 699, 11 L. R. A. (N. S.) 1149, 121 Am. St. Rep. 210; *Wells v. West. U. Tel. Co.*, 144 Iowa, 605, 123 N. W. 371, 24 L. R. A. (N. S.) 1045, 138 Am. St. Rep. 317; *West. U. Tel. Co. v. Schriver*, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678; *West. U. Tel. Co. v. Motley* (Tex. Civ. App.) 27 S. W. 51; *Leonard v. New York, etc., Elec. Mag. Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *Postal Tel. Cable Co. v. Levy* (Tex. Civ. App.) 102 S. W. 134. See *West. U. Tel. Co. v. Weniski*, 84 Ark. 457, 106 S. W. 486. See *West. U. Tel. Co. v. Potts*, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. (N. S.) 479, where a distinction is made between commercial telegrams and social telegrams, and although it is held that an undisclosed principal of the sendee may not recover from mental anguish, it is intimated that he might recover for a commercial loss. But see *West. U. Tel. Co. v. Kirkpatrick*, 76 Tex. 217, 13 S. W. 70, 18 Am. St. Rep. 37.

*Telephone.*—To render a telephone company liable in tort to the addressee whom it knows to have an interest therein, the addressee need not be the primary beneficiary in a message. *McLeod v. Pacific State Tel., etc., Co.*, 52 Or. 22, 28, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. (N. S.) 810, 18 L. R. A. (N. S.) 954, 16 Ann. Cas. 1239. See, also, § 468, and other cases cited in notes 46 and 47, *supra*.

<sup>50</sup> *United States Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519; *American U. Tel. Co. v. Daughtery*, 89 Ala. 191, 7 South. 660; *Daughtery v. American U. Tel. Co.*, 75 Ala. 168, 57 Am. Rep. 435.

<sup>51</sup> *Webbe v. West. U. Tel. Co.*, 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 207; *West. U. Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; *Fererro v. West. U. Tel. Co.*, 9 App. D. C. 455, 35 L. R. A. 548; *West. U. Tel. Co. v. Longwill*, 5 N. M. 308, 21 Pac. 339; *West. U. Tel. Co. v. Kirchbaum*, 132 Ala. 535, 31 South. 607; *Young v. West. U. Tel. Co.*, 107 N. C. 370, 11 S. E. 1044, 22 Am. St. Rep. 883, 9 L. R. A. 779; *De Rutte v. New York, etc., Elec. Mag. Tel. Co.*, 1 Daly (N. Y.) 547, 30 How. Prac. 403; *Wolfskehl v. West. U. Tel. Co.*, 46 Hun (N. Y.) 542; *New York, etc., Ptg. Tel. Co. v. Dryburg*, 35 Pa. 298, 78 Am. Dec. 338; *West. U. Tel. Co. v. Uvalde Nat. Bank*, 97 Tex. 219, 77 S. W. 603, 65 L. R. A. 805, 1 Ann. Cas. 573, affirming (Tex. Civ. App.) 72 S. W. 232; *Aiken v. West. U. Tel. Co.*, 5 S. C. 358; *Pacific Postal Tel. Cable Co. v. Palo Alto Bank*, 109 Fed. 369, 48 C. C. A. 413, 54 L. R. A. 711. See *Markley v. West. U. Tel. Co.*, 144 Iowa, 105, 122 N. W. 136, 138 Am. St. Rep. 263; *Cowan v. West. U. Tel. Co.*, 122 Iowa, 379, 98 N. W. 281, 101 Am. St. Rep. 268, 64 L. R. A. 545; *Milliken*



view to take of the subject, yet we do not mean to say that they may not sue for the breach of the contract.<sup>52</sup> These companies have undertaken to perform public functions, and, among these, it is presumed that they have assumed the duty to transmit correctly and accurately and deliver promptly all messages entrusted to them; and on a failure to discharge these duties with due care and diligence, they will become liable to any one who suffers damages thereby. People seldom resort to them for an employment of their services unless their business is of such importance that it must be attended to in the shortest possible time and in the most accurate and correct manner.<sup>53</sup> They have held themselves out to the public as ready and willing to accomplish such business, and when they are compensated for their undertaking, but fail in the attempt, they, and not their employer, should suffer for the negligence of the former. In other words, when they have failed to discharge their public duties in transmitting messages, whereby the addressee has been caused to suffer, the latter

v. West. U. Tel. Co., 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281; West. U. Tel. Co. v. Fenton, 52 Ind. 1; Abraham v. West. U. Tel. Co. (C. C.) 23 Fed. 315; West. U. Tel. Co. v. Adams, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 344; West. U. Tel. Co. v. Reynolds, 77 Va. 173, 46 Am. Rep. 715; West. U. Tel. Co. v. Allen, 66 Miss. 549, 6 South. 461.

<sup>52</sup> But where there are no contractual relations existing between the company and the addressee, the latter should sue in tort. West. U. Tel. Co. v. Cooper, 2 Ga. App. 376, 58 S. E. 517; West. U. Tel. Co. v. Adams, 154 Ala. 657, 46 South. 228; Webbe v. West. U. Tel. Co., 169 Ill. 611, 48 N. E. 670, 61 Am. St. Rep. 207; West. U. Tel. Co. v. Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109.

<sup>53</sup> Mr. Bigelow suggests as a satisfactory ground for the American rule the fact that telegraphic communication is usually resorted to only in matters of importance, from which the company ought to infer the necessity of correct and prompt transmission, and that "a mistake in its transmission will be likely to produce damage to the receiver by causing him to do what he would otherwise not do. Knowing, then, the probable consequence of transmitting an erroneous message, they owe a duty to the receiver of refraining from such acts; and if (by negligence) they violate this duty, they must, on plain legal principles, be liable for the damages produced"; Bigelow on Torts, 602. See, also, Coit v. West. U. Tel. Co., 130 Cal. 657, 63 Pac. 83, 53 L. R. A. 678, 80 Am. St. Rep. 153; West. U. Tel. Co. v. Lyeon, 60 Ill. App. 124; Webbe v. West. U. Tel. Co., 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 207; West. U. Tel. Co. v. Fenton, 52 Ind. 1; Mentzer v. West. U. Tel. Co., 93 Iowa, 752, 62 N. W. 1, 57 Am. St. Rep. 294, 28 L. R. A. 72; Alexander v. West. U. Tel. Co., 66 Miss. 161, 5 South. 397, 3 L. R. A. 71, 14 Am. St. Rep. 556; Shingleur v. West. U. Tel. Co., 72 Miss. 1030, 18 South. 425, 30 L. R. A. 444, 48 Am. St. Rep. 604; Tobin v. West. U. Tel. Co., 146 Pa. 375, 23 Atl. 324, 28 Am. St. Rep. 802; Pepper v. West. U. Tel. Co., 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699; Wadsworth v. West. U. Tel. Co., 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864; State Bank of Commerce v. West. U. Tel. Co., 19 N. M. 211, 142 Pac. 156, L. R. A. 1915A, 120, quoting text.

should have the right to maintain an action against the company for the breach of its public duty. The damages, however, which result from such breach should be the proximate consequence of the company's negligence.<sup>54</sup>

§ 478. **Same continued—action in contract or tort.**—It is often a question with the addressee as to whether he should bring an action in contract or in tort, and it is sometimes a doubtful question with the courts as to what kind of an action has been brought. Because the addressee has an action in contract is no reason why he may not sue in tort.<sup>55</sup> As was said: "In many cases an action as for tort, or an action as for breach of contract, may be brought by the same party on the same state of facts."<sup>56</sup> And, as further stated by another text-writer: "The fact that a contract existed, and was broken at the same time, and by the same act or omission, by which the plaintiff's cause of action arose, is only one of the incidents of the situation. The defendant owed, in respect of the same thing, two distinct duties, one of special character to the party with whom he contracted, and one of a general character to others. \* \* \* The duty, therefore, does not grow out of the contract, but exists before and independent of it."<sup>57</sup> These companies are engaged in a public employment and are, within certain limits, to be considered as common carriers. As such, they are charged with a common-law duty, and "actions may be brought in tort, although the breach of duty is the doing or not doing of something contrary to an agreement made in the course of such employment."<sup>58</sup> Almost all cases on this subject hold that the addressee, who is injured through the negligence or careless-

<sup>54</sup> *State Bank of Commerce v. West. U. Tel. Co.*, 19 N. M. 211, 142 Pac. 156, L. R. A. 1915A, 120, quoting text.

<sup>55</sup> *Reese v. West. U. Tel. Co.*, 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583; *Cordell v. West. U. Tel. Co.*, 149 N. C. 402, 63 S. E. 71, 22 L. R. A. (N. S.) 540; *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95; *Woods v. West. U. Tel. Co.*, 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581; *Green v. West. U. Tel. Co.*, 136 N. C. 489, 49 S. E. 165, 103 Am. St. Rep. 955, 67 L. R. A. 985, 1 Ann. Cas. 349; *Cogdell v. West. U. Tel. Co.*, 135 N. C. 431, 47 S. E. 490; *West. U. Tel. Co. v. Hill*, 164 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058; *Shingleur v. West. U. Tel. Co.*, 72 Miss. 1030, 18 South. 425, 48 Am. St. Rep. 604, 30 L. R. A. 444, sender may sue either in contract or in tort, but ordinarily the addressee's right of action is in tort: *Penn. v. Telephone Company*, 159 N. C. 306, 75 S. E. 16, 41 L. R. A. (N. S.) 223; *Strong v. West. U. Tel. Co.*, 18 Idaho, 389, 109 Pac. 910, Ann. Cas. 1912A, 55, 30 L. R. A. (N. S.) 409.

<sup>56</sup> *Cooley on Torts*, 103, 104.

<sup>57</sup> *Rigelow on Torts*, 586-617.

<sup>58</sup> *Southern Exp. Co. v. McVeigh*, 20 Grat. (Va.) 264; *McPeck v. West. U. Tel. Co.*, 107 Iowa. 362, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214; *Brown v. Chicago, etc., R. Co.*, 54 Wis. 342, 11 N. W. 356, 41 Am. Rep. 41.

ness of the company, may proceed either upon contract,<sup>59</sup> alleging the negligent act of the defendant as a breach of the contract, or he may proceed in tort,<sup>60</sup> making the negligence of the company the ground of his right of recovery.

§ 479. **Same continued—damages under either.**—The reason why this question should be considered and known is that the amount of damages to be recovered, and the ground upon which it is allowed under each, is quite different. The general rule as to the amount of damages to be recovered for a breach of contract is that none can be recovered save that which may reasonably be supposed to have been contemplated by the parties at the time the contract was made as the probable result of the breach of the contract.<sup>61</sup> Recovery in tort is not thus limited. The rule applicable to such cases is that a "party who commits a trespass, or other wrongful act, is liable for all the direct injury resulting from such act, although such resulting injury could not have been contemplated as a probable result of the act done."<sup>62</sup> This subject is most often brought up where the addressee is suing to recover damages for mental suffering. If the action is in contract, it is pretty generally held that the addressee cannot recover damages for mental suffering, since it is presumed that this was not in the contemplation of the parties as a probable result of the breach of the contract; yet, if the action were in tort, recovery could be had.<sup>63</sup> So it is of vital importance to know what kind of action, should be brought, and also the nature of the action which has been brought.<sup>64</sup>

<sup>59</sup> *Coit v. West. U. Tel. Co.*, 130 Cal. 657, 63 Pac. 83, 80 Am. St. Rep. 153, 53 L. R. A. 678; *West. U. Tel. Co. v. Cornwell*, 2 Colo. App. 491, 31 Pac. 393; *West. U. Tel. Co. v. Manker*, 145 Ala. 418, 41 South. 850; *West. U. Tel. Co. v. Rowell*, 153 Ala. 295, 45 South. 73; *Stamey v. West. U. Tel. Co.*, 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95; *De Rutte v. New York, etc., Mag. Tel. Co.*, 1 Daly (N. Y.) 547; *Id.*, 30 How. Prac. (N. Y.) 403; *Milliken v. West. U. Tel. Co.*, 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281; *Anniston Cordage Co. v. West. U. Tel. Co.*, 161 Ala. 216, 49 South. 770, 135 Am. St. Rep. 124, 30 L. R. A. (N. S.) 1116.

<sup>60</sup> *Strong v. West. U. Tel. Co.*, 18 Idaho, 389, 109 Pac. 910, Ann. Cas. 1912A, 55, 30 L. R. A. (N. S.) 409; *Anniston Cordage Co. v. West. U. Tel. Co.*, 161 Ala. 216, 49 South. 770, 135 Am. St. Rep. 124, 30 L. R. A. (N. S.) 1116. See, also, other cases cited in note 51, *supra*.

<sup>61</sup> *Cowan v. West. U. Tel. Co.*, 122 Iowa, 379, 98 N. W. 281, 101 Am. St. Rep. 274, 64 L. R. A. 545.

<sup>62</sup> *Brown v. Chicago, etc., R. Co.*, 54 Wis. 342, 11 N. W. 356, 41 Am. Rep. 41; *Keenan v. Cavanaugh*, 44 Vt. 268; *Metallic, etc., Co. v. Fitchburg R. Co.*, 109 Mass. 277, 12 Am. Rep. 689; *Hill v. Winson*, 118 Mass. 251; 1 *Sedgwick on Dam.* 130.

<sup>63</sup> See § 525 et seq.

<sup>64</sup> *West. U. Tel. Co. v. Rowell*, 153 Ala. 295, 45 South. 73; *West. U. Tel.*



§ 480. **Agent for addressee.**—It has been held, by some courts, that the company stands in the relation of an agent to the addressee and is, therefore, liable in damages to its principal for the consequence of its negligence.<sup>65</sup> It was held, in one case, viewing the matter in this light, that it was reasonable for all purposes of liability, that the company should be regarded as much the agent of him who receives as of him who sends the message, and it was considered that the company ought to be regarded as the common agent of the parties at either end of the wire.<sup>66</sup> We think this is clearly an incorrect view to take of the subject. It has also been held by some that a telegraph company was the agent of the sender,<sup>67</sup> when it is not suggested by the addressee to be used as a medium of communication;<sup>68</sup> but it may be sued by either for the negligent performance of its duty.

§ 481. **Right under statute.**—Other authorities claim that the right of the addressee to sue the company for negligently transmitting or delaying the delivery of a message, arises from statutes to that effect.<sup>69</sup> In some states there were statutes early adopted which gave the third party the right to maintain an action for a breach of a contract made for his benefit, although he may have been a stranger, both to the promise and the consideration.<sup>70</sup> In

Co. v. Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; West. U. Tel. Co. v. Potts, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. (N. S.) 479, holding that an action for the breach of a statutory duty in regard to the transmission or delivery of a message is, in effect, an action for negligence. However, in some cases it is immaterial in which form the action is brought. West. U. Tel. Co. v. Woodard, 84 Ark. 323, 105 S. W. 579, 13 Ann. Cas. 354; West. U. Tel. Co. v. Hogue, 79 Ark. 33, 94 S. W. 924; Champion Chem. Wks. v. Postal Tel. Cable Co., 123 Ill. App. 20.

<sup>65</sup> New York, etc., Printing Tel. Co. v. Dryburg, 35 Pa. 298, 78 Am. Dec. 338.

<sup>66</sup> Id. See, also, §§ 467, 487.

<sup>67</sup> See § 467.

<sup>68</sup> Ayer v. West. U. Tel. Co., 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353; Younker v. West. U. Tel. Co., 146 Iowa, 499, 125 N. W. 577. See, also, § 487, note 98.

<sup>69</sup> West. U. Tel. Co. v. McKibben, 114 Ind. 511, 14 N. E. 894; West. U. Tel. Co. v. Fenton, 52 Ind. 1; Herron v. West. U. Tel. Co., 90 Iowa, 129, 57 N. W. 696; Markel v. West. U. Tel. Co., 19 Mo. App. 80; Wadsworth v. West. U. Tel. Co., 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864; West. U. Tel. Co. v. Allen, 66 Miss. 549, 6 South. 461; Younker v. West. U. Tel. Co., 146 Iowa, 499, 125 N. W. 577; Francis v. West. U. Tel. Co., 58 Minn. 252, 59 N. W. 1078, 49 Am. St. Rep. 507, 25 L. R. A. 406; Rowan v. West. U. Tel. Co. (C. C.) 149 Fed. 550; Pacific Pine Lbr. Co. v. West. U. Tel. Co., 123 Cal. 428, 56 Pac. 103; Telephone Co. v. Biggerstaff, 177 Ind. 168, 97 N. E. 531. See West. U. Tel. Co. v. Potts, 120 Tenn. 37, 113 S. W. 789, 19 L. R. A. (N. S.) 479, 127 Am. St. Rep. 991.

<sup>70</sup> Ellis v. Harrison, 104 Mo. 270, 16 S. W. 198; Rice v. Savery, 22 Iowa,

three states in particular, there have been statutes adopted which are more specifically applicable to the negligence of telegraph companies.<sup>71</sup> It is often provided in these statutes that the right of the addressee is not affected by reason of the fact that the employes of the company may be proceeded against criminally for their negligence.<sup>72</sup> While these statutes have had a tendency to strengthen the general rule whereby a third person, in whose favor a contract has been made, may maintain an action for a breach thereof, yet we think that they are merely declaratory of the rights derived under the common law, and that a third person could as easily recover damages for the breach of the contract made in his behalf as if the statutes were not in existence.

§ 482. **Right of action—altered message.**—And still it has been held in other jurisdictions that, where a telegraph company has delivered an altered message or one materially different from that contracted to be sent, it would be a misrepresentation, or a false message, and the company should be held liable for the consequences.<sup>73</sup> The ground upon which the right of action arises is the same as that for injuries resulting from other misrepresentations. Thus it has been held that a physician, who negligently administered a wrong medicine, is responsible to his patient for the injury resulting therefrom, if he takes it in the belief that he was taking the right medicine.<sup>74</sup> And it has been suggested by analogy that a telegraph company must answer to an addressee for delivering to him a message which, through its negligence, has become false.<sup>75</sup> But in order for the addressee to recover, he must show that he himself has suffered an injury by the negligence of the company. Therefore, where a message from a dealer to his broker is erroneously transmitted, by reason of which the broker makes losing contracts for his principal, the broker cannot maintain an action for damages, because, as he is not responsible

470; *Miliani v. Tognini*, 19 Nev. 133, 7 Pac. 279; *McArthur v. Dryden*, 6 N. D. 438, 71 N. W. 125.

Statutes allowing the real party in interest to sue have been passed in Alabama, California, Indiana, Iowa, Kansas, Kentucky, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, Texas, Utah, and Wisconsin. Statutes specifically giving to a third party a right of action upon a contract made for his benefit have been passed in California, Civ. Code, § 1559; and Dakota, Comp. Laws 1887, § 3499.

<sup>71</sup> Tennessee, Indiana, and Iowa.

<sup>72</sup> *Wadsworth v. West. U. Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864; *West. U. Tel. Co. v. Fenton*, 52 Ind. 1.

<sup>73</sup> *May v. West. U. Tel. Co.*, 112 Mass. 90.

<sup>74</sup> *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Ayers v. Russell*, 50 Hun, 282, 3 N. Y. Supp. 338.

<sup>75</sup> *Allen's Tel. Cas.* 455; *Gray on Tel.*, § 73.

on the contracts, he cannot claim to have suffered any damages.<sup>76</sup> The courts and text-writers, as may be observed, have considered various grounds upon which the addressee's rights of action have been based, but we are inclined to think, as said before, that his right of action when on contract, is founded on the ground that a third party, in whose favor a contract is made, may sue for the breach thereof, and when the action is in tort, for the breach of the company's common-law duty.

**§ 483. Sender paying charges—effect upon the addressee's right.**—The fact that the sender paid the company the charges for transmitting the message will not affect the addressee's right of action.<sup>77</sup> If the sender is acting in the relation of agent to the addressee, in the particular instance, or if the latter is the beneficiary of the contract of sending, the payment by the sender will be a sufficient payment for the addressee. If he should sue for the breach of its public duty, the payment by the sender in the contract of sending, and out of which the action of tort arose, would be sufficient for him to maintain an action thereon. It matters not from whom it derives the compensation for its services, because, having received the charges, it is presumed that the company has assumed the duty to correctly transmit and promptly deliver the message. In one case it was held that the receiver could maintain his suit although the charges had been paid by the sender, to whom they were afterwards returned by the company.<sup>78</sup> The same rule will apply in actions brought by the sender when the message fees have been paid by the addressee.

**§ 484. Third party—right of action.**—It is not every one who may maintain suit against a telegraph company when interested in a message being correctly transmitted and promptly delivered, and who would suffer a loss by a failure of the company to properly discharge this duty. He must show that the company owed a duty to him in the particular instance.<sup>79</sup> Therefore a stranger cannot maintain an action against a telegraph company for its negligence in transmitting or delay in the delivery of a message, when the

<sup>76</sup> *Rose v. United States Tel. Co.*, 29 N. Y. Super. Ct. 305, 3 Abb. Prac. (N. S.) 408, 34 How. Prac. 308.

<sup>77</sup> *Wolfskehl v. West. U. Tel. Co.*, 46 Hun (N. Y.) 542; *West. U. Tel. Co. v. Allen*, 66 Miss. 549, 6 South. 461; *West. U. Tel. Co. v. Feegles*, 75 Tex. 537, 12 S. W. 860; *West. U. Tel. Co. v. Beringer*, 84 Tex. 38, 19 S. W. 336.

<sup>78</sup> *West. U. Tel. Co. v. Beringer*, 84 Tex. 38, 19 S. W. 336.

<sup>79</sup> *Poteet v. West. U. Tel. Co.*, 74 S. C. 491, 55 S. E. 113; *West. U. Tel. Co. v. Weniski*, 84 Ark. 457, 106 S. W. 486; *West. U. Tel. Co. v. Schriver*, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678; *McCormick v. West. U. Tel. Co.*, 79 Fed. 449, 25 C. C. A. 35, 38 L. R. A. 684; *West. U. Tel. Co. v. Jackson*, 163 Ala. 9, 50 South. 316.



company is ignorant of his connection or interest in the message, or when he is remotely connected in the transaction.<sup>80</sup> Thus, where the plaintiff delivers a message to a third person with the instruction to deliver it to the company for transmission, but instead of the third party obeying the instruction, he writes another message and prepares and delivers it to the company as his own, and of which act the company is ignorant, the latter will not be liable to the plaintiff for its negligence.<sup>81</sup> If the plaintiff can show that the sender and the addressee were acting merely as his agents,<sup>82</sup> or that the company was informed of his beneficial interest therein,<sup>83</sup> the rule would be different. So, also, where the

<sup>80</sup> *Holler v. West. U. Tel. Co.*, 149 N. C. 336, 63 S. E. 92, 19 L. R. A. (N. S.) 475; *Elliott v. West. U. Tel. Co.*, 75 Tex. 18, 12 S. W. 954, 16 Am. St. Rep. 872; *West. U. Tel. Co. v. Weniski*, 84 Ark. 457, 106 S. W. 486; *West. U. Tel. Co. v. Schriver*, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678; *West. U. Tel. Co. v. Schriver*, 129 Fed. 344, 64 C. C. A. 96; *Cranford v. West. U. Tel. Co.*, 138 N. C. 162, 50 S. E. 585, message itself need not show plaintiff's interest therein; *West. U. Tel. Co. v. Brown*, 6 Ala. App. 339, 59 South. 329.

*Mental anguish*.—As to the right of a person whose name or interest does not appear on the face of the telegram to recover for mental anguish due to its nondelivery, see *West. U. Tel. Co. v. Northcutt*, 158 Ala. 539, 48 South. 553, 132 Am. St. Rep. 38; *Holler v. West. U. Tel. Co.*, supra; *Harrelson v. West. U. Tel. Co.*, 90 S. C. 132, 72 S. E. 882; *Maxville v. West. U. Tel. Co.* (Tex. Civ. App.) 140 S. W. 464; *West. U. Tel. Co. v. Herring* (Tex. Civ. App.) 146 S. W. 699; *West. U. Tel. Co. v. Weniski*, supra; *West. U. Tel. Co. v. Swearengen*, 94 Ark. 336, 126 S. W. 1071; *Cranford v. West. U. Tel. Co.*, 138 N. C. 162, 50 S. E. 585; *Helms v. West. U. Tel. Co.*, 143 N. C. 386, 55 S. E. 831, 10 Ann. Cas. 643, 8 L. R. A. (N. S.) 249, 118 Am. St. Rep. 811; *West. U. Tel. Co. v. Potts*, 120 Tenn. 37, 113 S. W. 789, 19 L. R. A. (N. S.) 479, 127 Am. St. Rep. 991; *West. U. Tel. Co. v. Kirkpatrick*, 76 Tex. 217, 13 S. W. 70, 18 Am. St. Rep. 37; *Southwestern Tel., etc., Co. v. Goteher*, 93 Tex. 114, 53 S. W. 686; *West. U. Tel. Co. v. Motley* (Tex. Civ. App.) 27 S. W. 51; *Herring v. West. U. Tel. Co.*, 60 Tex. Civ. App. 5, 127 S. W. 882. But see *West. U. Tel. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 845.

<sup>81</sup> *Elliott v. West. U. Tel. Co.*, 75 Tex. 18, 12 S. W. 954, 16 Am. St. Rep. 872; *Deslottes v. Baltimore, etc., Tel. Co.*, 40 La. Ann. 183, 3 South. 566.

<sup>82</sup> *Harkness v. West. U. Tel. Co.*, 73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672; *West. U. Tel. Co. v. Potts*, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. (N. S.) 479. But it has been held that the action could not be maintained by one who is the undisclosed principal of the addressee alone. *West. U. Tel. Co. v. Schriver*, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678. See, also, *Lee v. West. U. Tel. Co.*, 51 Mo. App. 375. Compare *West. U. Tel. Co. v. Potts*, supra. But see *West. U. Tel. Co. v. Northcutt*, 158 Ala. 539, 48 South. 553, 132 Am. St. Rep. 38; *Holler v. West. U. Tel. Co.*, 149 N. C. 336, 63 S. E. 92, 19 L. R. A. (N. S.) 475; *Harrelson v. West. U. Tel. Co.*, 90 S. C. 132, 72 S. E. 882; *Maxville v. West. U. Tel. Co.* (Tex. Civ. App.) 140 S. W. 464; *West. U. Tel. Co. v. Herring* (Tex. Civ. App.) 146 S. W. 699.

<sup>83</sup> *Sherrill v. West. U. Tel. Co.*, 109 N. C. 527, 14 S. E. 94; *West. U. Tel. Co. v. Morrison* (Tex. Civ. App.) 33 S. W. 1025; *West. U. Tel. Co. v. Mellon*, 96 Tenn. 66, 33 S. W. 725; *Martin v. West. U. Tel. Co.*, 1 Tex. Civ. App. 143, 20 S. W. 860; *West. U. Tel. Co. v. Potts*, 120 Tenn. 37, 113 S. W. 789, 19 L. R. A. (N. S.) 479, 127 Am. St. Rep. 991; *Wells v. West. U. Tel. Co.*, 144 Iowa, 605, 123

message is sent on behalf of a wife, the husband is the proper person to sue, although he may not have been a party to the contract of sending.<sup>84</sup> And the parent or next friend may sue a company for its negligence in transmitting or delivering a message in which the child is interested. In such cases the contributory negligence of the parent will be no defense to the company as against the child, while it may be as against the parent.<sup>85</sup>

§ 485. **Under special statutes—penalty.**—There are special statutes adopted in some of the states which impose a penalty on telegraph companies for every failure to properly discharge its duty as to transmitting and delivering messages, and providing that the penalty may be recovered by the "party aggrieved." It has been held in Mississippi,<sup>86</sup> Tennessee<sup>87</sup> and Missouri<sup>88</sup> that either the sender or receiver could recover the penalty under these statutes. There is a statute somewhat similar to these in Indiana, but it is held there that only the sender has a right of action.<sup>89</sup> And in the latter state it is held that one who directs his clerk to forward to him, in his absence, an expected message from a third person, is not a

N. W. 371, 138 Am. St. Rep. 317, 24 L. R. A. (N. S.) 1045; *Alexander v. West. U. Tel. Co.*, 158 N. C. 473, 74 S. E. 449, 42 L. R. A. (N. S.) 407; *Penn. v. Telephone Co.*, 159 N. C. 306, 75 S. E. 16, 41 L. R. A. (N. S.) 223; *West. U. Tel. Co. v. Robertson* (Tex. Civ. App.) 133 S. W. 454; *Telephone Co. v. Carter*, 2 Tex. Civ. App. 624, 21 S. W. 688.

<sup>84</sup> The fact that the company had no notice that she was plaintiff's wife, or that the contract was made for her, is immaterial. *West. U. Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920; *West. U. Tel. Co. v. Feegles*, 75 Tex. 537, 12 S. W. 860; *West. U. Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728; *Young v. West. U. Tel. Co.*, 107 N. C. 370, 11 S. E. 1044, 22 Am. St. Rep. 883, 9 L. R. A. 669n. See note 2, *supra*, for other cases. See, also, § 475, and cases cited thereunder.

<sup>85</sup> *West. U. Tel. Co. v. Hoffman*, 80 Tex. 420, 15 S. W. 1048, 26 Am. St. Rep. 759. This case was an action by a father and son against the telegraph company for failure to deliver a message sent to a physician. The son, a boy of fifteen years, had broken his arm, and on the same day his mother, in his father's absence, telegraphed for a physician. Through the conceded negligence of the company the message was not delivered for nine days, but it appeared that the parents made no further efforts to secure a physician until it was too late to save the boy's arm. It was held that the father's contributory negligence in not sending for another physician would bar recovery on his own account, but that a judgment in favor of the son was proper, as the negligence of the father could not be imputed to him. See, also, *Williams v. Tex.*, etc., R. Co., 60 Tex. 205; *Galveston, etc., R. Co. v. Moore*, 59 Tex. 64, 46 Am. Rep. 265; *Plumley v. Birge*, 124 Mass. 57, 26 Am. Rep. 645.

<sup>86</sup> *West. U. Tel. Co. v. Allen*, 66 Miss. 549, 6 South. 461.

<sup>87</sup> *Wadsworth v. West. U. Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864.

<sup>88</sup> *Markel v. West. U. Tel. Co.*, 19 Mo. App. 80.

<sup>89</sup> *West. U. Tel. Co. v. Pendleton*, 95 Ind. 12, 48 Am. Rep. 692; *West. U. Tel. Co. v. Meek*, 49 Ind. 53; *West. U. Tel. Co. v. Hopkins*, 49 Ind. 223; *Hadley v. West. U. Tel. Co.*, 115 Ind. 191, 15 N. E. 845.

"sender" within the meaning of the statute;<sup>90</sup> nor is one a sender who merely shows that he delivered to the company a message for transmission, signed by another but paid for by himself.<sup>91</sup> There is another statute in this state authorizing the recovery of special damages, under which the addressee may sue.<sup>92</sup> There is a statute in New York which prescribes the duties of telegraph companies, and under this a company may maintain an action against a connecting line which refuses to accept a message from the initial line for further transmission;<sup>93</sup> although, in such cases, the original sender of the message might properly have maintained the action.<sup>94</sup>

**§ 486. Addressee's right not affected by failure to have message repeated.**—In some jurisdictions it is held that the stipulations in the message blanks with respect to a necessity of a message being repeated in order to bind the company are binding;<sup>95</sup> and, when this is the case, the addressee's right of action, when in tort, is not affected by these stipulations,<sup>96</sup> but if the action is in contract, we think the rule would be different.<sup>97</sup> When he sues for the breach of the contract, made by the sender as his agent or in his behalf, he assumes all the conditions of the contract, and as they would be binding on the sender, they would also be binding on the addressee.

**§ 487. Actions between sender and addressee.**—The prevailing view is that, as between the sender of a telegraph message and the innocent sendee, all losses caused by the errors or mistakes made in the transmission must be borne by the sender,<sup>98</sup> but the latter

<sup>90</sup> West. U. Tel. Co. v. Kinney, 106 Ind. 468, 7 N. E. 191.

<sup>91</sup> West. U. Tel. Co. v. Brown, 108 Ind. 538, 8 N. E. 171.

<sup>92</sup> West. U. Tel. Co. v. McKibben, 114 Ind. 511, 14 N. E. 894; West. U. Tel. Co. v. Fenton, 52 Ind. 1.

<sup>93</sup> United States Tel. Co. v. West. U. Tel. Co., 56 Barb. (N. Y.) 46.

<sup>94</sup> Leonard v. New York, etc., Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446.

<sup>95</sup> See § 376 et seq.

<sup>96</sup> New York, etc., Printing Tel. Co. v. Dryburg, 35 Pa. 298, 78 Am. Dec. 338; Tobin v. West. U. Tel. Co., 146 Pa. 375, 23 Atl. 324, 28 Am. St. Rep. 802.

<sup>97</sup> See § 376 et seq.

<sup>98</sup> West. U. Tel. Co. v. Shotter, 71 Ga. 760; Brooke v. West. U. Tel. Co., 119 Ga. 694, 46 S. E. 826; Richmond Hosiery Mills v. West. U. Tel. Co., 123 Ga. 216, 51 S. E. 290; West. U. Tel. Co. v. Cooper, 2 Ga. App. 376, 58 S. E. 517; Younker v. West. U. Tel. Co., 146 Iowa, 499, 125 N. W. 577; Saveland v. Green, 40 Wis. 431; Haubelt v. Rea, etc., Mill Co., 77 Mo. App. 672. See, also, Culver v. Warren, 36 Kan. 391, 13 Pac. 577; Hasbrouck v. West. U. Tel. Co., 107 Iowa, 160, 77 N. W. 1034, 70 Am. St. Rep. 181; Dunning v. Roberts, 35 Barb. (N. Y.) 463; Rose v. United States Tel. Co., 3 Abb. Prac. N. S. (N. Y.) 408; Sherrerd v. West. U. Tel. Co., 146 Wis. 197, 131 N. W. 341.

*View that the sender is liable only when taking initiative.*—Some courts have adopted the rule that the party who selects the telegraph as a mode of communication must bear the consequences. Joyues v. Postal Tel. Cable Co.,



may recover his loss from the company.<sup>99</sup> Thus, where a company erroneously transmits a message offering to sell merchandise at a certain price, so as to make the price less, the sender would be bound by the message as sent, but he could recover the difference from the company.<sup>100</sup> The reason of this rule is that the company

37 Pa. Sup. Ct. 65; *Ayer v. West. U. Tel. Co.*, 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353. See, also, *Wilson v. Minneapolis, etc., R. Co.*, 31 Minn. 481, 18 N. W. 291; *Magie v. Herman*, 50 Minn. 424, 52 N. W. 909, 36 Am. St. Rep. 660; *West. U. Tel. Co. v. Allen*, 30 Okl. 229, 119 Pac. 981, 38 L. R. A. (N. S.) 348.

*Contrary view.*—In several jurisdictions, however, the courts have held that the sender of an altered message is not bound thereby. *Shingleur v. West. U. Tel. Co.*, 72 Miss. 1030, 18 South. 425, 48 Am. St. Rep. 604, 30 L. R. A. 444; *Pegram v. West. U. Tel. Co.*, 100 N. C. 28, 6 S. E. 770, 6 Am. St. Rep. 557; *Pepper v. West. U. Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660; *Henkel v. Pape*, L. R. 6 Exch. (Eng.) 7, 40 L. J. Exch. 15, 23 L. T. N. S. 419, 19 Wkly. Rep. 106; *Flynn v. Kelly*, 32 Ont. L. Rep. 440, 8 Ont. W. Rep. 120; *Strong v. West. U. Tel. Co.*, 18 Idaho, 389, 109 Pac. 910, Ann. Cas. 1912A, 55, 30 L. R. A. (N. S.) 409. Some of these courts have taken the position that the doctrines of the law of agency do not apply and that in transmitting a message the telegraph company does not act as the agent of either the sender or receiver. The company is said to occupy a position *sui generis*, which is that of an independent contractor. The receiver of a message which has been altered by the company in transmitting is not entitled, according to this law, to hold the sender responsible for the error. *Shingleur v. West. U. Tel. Co.*, *supra*; *Strong v. West. U. Tel. Co.*, *supra*.

*Liability to receiver having notice of error.*—Assuming that the company is acting as the agent of the sender, and that the sendee has the right to rely upon the message, if, however, he knows or has reason to suppose that an error or mistake has been made, the sender will not be bound. *Ayer v. West. U. Tel. Co.*, *supra*; *Germain Fruit Co. v. West. U. Tel. Co.*, 137 Cal. 598, 70 Pac. 658, 59 L. R. A. 575; *Postal Tel. Cable Co. v. Akron Cereal Co.*, 23 Ohio Cir. Ct. R. 516.

*Parties to contract.*—Under some circumstances the contract is made between the principal direct and the third party. *Strong v. West. U. Tel. Co.*, *supra*.

<sup>99</sup> *Ayer v. West. U. Tel. Co.*, 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353.

<sup>100</sup> *West. U. Tel. Co. v. Flint River, etc., Co.*, 114 Ga. 576, 40 S. E. 815, 88 Am. St. Rep. 39.

The company in accepting a message is under obligation to transmit it correctly. *West. U. Tel. Co. v. Chamblee*, 122 Ala. 428, 25 South. 232, 82 Am. St. Rep. 89. If a land agent leaves a message directed to his principal and naming the price at which his property can be sold, and the company through error in the transmission raises the price, and the principal accepts the offer as received and executes a deed at that price first named by him, the company is liable to the vendor for the difference between the prices. *Reed v. West. U. Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609. See, also, *Hasbrouck v. West. U. Tel. Co.*, 107 Iowa, 160, 77 N. W. 1034, 70 Am. St. Rep. 181; *Rittenhouse v. Independent Line of Tel.*, 44 N. Y. 263, 4 Am. Rep. 673; *West. U. Tel. Co. v. Beals*, 56 Neb. 415, 76 N. W. 903, 71 Am. St. Rep. 682; *Sherrerd v. West. U. Tel. Co.*, 146 Wis. 197, 131 N. W. 341, holding that if a person sends a message to his broker directing the purchase of shares of stock or commodities, and the telegraph company changes

has no authority or agency either from the sender or addressee to make, modify, or alter any agreement or proposition contained in the message to buy or sell, or to bind a person sending or receiving it.<sup>101</sup> Hence the mere fact of employing the company to send a message does not make it the agent of the sender so as to bind him upon a telegram negligently altered in transmission. The sender is bound by the contents of the telegram as received only so far as it is a faithful reproduction of what is sent.<sup>102</sup> The negligence of the company in delivering a changed message cannot be attributed to the addressee, who acts upon its direction, when there is nothing in the message as received to suggest a doubt as to its accuracy.<sup>103</sup>

§ 488. **What law governs.**—Very frequently actions are brought against telegraph and telephone companies for negligently transmitting messages from one state to another and the laws in the two states regarding same are conflicting.<sup>104</sup> In such actions the question of penalties imposed by one state and not by the other or differently imposed is sometimes to be considered.<sup>105</sup> One state may have increased the common-law liability of such companies when the other has not.<sup>106</sup> Again, one state may uphold certain stipulations limiting the contract of transmitting messages contrary to the laws of the other state.<sup>107</sup> And then one state may allow a recovery for mental anguish when the other refuses a recovery.<sup>108</sup> As

the price or amount specified by the sender, the latter will be bound nevertheless. And if a message offering goods for sale at a certain price is given to a telegraph company for transmission, and by reason of error the message as delivered purports to offer the goods at a less price, the sender will be bound to deliver the articles at the latter price, if the purchaser duly accepts the offer. *West. U. Tel. Co. v. Shotter*, 71 Ga. 760; *Haubelt v. Rea, etc.*, Mill Co., 77 Mo. App. 672.

<sup>101</sup> *Pegram v. West. U. Tel. Co.*, 100 N. C. 28, 6 S. E. 770, 6 Am. St. Rep. 557.

<sup>102</sup> *Pepper v. Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660.

<sup>103</sup> *West. U. Tel. Co. v. Edsall*, 74 Tex. 329, 12 S. W. 41, 15 Am. St. Rep. 835.

<sup>104</sup> *Shaw v. Postal Tel. Cable Co.*, 79 Miss. 670, 31 South. 222, 89 Am. St. Rep. 666, 56 L. R. A. 486; *West. U. Tel. Co. v. Hill*, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058; *Gray v. West. U. Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301.

<sup>105</sup> See chapter XXV.

<sup>106</sup> *Reed v. West. U. Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492.

<sup>107</sup> *Shaw v. Postal Tel. Cable Co.*, 79 Miss. 670, 31 South. 222, 89 Am. St. Rep. 666, 56 L. R. A. 486. See, also, chapter 16.

<sup>108</sup> *Johnson v. West. U. Tel. Co.*, 144 N. C. 410, 57 S. E. 122, 10 L. R. A. (N. S.) 256, 119 Am. St. Rep. 961; *West. U. Tel. Co. v. Hill*, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058; *Gray v. West. U. Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301,

to the first question, or that of penalties imposed by the laws of one state for a default in or negligent transmission of messages, the rule is universal that such law has no extraterritorial effect.<sup>109</sup> But as to the other questions there is much conflict among the courts.<sup>110</sup> These questions are, however, quite analogous to those in relation to the law governing the contracts of common carriers. The question is not very material if the parties have contracted so as to be bound by the laws of one of the states, since it is a well-recognized rule that an express stipulation in a contract as to the governing law is controlling. The difficulty arises when there is no such stipulation. So, when this is the case, some of the courts apply the law of the state in which the contract for transmission was entered into.<sup>111</sup> On the other hand, other courts apply the law of the state where the contract is to be performed.<sup>112</sup> And still other courts draw a distinction between actions arising on contract and in tort; <sup>113</sup> and so, where it is in tort—and not a duty created by a

West. U. Tel. Co. v. Sloss, 45 Tex. Civ. App. 153, 100 S. W. 354, disapproving West. U. Tel. Co. v. Blake, 29 Tex. Civ. App. 224, 68 S. W. 526.

<sup>109</sup> See chapter XXV.

<sup>110</sup> Johnson v. West. U. Tel. Co., 144 N. C. 410, 57 S. E. 122, 10 L. R. A. (N. S.) 256; West. U. Tel. Co. v. Hill, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058. See, also, § 375.

<sup>111</sup> Reed v. West. U. Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492; Shaw v. Postal Tel., etc., Co., 79 Miss. 670, 31 South. 222, 89 Am. St. Rep. 666, 56 L. R. A. 486; West. U. Tel. Co. v. Pratt, 18 Okl. 274, 89 Pac. 237; Hall v. West. U. Tel. Co., 139 N. C. 369, 52 S. E. 50; Johnson v. West. U. Tel. Co., 144 N. C. 410, 57 S. E. 122, 10 L. R. A. (N. S.) 256; West. U. Tel. Co. v. Waller, 96 Tex. 589, 74 S. W. 751, 97 Am. St. Rep. 936, reversing (Tex. Civ. App.) 72 S. W. 264; Ligon v. West. U. Tel. Co., 46 Tex. Civ. App. 408, 102 S. W. 429; Brown v. West. U. Tel. Co., 85 S. C. 495, 67 S. E. 146, 137 Am. St. Rep. 914; Plant v. Tel. Co. (Ohio) 54 Cinn. Law Bul. 51; Heath v. Postal Tel. Cable Co., 87 S. C. 219, 69 S. E. 283; West. U. Tel. Co. v. Young (Tex. Civ. App.) 133 S. W. 512; West. U. Tel. Co. v. Moore (Tex. Civ. App.) 139 S. W. 1020. Compare Williamson v. Postal Tel. Cable Co., 151 N. C. 225, 65 S. E. 974; Fox v. Postal Tel. Cable Co., 138 Wis. 648, 120 N. W. 399, 28 L. R. A. (N. S.) 490, foreign law will not be applied against the public policy of the forum. See, also, § 375. See Kolliner v. West. U. Tel. Co., 126 Minn. 122, 147 N. W. 961, 52 L. R. A. (N. S.) 1180, where statute of state where message is sent from is not pleaded common law governs. Young v. West. U. Tel. Co., 168 N. C. 36, 84 S. E. 45.

<sup>112</sup> West. U. Tel. Co. v. Lacer, 122 Ky. 839, 93 S. W. 34, 29 Ky. Law Rep. 379, 121 Am. St. Rep. 502, 5 L. R. A. (N. S.) 751; North Packing, etc., Co. v. West. U. Tel. Co., 70 Ill. App. 275; West. U. Tel. Co. v. Hill, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058; Howard v. West. U. Tel. Co., 119 Ky. 625, 84 S. W. 764, 86 S. W. 982, 27 Ky. Law Rep. 244, 858, 7 Ann. Cas. 1065; West. U. Tel. Co. v. Fuel, 165 Ala. 391, 51 South. 571. See, also, § 375.

<sup>113</sup> Balderston v. West. U. Tel. Co., 79 S. C. 160, 60 S. E. 435; West. U. Tel. Co. v. Hill, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058.



penal statute<sup>114</sup>—the law of the state where the particular breach of duty occurred controls.<sup>115</sup> However, in accordance to the general rule on the subject, and where there is no evidence to the contrary, it will be presumed that, whether the action is in contract or tort, the law of the state where the contract was made or to be performed or where the breach of duty occurred is the same as that of the forum.<sup>116</sup> These actions are governed by the statutes of limitation applied in similar cases.<sup>117</sup>

§ 489. **Contract made where last act of assent was done.**—A contract is complete where nothing further remains to be done to give either party a right to have it carried into effect.<sup>118</sup> Therefore, where the parties are residents of different states, the state where the final assent is given or the last act necessary to complete it is done is the place where the contract is made, notwithstanding all preliminary arrangements were made in the other state.<sup>119</sup> It has been stated that "the general rule of law is that a contract takes effect, as such, at the place where it was intended to be delivered and become operative, and the liability of the parties is determined by the law of that place."<sup>120</sup> So, where a person in one state writes to a person in another a letter containing an offer or proposal, and the latter writes in reply a letter accepting the proposal, the contract is complete when the letter of assent is deposited in the post office, properly addressed.<sup>121</sup> The place of the contract is the place where the letter of acceptance is mailed, and not the place where the letter is received.<sup>122</sup>

<sup>114</sup> *Gray v. West. U. Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301; *West. U. Tel. Co. v. Ford*, 77 Ark. 531, 92 S. W. 528.

<sup>115</sup> *Gray v. West. U. Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301; *West. U. Tel. Co. v. Hill*, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058; *Balderston v. West. U. Tel. Co.*, 79 S. C. 160, 60 S. E. 435.

<sup>116</sup> *West. U. Tel. Co. v. Parsley*, 57 Tex. Civ. App. 8, 121 S. W. 226; *Burgess v. West. U. Tel. Co.*, 92 Tex. 125, 46 S. W. 794, 71 Am. St. Rep. 833, reversing (Tex. Civ. App.) 43 S. W. 1033; *West. U. Tel. Co. v. McNairy*, 34 Tex. Civ. App. 389, 78 S. W. 969.

<sup>117</sup> *West. U. Tel. Co. v. Witt*, 110 S. W. 889, 33 Ky. Law Rep. 685; *La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383.

<sup>118</sup> *Mactier v. Frith*, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; *Hamilton v. Lycoming Ins. Co.*, 5 Pa. 339.

<sup>119</sup> *Whiston v. Stodder*, 8 Mart. O. S. (La.) 95, 13 Am. Dec. 281; *Milliken v. Pratt*, 125 Mass. 375, 28 Am. Rep. 241; *Ames v. McCamber*, 124 Mass. 85.

<sup>120</sup> *Lee v. Selleck*, 33 N. Y. 615; *Tilden v. Blair*, 21 Wall. 246, 22 L. Ed. 632. See *Elliott on Contracts*, § 1116.

<sup>121</sup> *Mactier v. Frith*, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; *Adams v. Lindsell*, 1 Barn. & Ald. 681. See, also, *Elliott on Contracts*, § 1116.

<sup>122</sup> *Vassar v. Camp*, 14 Barb. (N. Y.) 341; *Clark v. Dales*, 20 Barb. (N. Y.)

§ 490. **Same continued—actions between sender and addressee—contract—where made.**—The place of final assent generally determines the place where a contract is made, when it consists of letters or telegrams passing between parties living in different places or countries.<sup>123</sup> When a telegram is sent accepting a proposition, received by mail or telegram, the contract thus consummated is deemed to have been made at the time when and the place where the last act of assent was thus done or made; and the contract is, therefore, binding, though, as a matter of fact, the telegram is not received by the person to whom it was addressed.<sup>124</sup> The parties to a contract made by means of telegrams are bound by the laws of the state in which the contract was made, although the suit may have been brought in another state. They may, however, agree by contract or stipulation to be governed by the laws of a state other than that in which the contract was made.<sup>125</sup>

§ 491. **Same continued—action where brought.**—The place where suit should be brought depends upon the question as to whether the action is local or transitory; and the difficulty is to determine what are local and what are transitory actions.<sup>126</sup> If the contract between the sender and the addressee concerns local matter, the suit must be brought in the place where the property is located; but if it is about transitory matter, it should be maintained in the place

42; *Bell v. Packard*, 69 Me. 105, 31 Am. Rep. 251. See Elliott on Contracts, § 1116.

<sup>123</sup> Elliott on Contracts, § 1116.

<sup>124</sup> *Dord v. Bonaffee*, 6 La. Ann. 563, 54 Am. Dec. 573; *Bell v. Packard*, 69 Me. 105, 31 Am. Rep. 251; *Vassar v. Camp*, 11 N. Y. 441; *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511; *Perry v. Mt. Hope Ins. Co.*, 15 R. I. 380, 5 Atl. 632, 2 Am. St. Rep. 902; *Garrettson v. North Atchison Bank (C. C.)* 47 Fed. 867, affirmed in *North Atchison Bank v. Garrettson*, 51 Fed. 168, 2 C. C. A. 145; *Tillinghast v. Boston, etc., Lumber Co.*, 39 S. C. 484, 18 S. E. 120, 22 L. R. A. 49. See, also, Elliott on Contracts, § 1116.

<sup>125</sup> *Griesemer v. Mut., etc., Ass'n*, 10 Wash. 202, 38 Pac. 1031; *Penn., etc., Ins. Co. v. Mechanics', etc., Co.*, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33, 70; *Id.*, 73 Fed. 653, 19 C. C. A. 316, 38 L. R. A. 33, 70. See, also, Elliott on Contracts, § 1116.

<sup>126</sup> Perhaps the best distinction to be found between local and transitory actions is that, "if the cause of action is one that might have arisen anywhere, then it is transitory; but if it could only have arisen in one place, then it is local; and, for the most part, actions which are local are those brought for the recovery of real estate or for injuries thereto, or for easement." *Cooley on Torts* (2d Ed.) 451. See, also, *Mason v. Warner*, 31 Mo. 508; *White v. Sanborn*, 6 N. H. 222; *Morris v. Missouri Pac. R. Co.*, 78 Tex. 17, 14 S. W. 228, 9 L. R. A. 349, 22 Am. St. Rep. 17; *Little v. Chicago, etc., R. Co.*, 65 Minn. 48, 67 N. W. 846, 60 Am. St. Rep. 421, 33 L. R. A. 423.

where the defendant can be found.<sup>127</sup> Where the company has been guilty of negligence in the transaction of its business, actions brought to recover damages arising therefrom are personal and transitory and may be brought wherever the defendant can be found, but if the action is brought to recover a statutory penalty, it must be instituted in the state in which the statute is in force.

<sup>127</sup> *Id.*



## CHAPTER XIX

## MATTERS OF PLEADING, PRACTICE AND EVIDENCE—GENERALLY

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- 494. Same continued—distinction between an altered message and one not sent or delivered.
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- 522. Weight and sufficiency.
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§ 492. **Scope of chapter.**—In this chapter we desire to discuss pleading, practice and procedure, generally, which has been found to be of use and importance in litigations against telegraph, telephone, and electric companies. This is a treatise upon the substantive law rather than upon procedure, and we shall not therefore undertake to discuss, at any great length, the subject of pleading and practice. The subject has been most fully and ably discussed by other text-writers while writing particularly upon that subject, and we shall only refer to these works. We shall here consider

merely such additional matters on this subject as most frequently arise, and are of practical use in telegraphic and electric litigations.

§ 493. **Character of action.**—We have discussed in a previous chapter the character or nature of actions brought against telegraph companies,<sup>1</sup> so we shall only supplement what has already been said. The character or nature of an action against these companies is properly one *ex contractu*, and is based upon the contract of sending, although it differs in some degree from ordinary actions for breach of contract, owing to the public character of the company. There are few, if any, cases directly adjudicating this subject, but it seems that the actions are analogous to that of actions against carriers of passengers. In such cases the action is in tort for the breach of public duty created by the contract of carriage. There is authority which holds that the addressee, when he does not stand in privity to the contract of sending, must sue in tort; but underlying this is a breach of a contract, out of which grows the breach of the company's public duty.<sup>2</sup> While the addressee's action may be in tort, yet if it had not been that the company was guilty of a breach of the contract of sending, it would not be liable in an action in tort.<sup>3</sup> The reason why the nature of the action should be considered, as said elsewhere,<sup>4</sup> is that the measure of damages is different in the two actions. Another reason is that the statute of limitation may run against a suit in one and not in the other. For instance, there are statutes in most of the states which provide that all actions in tort against corporations for negligence, must be brought within a certain time after the commission of the negligent act. These statutes are not applicable to actions in contract brought against the same company.<sup>5</sup>

§ 494. **Same continued—distinction between an altered message and one not sent or delivered.**—It was held, in one case, that there was a distinction in the nature of an action to be brought by the addressee for a loss sustained by the company negligently delivering a changed or altered message, and an action for a failure to transmit or deliver the message. It was held, in the first of these cases, that the action sounded in tort, and is different from that

<sup>1</sup> See chapter XVIII.

<sup>2</sup> See § 477 et seq.; *West. U. Tel. Co. v. Potts*, 120 Tenn. 37, 113 S. W. 789, 19 L. R. A. (N. S.) 479, 127 Am. St. Rep. 991, an action under statute for a delay in delivering a message is, in effect, one for negligence.

<sup>3</sup> See § 478.

<sup>4</sup> See § 479.

<sup>5</sup> Examine local statutes.

where the sender sustains a loss for a nondelivery.<sup>6</sup> This decision has been followed by one court, and we think that the reasons upon which this holding is based, are unsound. It is the duty of the company to follow the exact words of the message, and it cannot transmit the message in words other than those contained therein, although the company may intend to convey the same thought.<sup>7</sup> When it fails to perform this duty, the addressee or the sender may maintain an action for such breach to recover a loss sustained thereby.<sup>8</sup> It would be ordinarily the addressee's only remedy,<sup>9</sup> where he was not a beneficiary to the contract of sending; and the sender may maintain his action for the breach of the contract or for the breach of its public duty.<sup>10</sup> It is also one of the duties of these companies to transmit and deliver promptly all messages tendered, and, on a failure to do so, the company may be liable either in contract or in tort.<sup>11</sup> So we cannot see that there is any distinction in the two kinds of action.

§ 495. **Action—by mandamus.**—The public nature of the duties of telegraph and electric telephone companies is such that performance may, in some instances, be enforced by mandamus.<sup>12</sup> Some of the duties of these companies are primarily a duty which they owe to the public, but there is a particular or specific right in every member of the public to enforce a performance of these duties.<sup>13</sup> Thus it seems that, if the company should refuse, without a legal excuse, to accept a message for transmission, it may be forced to do so by a writ of mandamus. While the injured party may have an action against the company arising in tort or contract for such refusal, yet in certain cases, we think, the company may be compelled to transmit the message by mandamus proceedings. So also, if any of these companies should discriminate in their business against any members of the public, they may be forced by mandamus to discontinue such discrimination.<sup>14</sup> Thus, if a telephone company should refuse to furnish its facilities to any one who offers to comply with the rules of the company, it could be forced to fur-

<sup>6</sup> *West. U. Tel. Co. v. Richman* (Pa.) 8 Atl. 172. See, also, *N. Y., etc., Tel. Print. Co. v. Dryburg*, 35 Pa. 298, 78 Am. Dec. 338.

<sup>7</sup> See § 285.

<sup>8</sup> See chapter XVIII.

<sup>9</sup> See chapter XVIII.

<sup>10</sup> See chapter XVIII.

<sup>11</sup> See chapter XII.

<sup>12</sup> *Gwynn v. Citizens' Tel. Co.*, 69 S. C. 434, 48 S. E. 460, 67 L. R. A. 111, 104 Am. St. Rep. 819, and note; *Potwin Place v. Topeka R. Co.*, 51 Kan. 609, 33 Pac. 309, 37 Am. St. Rep. 312, and note.

<sup>13</sup> See § 268.

<sup>14</sup> See chapter XI.



nish such, by a writ of mandamus.<sup>15</sup> It is true that mandamus is an extraordinary remedy and cannot be resorted to where ordinary remedy will afford complete relief, but in some cases the latter remedy will not afford ample and complete relief, and when such is the case we think that the extraordinary remedy may be resorted to. We do not mean to be understood as saying that the sender of a message could, in every particular case, compel a company to transmit a message by mandamus, but if it continued to refuse to transmit any and all proper messages tendered it, the company could be compelled to perform this duty by mandamus. There may be instances, however, where it could be forced by mandamus to transmit even one message, but as a general rule the ordinary remedy should be resorted to in such cases.

§ 496. **Action—injunction—specific performance.**—In some cases the proper action to be brought against telegraph telephone and electric companies for failure to carry out their duties is by injunction,<sup>16</sup> or by its complement, an action for specific performance. It is hardly necessary to discuss these actions, since there is nothing new in the procedure, in either of them, which is particularly applicable to these companies. But suffice it to say that, if they refuse to carry out any contract entered into between them and an individual, they may be compelled to do so by an action for specific performance of the contract; or, should either attempt to discontinue service to any person, such person would have a right to enjoin them from so doing.<sup>17</sup> In other words, whenever an individual could enjoin another person for doing or not doing a particular act, he may also enforce the same remedy against these companies.

§ 497. **Service of process.**—Before judgment can be legally entered against one of these companies for damages sustained for the breach of any of its duties, or before judgment can be rendered for any cause, the company must first have been summoned to come into court to plead, answer or demur to the pleadings of the plaintiff. We shall only briefly state the manner in which this process

<sup>15</sup> *State v. Citizens' Tel. Co.*, 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139; *Central Union Tel. Co. v. Falley*, 118 Ind. 194, 19 N. E. 601, 10 Am. St. Rep. 114; *State v. Nebraska Tel. Co.*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404. See, also, § 268.

<sup>16</sup> *Louisville Transf. Co. v. American Dist. Tel. Co. (Ky.)* 24 Alb. Law J. 283. See, also, *Central Dist. Tel. Co. v. Com.*, 114 Pa. 592, 7 Atl. 926. And where the service is wrongfully discontinued, the subscriber is entitled to recover such damages as were the direct result of the wrong. *Cumberland Tel., etc., Co. v. Hendon*, 71 S. W. 435, 24 Ky. Law Rep. 1271; *Malochee v. Great Southern Tel., etc., Co.*, 49 La. Ann. 1690, 22 South. 922. See, also, § 268.

<sup>17</sup> See § 268.

may be legally served, since there is no difference in the manner of service on these corporations to that practiced in cases where other similar corporations are concerned, and which may be found discussed at greater length in treatises on corporations in general. At common law, process against a corporation was by writ of summons against some one of its agents, and in case no appearance was made, then by a distringas against its goods; so that, if the corporation had neither land nor other property, there was no way to compel its appearance either at law or in equity.<sup>18</sup> The manner of process upon corporations is now generally regulated by statutes in most all the states of the Union. So we refer the reader to the statutes of his own state for a consideration of this subject. The statutes of most of the states are somewhat similar, and, as a general rule, they all provide for the service to be on some agent or employé of the company. Speaking more specifically of telegraph and telephone companies, a service upon one of their agents, operators or managers in the county through which their lines run is sufficient for a suit brought in that county. If there is any doubt of the person being the company's agent, any facts which go to show that he is working for the company, such as receiving money for it while in an office over whose doors may be found the defendant's name, is of itself *prima facie* evidence that he is the employé of the company, and one on whom service may be made.<sup>19</sup> These statutes generally provide that the service shall be made on certain officers or agents of the company, as the operator, agent, manager or some other employé of the company, and a summons on any other than one of these would not be sufficient.

§ 498. **Pleadings in general.**—The manner of pleading in the several states with respect to the time when the complaint, petition, or declaration shall be filed with the clerk of the court in which the case is to come up is not the same. In some states the first step to be taken in bringing a suit is the filing of the declaration, petition or complaint with the court, from which summons must then be served upon the defendant to the suit within a certain time of the return term; while in others the first step is the summoning of the defendant into court to answer, plead or demur to a certain charge. In the latter method of procedure, the declaration or complaint must be filed within a certain time before the return term. In either instance, the defendant must have time to examine the plead-

<sup>18</sup> 1 Minor's Inst. 565; 3 Black Com. 447, 477; McQueen v. Middletown Mfg Co., 16 Johns. (N. Y.) 5; Glaize v. South Carolina R. Co., 1 Strober (S. C.) 73.

<sup>19</sup> Thompson v. West. U. Tel. Co., 107 N. C. 449, 12 S. E. 427.

ings in order to meet the allegations contained therein. There is also a difference in the length of time provided for in the several states within which the pleadings must be filed with the clerk of the court. In most of the states the first term of the court after the filing of the case is the return term, and the next succeeding term is the trial term; yet in other states, Mississippi for instance, there are statutes which provide that, if the suit is brought thirty days before the first term, it shall be the trial term. These statutes are in states where the courts are few and the object is not to delay the trial of the cause too long before hearing.

§ 499. **Same continued—nature of.**—There is nothing peculiar about the pleadings in actions against telegraph, telephone, and electric companies for damages, since in such cases the recognized rules of pleading are applicable. The declaration or complaint of the plaintiff must, of course, allege the facts necessary to sustain the action.<sup>20</sup> Thus, if the action is for a refusal to receive and

<sup>20</sup> *Gist v. West. U. Tel. Co.*, 45 S. C. 344, 23 S. E. 143, 55 Am. St. Rep. 763; *S. Florida Tel. Co. v. Maloney*, 34 Fla. 338, 16 South. 280; *Bass v. Postal Tel. Cable Co.*, 127 Ga. 423, 56 S. E. 465, 12 L. R. A. (N. S.) 489; *West. U. Tel. Co. v. Fuel*, 165 Ala. 391, 51 South. 571; *Roberts v. Wisconsin Tel. Co.*, 77 Wis. 589, 46 N. W. 800, 20 Am. St. Rep. 143, where action is based upon city ordinance, pleadings must show the ordinance and its breach; *Cumberland Tel., etc., Co. v. Pierson*, 170 Ind. 543, 84 N. E. 1088, averment held insufficient to charge company with notice of defective condition of wire. Declaration should set out distinctly the circumstances which create the liability of the company. *S. Florida Tel. Co. v. Maloney*, supra; *Lee v. West. U. Tel. Co.*, 51 Mo. App. 375; *Telephone Co. v. Russell*, 4 Ala. App. 485, 58 South. 938; *Telephone Co. v. Richards* (Tex. Civ. App.) 158 S. W. 1187; *Telephone, etc., Co. v. Carter*, 1 Tenn. Civ. App. 750, sufficient statement; *Telephone Co. v. Forest* (Tex. Civ. App.) 157 S. W. 204, complaint insufficient. Declaration must allege facts, and not legal conclusions. *S. Florida Tel. Co. v. Maloney*, supra; *White v. Telephone Co.*, 153 App. Div. 684, 138 N. Y. Supp. 598. The facts and not evidence of such facts, must be alleged positively. *Graddy v. West. U. Tel. Co.*, 43 S. W. 468, 19 Ky. Law Rep. 1455; *Howard v. West. U. Tel. Co.*, 76 S. W. 387, 25 Ky. Law Rep. 828; *Mitchell v. West. U. Tel. Co.*, 5 Tex. Civ. App. 527, 24 S. W. 550; *West. U. Tel. Co. v. Rowe*, 44 Tex. Civ. App. 84, 98 S. W. 228; *West. U. Tel. Co. v. Wilhelm*, 48 Neb. 910, 67 N. W. 870; *Tel. Co. v. Henderson*, 62 Tex. Civ. App. 457, 131 S. W. 1153; *Tel. Co. v. Smith* (Tex. Civ. App.) 133 S. W. 1062. Negative matters of defense need not be alleged. *West. U. Tel. Co. v. Cook*, 45 Tex. Civ. App. 87, 99 S. W. 1131; *West. U. Tel. Co. v. Henley*, 157 Ind. 90, 60 N. E. 682, need not allege message had a revenue stamp affixed. But see *Kirk v. West. U. Tel. Co.* (C. C.) 90 Fed. 809, holding that such allegation should be made; *Tel. Co. v. Henderson*, supra; *West. U. Tel. Co. v. Whitson*, 145 Ala. 426, 41 South. 405, need not allege addressee lived within free delivery limit; need not allege freedom from contributory negligence. *Mitchell v. West. U. Tel. Co.*, supra. However, this may not be the rule in every jurisdiction.

*Sunday message—future contracts.*—Where an action is based upon a Sunday message, the declaration should allege that it related to a matter of charity or necessity. *West. U. Tel. Co. v. Henley*, supra; *West. U. Tel. Co. v. Esk-*



transmit a message, the declaration must in some manner state that the company is a corporation and has a line of wires in the county in which the suit is brought.<sup>21</sup> It should also aver that the

ridge, 7 Ind. App. 208, 33 N. E. 238. This, however, cannot be objected to by demurrer, but by answer. If the message related to futures it should be alleged that it related to a legal transaction. *Gist v. West. U. Tel. Co.*, supra.

*Mental anguish.*—See the following cases illustrating various general rules of pleading as applied in mental anguish cases: *So Relle v. West. U. Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805, damages for mental anguish may be recovered under a general averment of damages; *West. U. Tel. Co. v. Russell* (Tex. Civ. App.) 31 S. W. 698, may recover for the mental anguish of wife alone; *West. U. Tel. Co. v. Johnson*, 164 Ala. 229, 51 South. 230, failing to set out in telegram either in words or substance, demurrable; *Hall v. West. U. Tel. Co.*, 139 N. C. 369, 52 S. E. 50, where the mental anguish is not set up as the separate cause of action, demurrer irregular; *Havener v. West. U. Tel. Co.*, 117 N. C. 540, 23 S. E. 457, where complaint was broad enough to embrace any damage for the negligent delivery that plaintiff might have suffered; *West. U. Tel. Co. v. Campbell*, 41 Tex. Civ. App. 204, 91 S. W. 312, damages cannot be recovered unless asked for; *West. U. Tel. Co. v. Bell*, 48 Tex. Civ. App. 359, 107 S. W. 570, not necessary to allege that company had notice that plaintiff was husband of addressee; *Hartzog v. West. U. Tel. Co.* (Miss.) 34 South. 361, stating good cause of action; *Cumberland Tel., etc., Co. v. Quigley*, 129 Ky. 788, 112 S. W. 897, 19 L. R. A. (N. S.) 575, states the cause of action; *West. U. Tel. Co. v. Jackson*, 163 Ala. 9, 50 South. 316, not necessary to allege contractual relations between the sendee and the company; *West. U. Tel. Co. v. Pelzer* (Tex. Civ. App.) 35 S. W. 836, variance between allegation and truth; *Simmons v. West. U. Tel. Co.*, 63 S. C. 425, 41 S. E. 521, 57 L. R. A. 607, allegations not irrelevant; *Howard v. West. U. Tel. Co.*, 25 Ky. Law Rep. 828, 76 S. W. 387, allegations sufficient; *West. U. Tel. Co. v. Smith* (Tex. Civ. App.) 33 S. W. 748, defendant not prejudiced by allegation; *West. U. Tel. Co. v. Cook*, supra, not necessary for plaintiff to allege that he had replied to a delayed message.

*Electric companies.*—In an action against an electric company for a negligent escape of electricity resulting in injuries, the declaration should allege that it was the duty of the company to prevent the accident and that it had a reasonable opportunity to discharge such duty. *Scheiber v. United Tel. Co.*, 153 Ind. 609, 55 N. E. 742; *Tel. Co. v. Sokola*, 34 Ind. App. 429, 73 N. E. 143; *Graves v. Tel. Ass'n (C. C.)* 132 Fed. 387; *Telephone Co. v. Cheshire*, 12 Ga. App. 652, 78 S. E. 53; by adding the general averment that it was negligently or carelessly done or omitted, *Boyd v. Portland Elec. Co.*, 40 Or. 126, 66 Pac. 576, 57 L. R. A. 619; *Chaperon v. Portland Elec. Co.*, 41 Or. 39, 67 Pac. 928; *Snyder v. Wheeling Electrical Co.*, 43 W. Va. 661, 28 S. E. 733, 64 Am. St. Rep. 922, 39 L. R. A. 499; *Telephone, etc., Co. v. Davis*, 12 Ga. App. 28, 76 S. E. 786; *Tel., etc., Co. v. Howell*, 124 Ga. 1050, 53 S. E. 577, 4 Ann. Cas. 707; *Morgan v. Electric Co.*, 213 Pa. 151, 62 Atl. 638; *Whitten v. Power, etc., Co. (C. C.)* 132 Fed. 782. In determining whether declaration states a cause of action, the care required of the company, together with the presumption of negligence often arising, will be considered. *Alton R., etc., Co. v. Foulds*, 81 Ill. App. 323. Plaintiff cannot declare upon one cause of action and recover upon

<sup>21</sup> *Southern Florida Tel. Co. v. Maloney*, 34 Fla. 338, 16 South. 280, complaint defective where it merely alleges that the company refuses to receive the message, without alleging that it owned or operated a telegraph line or had any facilities for transmitting messages or was engaged in such business, or had an office at the place to which the message was addressed, or even that it refused to receive the message was willful or wrongful.

message was delivered to the company for transmission,<sup>22</sup> and that the charges were paid or tendered, although this is not essential.<sup>23</sup> If the action is brought by the addressee, in contract, he should aver in the declaration that the sender was acting as his agent in that particular instance.<sup>24</sup> If the action is in contract, the contract of sending must be sufficiently pleaded;<sup>25</sup> and, if in tort, the allegation must show that the failure of the message to reach its destination promptly and correctly was caused by the negligence of the company in transmitting it.<sup>26</sup> The blank forms of these companies generally contain a stipulation to the effect that the messages shall be presented for transmission in writing, but it is not necessary for the declaration to aver this fact,<sup>27</sup> because, when the company has accepted the message it is presumed that it has

another. *Gannon v. Laclede Gaslight Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505, overruled on another point by *Hendley v. Globe Refinery Co.*, 106 Mo. App. 20, 79 S. W. 1163. Allegations which merely set out the conclusions of the pleader upon the legal effect of an ordinance, but do not allege the provisions of the ordinance either in terms or in substance, so that the court could determine what was required of the company, is not sufficiently definite as against a special demurrer. *Brush Elec. Light, etc., Co. v. Leffevre*, 93 Tex. 604, 57 S. W. 640, 77 Am. St. Rep. 898, 49 L. R. A. 771.

*Pleadings held sufficient.*—See following cases: *Ala. City, etc., R. Co. v. Appleton*, 171 Ala. 324, 54 South. 638, Ann. Cas. 1913A, 1181; *Sheffield Co. v. Morton*, 161 Ala. 153, 49 South. 772; *Dow v. Tel., etc., Co.*, 157 Cal. 182, 106 Pac. 587; *Lighting Co. v. Tyler*, 177 Ind. 278, 96 N. E. 768; *Eining v. Railroad, etc., Co.*, 133 Ga. 458, 66 S. E. 237; *Downs v. Andrews*, 145 Mo. App. 173, 130 S. W. 472; *Downs v. Tel. Co.*, 161 Mo. App. 274, 143 S. W. 889; *Sommer v. Service Corp.*, 79 N. J. Law, 349, 75 Atl. 892; *West. U. Tel. Co. v. Wells*, 50 Fla. 474, 39 South. 838, 2 L. R. A. (N. S.) 1072, 111 Am. St. Rep. 129, 7 Ann. Cas. 531, jurisdiction of court.

<sup>22</sup> Need not state that the message was presented during the company's office hours. *West. U. Tel. Co. v. Pells*, 2 Willson, Civ. Cas. Ct. App. § 41.

<sup>23</sup> *West. U. Tel. Co. v. Meek*, 49 Ind. 53; *West. U. Tel. Co. v. Henley*, 157 Ind. 90, 60 N. E. 682; *West. U. Tel. Co. v. Snodgrass*, 94 Tex. 284, 60 S. W. 308, 86 Am. St. Rep. 851.

*Forwarding.*—Not sufficient to allege that the company failed to forward a message, without some allegation of payment or offer to pay the cost thereof. *Abbott v. West. U. Tel. Co.*, 86 Minn. 44, 90 N. W. 1.

<sup>24</sup> *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23; *West. U. Tel. Co. v. Cleveland*, 169 Ala. 131, 53 South. 80, Ann. Cas. 1912B, 534.

<sup>25</sup> Need not allege that a contract of transmission was made in expressed terms. *West. U. Tel. Co. v. Rowe*, 44 Tex. Civ. App. 84, 98 S. W. 228. See, also, *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23, sufficient to show a contract or transmission; *Milliken v. West. U. Tel. Co.*, 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281, reversing 53 N. Y. Super. Ct. 111, sufficient to show a special contract.

<sup>26</sup> *Washington, etc., Tel. Co. v. Hobson*, 15 Grat. (Va.) 122; *West. U. Tel. Co. v. Merritt*, 55 Fla. 462, 46 South. 1024, 127 Am. St. Rep. 169, language showing negligence proximate cause of injury.

<sup>27</sup> *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23.

waived this right, or, rather, it is estopped from claiming the right after the message has been accepted.

§ 500. **Allegations as to damages.**—Where a telegraph, telephone, or electric company has violated a duty toward or breached a contract with the plaintiff, and by reason thereof the law would impute certain damages as the natural, necessary, and logical consequence, such damages need not specifically be set forth in the complaint, but are, upon proper averment of such breach or wrong, recoverable under a claim for damages generally.<sup>28</sup> So, where the plaintiff alleges in his declaration that a contract was made with a telegraph company to transmit a message and that the company had failed to carry out the contract, nominal damages may be recovered therefor, although no substantial damages are shown.<sup>29</sup> It has been held that, where there is a general allegation of damages resulting from the breach of such a contract, the price paid for transmission may be recovered.<sup>30</sup> Again, where it is alleged that as a result of the company negligently failing to transmit or deliver a message announcing the illness or death of a near relative of the plaintiff, whereby he was prevented from being present before or at the death of such relative, or from being present at his funeral, such damages for mental anguish resulting naturally from such breach may be recovered under a general allegation of damages.<sup>31</sup> On the other hand, if substantial compensatory damages are claimed, they should be proved.<sup>32</sup> Furthermore, if special damages are claimed, the declaration must allege them specifically and in detail so that the company will not be taken by surprise;<sup>33</sup>

<sup>28</sup> *So Relle v. West. U. Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805.

<sup>29</sup> *Stafford v. West. U. Tel. Co. (C. C.)* 73 Fed. 273; *West. U. Tel. Co. v. Milton*, 53 Fla. 484, 43 South. 495, 11 L. R. A. (N. S.) 560, 125 Am. St. Rep. 1077.

<sup>30</sup> *West. U. Tel. Co. v. McMorris*, 158 Ala. 563, 48 South. 349, 132 Am. St. Rep. 46. See, also, *Stafford v. West. U. Tel. Co. (C. C.)* 73 Fed. 273.

<sup>31</sup> *So Relle v. West. U. Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805. See, also, *Havener v. West. U. Tel. Co.*, 117 N. C. 540, 23 S. E. 457. But where the relationship is remote the rule is otherwise. *Amos v. West. U. Tel. Co.*, 79 S. C. 259, 60 S. E. 660, 128 Am. St. Rep. 845; *Harrelson v. Tel. Co.*, 90 S. C. 132, 72 S. E. 882. *Contra*, *Bush v. Tel. Co.*, 93 S. C. 176, 76 S. E. 197, under statute.

<sup>32</sup> *Bashinsky v. West. U. Tel. Co.*, 1 Ga. App. 761, 58 S. E. 91; *Bierhaus v. West. U. Tel. Co.*, 8 Ind. App. 246, 34 N. E. 581, allegations held sufficient; *Trigg v. West. U. Tel. Co.*, 4 Ga. App. 416, 61 S. E. 855, can recover nominal damages only if complaint shows that the damages could have been avoided, by the exercise of ordinary care; *Bass v. Postal Tel. Cable Co.*, 127 Ga. 423, 56 S. E. 465, 12 L. R. A. (N. S.) 489, allegation demurrable.

<sup>33</sup> *Bass v. Postal Tel. Cable Co.*, 127 Ga. 423, 56 S. E. 465, 12 L. R. A. (N. S.) 489; *Pacific Pine Lbr. Co. v. West. U. Tel. Co.*, 123 Cal. 428, 56 Pac. 103; *Graddy v. West. U. Tel. Co.*, 43 S. W. 468, 19 Ky. Law Rep. 1455;



however, if they are defectively pleaded, or if they are too remote or otherwise unrecoverable, the plaintiff will not be denied a recovery of general or nominal damages.<sup>34</sup> The general rule is that, if special damages are claimed, the declaration must allege that the company was informed of the fact that such damages would result in case of a failure to transmit or deliver the message. If the message does not show such fact, then the manner in which the company derived such must be alleged.<sup>35</sup> Some of the courts hold

*Barrett v. West. U. Tel. Co.*, 42 Mo. App. 542; *West. U. Tel. Co. v. Turner* (Tex. Civ. App.) 78 S. W. 362; *West. U. Tel. Co. v. Partlow*, 30 Tex. Civ. App. 599, 71 S. W. 584, action for employment, expense of securing another position must be alleged, otherwise unrecoverable; *Capers v. West. U. Tel. Co.*, 71 S. C. 29, 50 S. E. 537; *West. U. Tel. Co. v. Bell*, 24 Tex. Civ. App. 572, 59 S. W. 918; *Simmons v. West. U. Tel. Co.*, 63 S. C. 425, 41 S. E. 521, 57 L. R. A. 607, physical suffering, medicine, and nursing; *Mood v. West. U. Tel. Co.*, 40 S. C. 524, 19 S. E. 67, loss of employment; *Lee v. West. U. Tel. Co.*, 51 Mo. App. 375, action before justice of the peace, rule does not apply; *Bashinsky v. West. U. Tel. Co.*, 1 Ga. App. 761, 58 S. E. 91; *Ferguson v. Anglo-American Tel. Co.*, 151 Pa. 211, 25 Atl. 40; *Purdom Naval Stores Co. v. West. U. Tel. Co.* (C. C.) 153 Fed. 327; *West. U. Tel. Co. v. Linney* (Tex. Civ. App.) 28 S. W. 234; *West U. Tel. Co. v. Wilhelm*, 48 Neb. 910, 67 N. W. 870; *West. U. Tel. Co. v. True*, 105 Tex. 344, 148 S. W. 561, 41 L. R. A. (N. S.) 1188, sufficient.

*Mental anguish cases.*—Having to leave the corpse on platform because plaintiff was not met at station, *West. U. Tel. Co. v. Turner* (Tex. Civ. App.) 78 S. W. 362, or missing funeral or burial, *Graddy v. West. U. Tel. Co.*, 43 S. W. 468, 19 Ky. Law Rep. 1455, should be alleged. It has been held that, where plaintiff was prevented to attend the illness or burial of a near relative, it should be affirmatively shown that, but for the negligence of the company, the plaintiff not only could, but would, have gone. *West. U. Tel. Co. v. Bell*, 42 Tex. Civ. App. 462, 92 S. W. 1036; *West. U. Tel. Co. v. Rowe*, 44 Tex. Civ. App. 84, 98 S. W. 228. Contra, *Harrison v. West. U. Tel. Co.*, 71 S. C. 386, 51 S. E. 119. But it is not necessary to set forth the evidence of such fact. *Howard v. West. U. Tel. Co.*, 76 S. W. 387, 25 Ky. Law Rep. 828; *West. U. Tel. Co. v. Rowe*, supra.

<sup>34</sup> *West. U. Tel. Co. v. Merritt*, 55 Fla. 462, 46 South. 1024, 127 Am. St. Rep. 169; *West. U. Tel. Co. v. McMorris*, 158 Ala. 563, 48 South. 349, 132 Am. St. Rep. 46; *Trigg v. West. U. Tel. Co.*, 4 Ga. App. 416, 61 S. E. 855; *West. U. Tel. Co. v. Hopkins*, 49 Ind. 223; *Alexander v. West. U. Tel. Co.*, 66 Miss. 161, 5 South. 397, 14 Am. St. Rep. 556, 3 L. R. A. 71; *Taliferro v. West. U. Tel. Co.*, 54 S. W. 825, 21 Ky. Law Rep. 1290; *Hall v. West. U. Tel. Co.*, 139 N. C. 369, 52 S. E. 50; *Stafford v. West. U. Tel. Co.* (C. C.) 73 Fed. 273.

<sup>35</sup> *Graddy v. West. U. Tel. Co.*, 43 S. W. 468, 19 Ky. Law Rep. 1455; *Taylor v. West. U. Tel. Co.*, 101 S. W. 969, 31 Ky. Law Rep. 240; *Fass v. West. U. Tel. Co.*, 82 S. C. 461, 64 S. E. 235; *West. U. Tel. Co. v. Turner* (Tex. Civ. App.) 78 S. W. 362; *West. U. Tel. Co. v. Steele* (Tex. Civ. App.) 110 S. W. 546.

*Cipher message.*—Must allege that company was notified of the value and importance of the message. *Harrison v. West. U. Tel. Co.*, 3 Willson, Civ. App. Ct. App. § 43.

*Mental anguish.*—Rule applied in actions to recover damages for mental anguish. *Fass v. West. U. Tel. Co.*, supra; *West. U. Tel. Co. v. Steele*.

that the declaration should show whether the damages are actual or exemplary;<sup>36</sup> however, there are many courts upholding a contrary rule.<sup>37</sup> In any event, sufficient facts should be alleged to warrant such damages.<sup>38</sup>

§ 501. Same continued—copy of telegram—part of pleading.—In most of the cases brought against telegraph companies to recover damages for the negligent transmission or delivery of a message, the message is written out in the declaration. This is usually done to better show that there was a contract made, and also to show that the company was informed by the face of the message of its importance.<sup>39</sup> In furtherance of this proof, they often attach a copy of the telegram to the pleadings, and ask that it may be made a part thereof. When the request is made, it is generally held that all the reasonable stipulations contained in the blank become a part of the pleadings.<sup>40</sup> We may say that all of the printed contracts in this form are made a part of the pleadings,

supra; *Dempsey v. West. U. Tel. Co.*, 77 S. C. 399, 58 S. E. 9, "notwithstanding the defendant had every reason to know the message was important" is sufficient to apprise company. *Tel., etc., Co. v. Givens* (Tex. Civ. App.) 139 S. W. 676; *Tel. Co. v. Samuels* (Tex. Civ. App.) 141 S. W. 802; must allege that there were special relations of intimacy or affection, *Amos v. West. U. Tel. Co.*, 79 S. C. 259, 60 S. E. 660, 128 Am. St. Rep. 845; *Little v. West. U. Tel. Co.*, 79 S. C. 255, 60 S. E. 663; *McDowell v. West. U. Tel. Co.*, 79 S. C. 257, 60 S. E. 662; *Seddon v. Tel. Co.*, 146 Iowa, 743, 126 N. W. 969; *Harrelson v. Tel. Co.*, 90 S. C. 132, 72 S. E. 882; *Stewart v. Tel. Co.*, 93 S. C. 119, 76 S. E. 111; that the company had notice of such, *Amos v. West. U. Tel. Co.*, supra. Contra, *Graham v. West. U. Tel. Co.*, 93 S. C. 173, 76 S. E. 200.

<sup>36</sup> *McAllen v. West. U. Tel. Co.*, 70 Tex. 243, 7 S. W. 715.

<sup>37</sup> See *Machen v. West. U. Tel. Co.*, 63 S. C. 363, 41 S. E. 448; *Butler v. West. U. Tel. Co.*, 62 S. C. 222, 40 S. E. 162, 89 Am. St. Rep. 893.

<sup>38</sup> *West U. Tel. Co. v. Godsey* (Tex. App.) 16 S. W. 789; *Daniel v. West. U. Tel. Co.*, 61 Tex. 452, 48 Am. Rep. 305.

*Allegations not sufficient*, where it contains indefinite allegations of negligence, *Daniel v. West. U. Tel. Co.*, supra; or gross negligence unaccompanied by facts to warrant such damages, *West. U. Tel. Co. v. Godsey*, supra; but sufficient where it alleges "willful negligence," *Hartzog v. West. U. Tel. Co.* (Miss.) 34 South, 361; or "wanton, willful and grossly negligent," *Butler v. West. U. Tel. Co.*, 62 S. C. 222, 40 S. E. 162, 89 Am. St. Rep. 893; or "gross negligence," "carelessness," "wantonness," and "reckless mismanagement," *Machen v. West. U. Tel. Co.*, 63 S. C. 363, 41 S. E. 448; *Machen v. West. U. Tel. Co.*, supra.

<sup>39</sup> However, not necessary, *Butler v. West. U. Tel. Co.*, 62 S. C. 222, 40 S. E. 162, 89 Am. St. Rep. 893; *Lee v. West. U. Tel. Co.*, 51 Mo. App. 375; unless the message was in cipher, *Bashinsky v. West. U. Tel. Co.*, 1 Ga. App. 761, 58 S. E. 91. See *West. U. Tel. Co. v. Merritt*, 55 Fla. 462, 46 South. 1024, 127 Am. St. Rep. 169.

<sup>40</sup> *Sherrill v. West. U. Tel. Co.*, 109 N. C. 527, 14 S. E. 94. See, also, *Loper v. West. U. Tel. Co.*, 70 Tex. 689, 8 S. W. 600, 16 Am. St. Rep. 864.

but the company can take advantage only of those which are reasonable.<sup>41</sup>

§ 502. Same continued—amendments liberally allowed.—The strictness with which the common-law rule regarded the pleadings brought against private persons and corporations has been greatly obviated by the liberal allowance of statutes in most of the states in allowing amendments to them. It has become so, by these statutes, that almost any reasonable amendment may be made to the complaint or declaration of the plaintiff;<sup>42</sup> and where, under the common-law rule, the plaintiff may have been demurred out of court, he may, under the statute rule, reinstate his case by an amendment of the error made in the declaration. Thus, where the declaration averred that the message was delivered to the company at a certain place on the line, but in fact it was delivered at another place, the declaration may be amended so as to correct the mistake.<sup>43</sup> The amendment may go further and show that the message was delivered to another company other than the defendant, but accepted by the latter;<sup>44</sup> but, in such a case, it seems that it must be shown that the defendant's negligence was the cause of the loss. A misnomer may be amended if the defendant is not prejudiced in his rights. The declaration may be amended so as to show a different amount and the character of the damages claimed. But we think, if the negligent act of the defendant occurred in a certain manner, an amendment cannot be made without the defendant having a ground for continuance of the cause, where the act is averred as having occurred otherwise, and materially different to that first alleged in the pleadings. It is unnecessary to discuss this subject further, since there have been volumes more ably written on this particular subject which are available.

<sup>41</sup> Precedent conditions must be alleged as having been complied with. *West. U. Tel. Co. v. Hays* (Tex. Civ. App.) 63 S. W. 171; *Albers v. West. U. Tel. Co.*, 98 Iowa, 51, 66 N. W. 1040. But conditions held not precedent. See *Sherrill v. West. U. Tel. Co.*, 109 N. C. 527, 14 S. E. 94; *West. U. Tel. Co. v. Trumbull*, 1 Ind. App. 121, 27 N. E. 313; *West. U. Tel. Co. v. Piner*, 9 Tex. Civ. App. 152, 29 S. W. 66. However, where this is a statutory requirement, rule otherwise. *Heald v. West. U. Tel. Co.*, 129 Iowa, 326, 105 N. W. 588.

<sup>42</sup> *West. U. Tel. Co. v. Corso*, 121 Ky. 322, 89 S. W. 212, 28 Ky. Law Rep. 290, 11 Ann. Cas. 1065; *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844; *West. U. Tel. Co. v. Norris*, 25 Tex. Civ. App. 43, 60 S. W. 982; *West U. Tel. Co. v. Pelzer* (Tex. Civ. App.) 35 S. W. 836; *Hall v. West. U. Tel. Co.*, 59 Fla. 275, 51 South. 819, 27 L. R. A. (N. S.) 639, damages improperly alleged may be reached by motion to strike out or to amend.

<sup>43</sup> *Conyers v. Postal Tel. Cable Co.*, 92 Ga. 619, 19 S. E. 253, 44 Am. St. Rep. 100.

<sup>44</sup> *Id.*



§ 503. **Action—whether in contract or in tort.**—Sometimes it becomes difficult for the court to decide whether the action is brought for a breach of the contract of sending or whether it is for a breach of its public duty. In order to determine this fact, the court should look to the nature of the cause of action stated in the complaint or declaration, and if the special contract is not set out they will generally construe the pleadings as founded in tort.<sup>45</sup> It has been held that, where the action is founded on a special contract and a breach thereof resulting in damages to the plaintiff, it is not necessary to allege in the complaint that the defendant is a public corporation, or a common carrier for hire, where it is made so by statute; but where the action is founded in tort, or a breach of its public duties, it is necessary to state these facts, or averments equivalent thereto.<sup>46</sup> Sufficient facts must be averred to show that it has public duties to perform, and that it has failed to discharge these to the injury of the plaintiff.<sup>47</sup> It is generally held that a declaration is demurrable where it contains two counts, one where it is averred that the defendant is guilty of a breach of a contract and the other which alleges that it has negligently failed to discharge its public duty.<sup>48</sup> In other words, counts in tort and counts in contract cannot be joined in the same action.

§ 504. **Actions for statutory penalty—variance, etc.**—Following the general rule that penal statutes must be strictly construed, it is held that the pleadings in an action brought against telegraph companies to recover a statutory penalty, are usually enforced with more strictness than pleadings in the ordinary actions to recover damages. The complaint or declaration must allege all the facts necessary to bring the case not only within the letter of the statute but within its spirit as well.<sup>49</sup> Thus it must allege that the

<sup>45</sup> *Frink v. Potter*, 17 Ill. 406; *Hell v. St. Louis, etc., R. Co.*, 16 Mo. App. 363; *Atlantic R. Co. v. Laird*, 58 Fed. 760, 7 C. C. A. 489; *New Orleans, etc., R. Co., v. Hurst*, 36 Miss. 660, 74 Am. Dec. 785; *Heirn v. McCaughan*, 32 Miss. 17, 66 Am. Dec. 588.

<sup>46</sup> *Bristol v. Rensselaer, etc., R. Co.*, 9 Barb. (N. Y.) 158; *Southern Ex. Co. v. McVeigh*, 20 Grat. (Va.) 264.

<sup>47</sup> *Greenberg v. West. U. Tel. Co.*, 89 Ga. 754, 15 S. E. 651; *S. Florida Tel. Co. v. Maloney*, 34 Fla. 338, 16 South. 280; *May v. West. U. Tel. Co.*, 112 Mass. 90; *Lewis v. Southwestern Tel., etc., Co. (Tex. Civ. App.)* 59 S. W. 303; *Abbott v. West. U. Tel. Co.*, 86 Minn. 44, 90 N. W. 1; *West. U. Tel. Co. v. Rowe*, 44 Tex. Civ. App. 84, 98 S. W. 228; *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23; *Milliken v. West. U. Tel. Co.*, 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281, reversing 53 N. Y. Super. Ct. 111.

<sup>48</sup> *Norfolk, etc., R. Co. v. Wysor*, 82 Va. 250.

<sup>49</sup> *West. U. Tel. Co. v. Kinney*, 106 Ind. 468, 7 N. E. 191; *Greenberg v. West. U. Tel. Co.*, 89 Ga. 754, 15 S. E. 651.

charges were paid or tendered, and that the case comes within the statute.<sup>50</sup> So, if the statute provides that only such companies as are "engaged in telegraphing for the public," and the allegations in the complaint state that it was "engaged in the business of transmitting telegraphic dispatches for hire," this will not be a compliance with the statute.<sup>51</sup> A statutory penalty cannot be recovered where the complaint avers that the defendant negligently *transmitted* a message whereby he suffers a loss, when the statute provides that the recovery can only be had where the company has negligently *delayed the delivery* of the message, or *vice versa*.<sup>52</sup> It is not necessary for the copy of the message to be set out in the pleading in these cases;<sup>53</sup> nor is it necessary that it should negative matters of defense.<sup>54</sup> Thus, where the rule of the company is that it will deliver all messages free of charge within the free delivery limit it is not necessary for the declaration to contain an averment that the addressee lived within the free delivery limits, since if such should not be the fact, it is a defense to be used by the company.<sup>55</sup> It is a general rule of procedure that the proof must be consistent with the averments in the pleadings, but if the variance is on immaterial allegations, the complaint will be good.<sup>56</sup> It is

<sup>50</sup> West. U. Tel. Co. v. Mossler, 95 Ind. 32; West. U. Tel. Co. v. Ferguson, 57 Ind. 495.

In a common-law remedy to recover damages, it is not necessary to show that the charges were paid. West. U. Tel. Co. v. Meek, 49 Ind. 53; Milliken v. West. U. Tel. Co., 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281. But all the facts enumerated in the statute as necessary to render the contract valid must be shown. Gist v. West. U. Tel. Co., 45 S. C. 344, 23 S. E. 143, 55 Am. St. Rep. 763.

<sup>51</sup> West. U. Tel. Co. v. Axtell, 69 Ind. 199; West. U. Tel. Co. v. Roberts, 87 Ind. 377; West. U. Tel. Co. v. Adams, 87 Ind. 598, 44 Am. Rep. 776.

<sup>52</sup> Wilkins v. West. U. Tel. Co., 68 Miss. 6, 8 South. 678.

<sup>53</sup> West. U. Tel. Co. v. Meredith, 95 Ind. 93; Lee v. West. U. Tel. Co., 51 Mo. App. 375; Butler v. West. U. Tel. Co., 62 S. C. 222, 40 S. E. 162, 89 Am. St. Rep. 893.

<sup>54</sup> Cowan v. West. U. Tel. Co., 122 Iowa, 379, 98 N. W. 281, 64 L. R. A. 545, 101 Am. St. Rep. 268; West. U. Tel. Co. v. Henderson, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; West. U. Tel. Co. v. Henley, 157 Ind. 90, 60 N. E. 682; West. U. Tel. Co. v. Cook, 45 Tex. Civ. App. 87, 99 S. W. 1131; West. U. Tel. Co. v. Whitson, 145 Ala. 426, 41 South. 405.

<sup>55</sup> Id.

<sup>56</sup> Thus, where the complaint alleged that the message sent in March, the plaintiff might still show it to have been sent in January. West. U. Tel. Co. v. Kilpatrick, 97 Ind. 42; Pope v. West. U. Tel. Co., 9 Ill. App. 283; West. U. Tel. Co. v. Roberts, 34 Tex. Civ. App. 76, 78 S. W. 522; West. U. Tel. Co. v. Pelzer (Tex. Civ. App.) 35 S. W. 836; West. U. Tel. Co. v. Linney (Tex. Civ. App.) 28 S. W. 234; West. U. Tel. Co. v. Hinkle, 3 Tex. Civ. App. 518, 22 S. W. 1004. See Ogilvie v. West. U. Tel. Co., 83 S. C. 8, 64 S. E. 860, 137 Am. St. Rep. 791.

only where the variance is on material averments that the rule is applicable.<sup>57</sup> If the message was delivered to the company on Sunday, the declaration must allege its necessity of being sent on that day, in order to recover under these statutes.<sup>58</sup>

§ 505. **Plea to the declaration.**—At the common law, whether the action sounded in contract or in tort, it was generally sufficient for the company to plead the general issue,<sup>59</sup> and a general denial will be sufficient in the states in which the code procedure is used, but as new matter must be specially pleaded under the code, it will sometimes be necessary to answer specially.<sup>60</sup> Thus, if the claim is not presented within the required time, or if the message was not ordered to be repeated, or if there is a failure on the part of the plaintiff to comply with any of the stipulations contained in the message blank, the plea should specially aver these facts.<sup>61</sup> If the message is sent in cipher, and the company is not informed of its importance, an averment of this fact should be made; and it will be an error in the court to strike from the plea

<sup>57</sup> *West. U. Tel. Co. v. Smith*, 88 Tex. 9, 28 S. W. 931, 30 S. W. 549, reversing (Tex. Civ. App.) 30 S. W. 957; *West. U. Tel. Co. v. Byrd*, 34 Tex. Civ. App. 594, 79 S. W. 40; *Telephone Co. v. Brown*, 6 Ala. App. 339, 59 South. 329.

<sup>58</sup> *West. U. Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; *West. U. Tel. Co. v. Griffin*, 1 Ind. App. 46, 27 N. E. 113; *West. U. Tel. Co. v. Henley*, 23 Ind. App. 14, 54 N. E. 775; *West. U. Tel. Co. v. Eskridge*, 7 Ind. App. 208, 33 N. E. 238. See, also, cases in note 20, *supra*.

<sup>59</sup> *Hutchinson on Carriers* (2d Ed.), § 758; *I. C. R. Co. v. Johnson*, 34 Ill. 389; *St. Louis, etc., R. Co. v. Knight*, 122 U. S. 79, 7 Sup. Ct. 1132, 30 L. Ed. 1077; *Mitchiner v. West. U. Tel. Co.*, 70 S. C. 522, 50 S. E. 190; *Telephone Co. v. Calhoun*, 13 Ga. App. 482, 79 S. E. 371; *Hinson v. West. U. Tel. Co.*, 91 S. C. 338, 74 S. E. 752, Ann. Cas. 1914A, 114.

<sup>60</sup> *What must be specially pleaded.*—*West. U. Tel. Co. v. Trumbull*, 1 Ind. App. 121, 27 N. E. 313, presenting claim in time; *West. U. Tel. Co. v. Whitson*, 145 Ala. 426, 41 South. 405, free delivery limit; *Kendall v. West. U. Tel. Co.*, 56 Mo. App. 192, presenting claim; *Collins v. West. U. Tel. Co.*, 145 Ala. 412, 41 South. 160, 8 Ann. Cas. 268; *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148, free delivery limits; *Harris v. West. U. Tel. Co.*, 121 Ala. 519, 25 South. 910, 77 Am. St. Rep. 70, presenting claim; *Conrad v. West. U. Tel. Co.*, 162 Pa. 204, 29 Atl. 888, connecting line; *Martin v. Sunset Tel., etc., Co.*, 18 Wash. 260, 51 Pac. 376, presenting claim; *West. U. Tel. Co. v. Linney* (Tex. Civ. App.) 28 S. W. 234, presenting claim; *West. U. Tel. Co. v. Smith* (Tex. Civ. App.) 26 S. W. 216, special contract; *West. U. Tel. Co. v. Rowell*, 166 Ala. 651, 51 South. 880; *Telephone Co. v. Harris*, 105 Tex. 320, 148 S. W. 289, failure to pay extra charges; *West. U. Tel. Co. v. Saunders*, 164 Ala. 234, 51 South. 176, 137 Am. St. Rep. 35, double pleadings, motion to strike out proper practice. Pleas held insufficient, see *Telephone Co. v. Fuel*, 165 Ala. 391, 51 South. 571; *Park v. Telephone Co.*, 167 Ala. 339, 52 South. 884; *Telephone Co. v. Sledge*, 7 Ala. App. 650, 62 South. 390.

<sup>61</sup> *West. U. Tel. Co. v. Saunders*, 164 Ala. 234, 51 South. 176, 137 Am. St. Rep. 35. See, also, other cases cited in note 60, *supra*.



such an averment.<sup>62</sup> The plaintiff should have notice of the rules of the company in order for them to be binding on him; and if a plea to a complaint against one of these companies avers that a message, received for transmission, was written on one of the blanks upon which the requirement for notice of damages within sixty days was printed, and was sent subject to the contract expressed thereon and of which this requirement was a part, it is equivalent to an averment of notice of the rule on plaintiff's part.<sup>63</sup>

**§ 506. The issue and proof.**—In an action against a telegraph, telephone, or electric company, the evidence will be limited as in all other cases against corporations or private persons to the issue involved,<sup>64</sup> so evidence of a breach of a contract or tort other than the one alleged in the declaration will be inadmissible.<sup>65</sup> So also it seems that, if the complaint counts entirely upon the failure of the company to promptly deliver the message, he cannot recover where the loss has been sustained by a negligent transmission.<sup>66</sup> Where special damages are claimed, they must not only be pleaded,<sup>67</sup> but proved as alleged.<sup>68</sup> In an action to recover damages

<sup>62</sup> *Hill v. West. U. Tel. Co.*, 42 S. C. 367, 20 S. E. 135, 46 Am. St. Rep. 734. See *Harrison v. West. U. Tel. Co.*, 3 Willson, Civ. Cas. Ct. App. § 43.

<sup>63</sup> *Harris v. West. U. Tel. Co.*, 121 Ala. 519, 25 South. 910, 77 Am. St. Rep. 70.

<sup>64</sup> *Barrett v. West. U. Tel. Co.*, 42 Mo. App. 542; *West. U. Tel. Co. v. Byrd*, 34 Tex. Civ. App. 594, 79 S. W. 40; *Martin v. West. U. Tel. Co.*, 81 S. C. 432, 62 S. E. 833; *Lofton v. Electric Co.*, 61 Fla. 293, 54 South. 959; *Brown v. Light, etc., Co.*, 137 Mo. App. 718, 109 S. W. 1032. See *Cutler v. Light, etc., Co.*, 80 Conn. 470, 68 Atl. 1006; *Winkelman v. Light Co.*, 110 Mo. App. 184, 85 S. W. 99; *Telephone Co. v. Thomas*, 45 Tex. Civ. App. 20, 99 S. W. 879; *Power Co. v. Hooper*, 46 Tex. Civ. App. 257, 102 S. W. 133, variance held immaterial; *Fickeisen v. Electrical Co.*, 67 W. Va. 335, 67 S. E. 788, 27 L. R. A. (N. S.) 893, failure to prove ownership of wire; *Telephone Co. v. Booker*, 103 Va. 594, 50 S. E. 148; *Railroad, etc., Co. v. Cockrum*, 179 Ala. 372, 60 South. 304. See, however, *Lutolf v. United Elec. Lt. Co.*, 184 Mass. 53, 67 N. E. 1025; *Melican v. Missouri-Edison Elec. Co.*, 90 Mo. App. 595; *Ogilvie v. West. U. Tel. Co.*, 83 S. C. 8, 64 S. E. 860, 137 Am. St. Rep. 790; *Baker v. West. U. Tel. Co.*, 84 S. C. 477, 66 S. E. 182, 137 Am. St. Rep. 848; *West. U. Tel. Co. v. Sights*, 34 Okl. 461, 126 Pac. 234, Ann. Cas. 1914C, 204, 42 L. R. A. (N. S.) 419; *Traction Co. v. Daily*, 111 Va. 665, 69 S. E. 963; *West. U. Tel. Co. v. Milton*, 53 Fla. 484, 43 South. 495, 125 Am. St. Rep. 1077, 11 L. R. A. (N. S.) 560.

<sup>65</sup> *West. U. Tel. Co. v. Byrd*, 34 Tex. Civ. App. 594, 79 S. W. 40.

<sup>66</sup> *Connell v. West. U. Tel. Co.*, 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 172, 38 Am. St. Rep. 575.

<sup>67</sup> *Amos v. West. U. Tel. Co.*, 79 S. C. 259, 60 S. E. 660, 128 Am. St. Rep. 845.

<sup>68</sup> *Barrett v. West. U. Tel. Co.*, 42 Mo. App. 542; *West. U. Tel. Co. v. Turner* (Tex. Civ. App.) 78 S. W. 362; *Fass v. West. U. Tel. Co.*, 82 S. C. 461, 64 S. E. 235. See *McNeil v. Postal Tel. Cable Co.*, 154 Iowa, 241, 134 N. W. 611, Ann. Cas. 1914A, 1294, 38 L. R. A. (N. S.) 727.

for the death of a horse caused by the delay of the company in delivering a message requesting the attendance of a veterinary surgeon, the sole issue is whether such death was due to delay in the treatment caused by the failure to deliver the message, regardless of negligence in the treatment of the horse after the dispatch was delivered.<sup>69</sup> In actions brought to recover damages for mental anguish and in which the question arises whether the relationship is too remote to give rise to a presumption of mental anguish, evidence of any special relations of intimacy is not admissible unless alleged.<sup>70</sup>

§ 507. **Cause—proximate—remote.**—In order that the injured party may recover for an alleged negligence of a telegraph, telephone, or electric company, it must be shown that the company's negligence was the proximate cause of the injury.<sup>71</sup> While this is the undisputed principle of law in such cases, yet there has not been any rule laid down by which it may be determined as to whether or not the negligence is proximate or remote. In other words, there has not been nor can there be a line drawn separating the two, so that it may be said that it is a subject to be placed on one or the other side of this line, but the facts in each particular case must be considered in determining the question.<sup>72</sup> After the facts have been presented, they must then be sufficient to warrant a jury in finding that the negligence was the proximate cause of the injury; that is, facts and circumstances must be proved sufficiently to bring conviction to a reasonable mind, without resorting to mere conjecture or uncertainty, and mere presumption that the company's neglect of duty was the proximate cause of the injury.<sup>73</sup>

<sup>69</sup> *Hendershot v. West. U. Tel. Co.*, 106 Iowa, 529, 76 N. W. 828, 68 Am. St. Rep. 313.

<sup>70</sup> *McDowell v. West. U. Tel. Co.*, 79 S. C. 257, 60 S. E. 662; *Amos v. West. U. Tel. Co.*, 79 S. C. 259, 60 S. E. 660, 128 Am. St. Rep. 845; *Little v. West. U. Tel. Co.*, 79 S. C. 255, 60 S. E. 663.

<sup>71</sup> See §§ 520, 522; *West. U. Tel. Co. v. Milton*, 53 Fla. 484, 43 South. 495, 125 Am. St. Rep. 1077, 11 L. R. A. (N. S.) 560, holding that a proximate cause is one that leads to or produces or directly contributes to producing the result or loss. *Hall v. West. U. Tel. Co.*, 59 Fla. 275, 51 South. 819, 27 L. R. A. (N. S.) 639; *Providence-Washington Ins. Co. v. West. U. Tel. Co.*, 247 Ill. 84, 93 N. E. 134, 30 L. R. A. (N. S.) 1170, 139 Am. St. Rep. 314. Compare *Brown v. Chesapeake & Ohio R. Co.*, 135 Ky. 798, 123 S. W. 298, 25 L. R. A. (N. S.) 717.

<sup>72</sup> *Hendershot v. West. U. Tel. Co.*, 106 Iowa, 529, 76 N. W. 828, 68 Am. St. Rep. 313; *McPeck v. West. U. Tel. Co.*, 107 Iowa, 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214; *West. U. Tel. Co. v. Simpson*, 64 Kan. 309, 67 Pac. 839; *Strahorn-Hutton-Evans Coms. Co. v. West. U. Tel. Co.*, 101 Mo. App. 500, 74 S. W. 876; *Higdon v. West. U. Tel. Co.*, 132 N. C. 726, 44 S. E. 558.

<sup>73</sup> *Hendershot v. West. U. Tel. Co.*, 106 Iowa, 529, 76 N. W. 828, 68 Am. St. Rep. 313. See §§ 520, 522.

A jury must not, in determining this question, indulge in conjecture, speculation, or guesswork, although they need not be convinced to an absolute certainty; if there is a preponderance of the evidence to the effect that negligence was the proximate cause of the injury, the jury is warranted in finding the company liable therefor.<sup>74</sup> Thus a delay of five hours in delivering a message, the importance of which was shown on its face, to a veterinary surgeon requesting his immediate attendance to treat a very valuable horse, was negligence on the part of the company; and if by a prompt delivery the surgeon would probably have gotten to the horse in time to have saved its life, then, the proximate cause of the death of the animal would be the delay in the delivery of the message.<sup>75</sup> Where the plaintiff informs the company that he is expecting to receive an important message and, after this information, the company delays the delivery of a telegram, whereby the plaintiff is defeated in capturing a fugitive from justice, and thereby loses the reward, the company's negligent delay is the proximate cause of the loss and it is, therefore, liable for so much thereof.<sup>76</sup> It must be shown that the prompt delivery would have prevented the loss;<sup>77</sup> as, where a warning message, directed to a man who was being pursued, was not delivered, and the addressee was killed by his pursuers, it was held that there could be no recovery, since it did not appear that the prompt delivery of the message would have saved his life.<sup>78</sup>

§ 508. **Contributory negligence—same rule.**—The same rule as above will apply where the company attempts to set up, as a defense, the contributory negligence of the injured party. The plaintiff must use ordinary care in carrying out his business transactions with these companies, and if he fails to do so, which contributes proximately to the company's neglect, he cannot recover.<sup>79</sup> While it is difficult to say as to whether or not the want of the injured party to use ordinary care has contributed proximately to the company's negligence, yet it may be said that it does contribute proximately to the injury when it is an active and effective

<sup>74</sup> Id.

<sup>75</sup> Id.

<sup>76</sup> *McPeck v. West. U. Tel. Co.*, 107 Iowa, 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214.

<sup>77</sup> See §§ 208, 520.

<sup>78</sup> *Ross v. West. U. Tel. Co.*, 81 Fed. 676, 26 C. C. A. 564; *Barnes v. West. U. Tel. Co.*, 24 Nev. 125, 50 Pac. 438, 74 Am. St. Rep. 791. In this case it was held that unreasonable delay in the delivery of a message was the proximate cause of an injury caused by being run over by rail cars due to the injured party's negligence.

<sup>79</sup> Note §§ 210, 520, 522.



cause of the injury in any degree, however slight, and not the mere condition or occasion of it. That is, if both the injured party and the company have been guilty of negligence, but that of the company is the more immediate cause of the injury, the company will be liable.<sup>80</sup> On the other hand, if it appears that the injury would have nevertheless occurred had the company exercised ordinary care, the plaintiff cannot recover, however negligent the company may have been. In other words, the act must have been caused by the negligence of the company unconnected with any fault of the plaintiff, and as the result of which the injury would not have been inflicted.<sup>81</sup> With regard to the burden of proof as to contributory negligence in actions against electric companies for damages for personal injuries there exists as in the case of actions for negligent injuries generally a conflict of opinion. Thus, according to some authorities, where the action of both parties must have combined to produce the injury, it devolves upon the plaintiff to show that he was not himself guilty of negligence, and he must show affirmatively that he was in the exercise of due and reasonable care when the injury happened.<sup>82</sup> However, the proof need not be direct, but may be inferred from the circumstances of the

<sup>80</sup> *Suburban Elec. Co. v. Nugent*, 58 N. J. Law, 658, 34 Atl. 1069, 32 L. R. A. 700. See, also, *Bigelow on Torts*, 311; *Beach on Con. Neg.* 36; *Wharton on Neg.* § 303; *Shearman & Redf. on Neg.* § 33; *McAunich v. Mississippi, etc., R. Co.*, 20 Iowa, 338; *Murphy v. Deane*, 101 Mass. 455, 3 Am. Rep. 390; *Norris v. Litchfield*, 35 N. H. 271, 69 Am. Dec. 546; *Washington v. B. & O. R. R. Co.*, 17 W. Va. 190. In this case the court said: "Properly speaking, contributory negligence, as the very words impart, arises when the plaintiff as well as the defendant has done some act negligently, or has omitted through negligence to do some act which it was their respective duty to do, and the combined negligence of the two parties has directly produced the injury. On the contrary, if the act of the defendant is the immediate cause of the injury, no preceding negligence or improper conduct of the plaintiff would prevent him from recovering; for in such a case his preceding negligence or improper conduct would not be in law regarded as any part of the cause of the injury, and would not therefore be held to be contributory negligence. The plaintiff's preceding negligence or improper conduct is in such case a mere condition, and not a cause of the injury. Though it may be in such a case that the injury could not possibly have happened without this preceding negligence or improper conduct of the plaintiff, that is, without circumstances being in the actual condition in which the plaintiff had improperly placed them, he may in such case nevertheless recover; for in the view of the law, which now looks to the remote cause, which we have called a condition, but only the proximate cause, the injury in such a case would be held to be caused by the defendant only."

<sup>81</sup> *Gentzkow v. Portland Ry. Co.*, 54 Or. 114, 102 Pac. 614, 135 Am. St. Rep. 821; *Ross v. West. U. Tel. Co.*, 91 Fed. 676, 26 C. C. A. 564.

<sup>82</sup> *Clements v. Louisiana Elec. Lt. Co.*, 44 La. Ann. 692, 11 South. 51, 32 Am. St. Rep. 348, 16 L. R. A. 43; *West. U. Tel. Co. v. Sights*, 34 Okl. 461, 126 Pac. 234, 42 L. R. A. (N. S.) 419, Ann. Cas. 1914C, 204.

case.<sup>83</sup> However, contributory negligence on the part of the plaintiff, according to other authorities, is matter of defense, the burden of proving which rests upon the defendant,<sup>84</sup> and the plaintiff is not required to show that he was free from negligence.<sup>85</sup> In all cases where the question is whether or not the alleged negligence is the proximate cause of the injury, it is a question of fact to be decided by a jury.<sup>86</sup>

§ 509. **Presumption of negligence—burden of proof.**—In ordinary actions brought to recover damages for personal injuries, there is probably no presumption of negligence against either party; the mere fact of injury being sustained creates no such presumption, except where, from the peculiar circumstances involved, the familiar maxim of *res ipsa loquitur* is applicable.<sup>87</sup> But in similar actions against electric companies the mere introduction of the facts surrounding an injury from electricity, showing that such injury resulted from contact with live electric wires, or other appliances, when out of their proper condition or out of their proper place, may suffice, under the doctrine of *res ipsa loquitur*, to raise a *prima facie* presumption that such companies having such appliances in charge have been negligent in the performance of their duty,<sup>88</sup> and to place upon them the burden of overthrowing such

<sup>83</sup> *Myhan v. Louisiana Elec. Lt., etc., Co.*, 41 La. Ann. 964, 6 South. 799, 17 Am. St. Rep. 436, 7 L. R. A. 172; *Stevens v. United Gas, etc., Co.*, 73 N. H. 159, 60 Atl. 848, 70 L. R. A. 119; *Clements v. Louisiana Elec. Lt. Co.*, 44 La. Ann. 692, 11 South. 51, 32 Am. St. Rep. 348, 16 L. R. A. 43.

<sup>84</sup> *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 19 S. E. 344, 41 Am. St. Rep. 786, 26 L. R. A. 810.

<sup>85</sup> *Getzkow v. Portland Ry. Co.*, 54 Or. 114, 102 Pac. 614, 135 Am. St. Rep. 821.

<sup>86</sup> See § 520. See, also, *West. U. Tel. Co. v. Morris*, 83 Fed. 992, 28 C. C. A. 56; *Wallingford v. West. U. Tel. Co.*, 60 S. C. 201, 38 S. E. 443, 629.

<sup>87</sup> *Thompson on Neg.* 1227-1235, § 3; *Cooley on Torts*, 796; *Shear. & Red. on Neg.* § 59; *Wharton on Neg.* §§ 421, 422; *Addison on Torts*, 17, 366; *Bigelow on Torts*, 596; *State Bank of Commerce v. West. U. Tel. Co.*, 19 N. M. 211, 142 Pac. 156, L. R. A. 1915A, 120, quoting author.

<sup>88</sup> See §§ 194, 198. See, also, *Texarkana Gas, etc., Co. v. Orr*, 59 Ark. 215, 27 S. W. 66, 43 Am. St. Rep. 30; *Ala. City, etc., R. Co. v. Appleton*, 171 Ala. 324, 54 South. 638, Ann. Cas. 1913A, 1181; *Giraudi v. San Jose Elec. etc., Co.*, 107 Cal. 120, 40 Pac. 108, 48 Am. St. Rep. 114, 28 L. R. A. 596; *Denver Cons. Elec. Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566; *Diller v. Northern California Power Co.*, 162 Cal. 531, 123 Pac. 359, Ann. Cas. 1913D, 908; *Clements v. Louisiana Elec. Lt. Co.*, 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348; *Hebert v. Lake Charles Ice, etc., Co.*, 111 La. 522, 35 South. 731, 100 Am. St. Rep. 505, 64 L. R. A. 101; *Brown v. Edison Elec. Ill. Co.*, 90 Md. 400, 45 Atl. 182, 78 Am. St. Rep. 442, 46 L. R. A. 745; *West. U. Tel. Co. v. State*, 82 Md. 293, 33 Atl. 763, 51 Am. St. Rep. 464, 31 L. R. A. 572; *Walter v. Baltimore Elec. Co.*, 109 Md. 513, 71 Atl. 953, 22 L. R. A. (N. S.) 1178; *Griffin v. United Elec. Co.*, 164 Mass. 492, 41 N. E. 675, 49 Am. St. Rep. 477, 32 L. R. A.

presumption.<sup>89</sup> And where, in an action against a telegraph or telephone company, it is shown that a message has been delivered to it and a material error has been made in its transmission,<sup>90</sup> or

400; *St. Louis v. Bay State, etc., R. Co.*, 216 Mass. 255, 103 N. E. 639, Ann. Cas. 1915B, 706, 49 L. R. A. (N. S.) 447; *Gannon v. Laclede Gas Lt. Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505, overruled on another point by *Hendley v. Globe Refinery Co.*, 106 Mo. App. 20, 79 S. W. 1163; *Gilbert v. Duluth Gen. Elec. Co.*, 93 Minn. 99, 100 N. W. 653, 106 Am. St. Rep. 430; *Mize v. Rocky Mountain Bell Tel. Co.*, 38 Mont. 521, 100 Pac. 971, 129 Am. St. Rep. 659, 16 Ann. Cas. 1189; *Suburban Elec. Co. v. Nugent*, 58 N. J. Law, 658, 34 Atl. 1069, 32 L. R. A. 700; *Newark Elec. Lt., etc., Co. v. Ruddy*, 62 N. J. Law, 505, 41 Atl. 712, 57 L. R. A. 624; *Trenton Pass. Ry. Co. v. Cooper*, 60 N. J. Law, 219, 37 Atl. 730, 64 Am. St. Rep. 592, 38 L. R. A. 637; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 19 S. E. 344, 41 Am. St. Rep. 786, 26 L. R. A. 810; *Turner v. Southern Power Co.*, 154 N. C. 131, 69 S. E. 767, 32 L. R. A. (N. S.) 848; *Fisher v. New Bern*, 140 N. C. 506, 53 S. E. 342, 111 Am. St. Rep. 857, 5 L. R. A. (N. S.) 542; *Perham v. Portland Gen. Elec. Co.*, 33 Or. 451, 53 Pac. 14, 24, 72 Am. St. Rep. 730, 40 L. R. A. 799; *Carroll v. Grande Ronde Elec. Co.*, 47 Or. 424, 84 Pac. 389, 6 L. R. A. (N. S.) 290; *Boyd v. Portland Elec. Co.*, 40 Or. 126, 66 Pac. 576, 57 L. R. A. 619; *Alexander v. Nanticoke Light Co.*, 209 Pa. 571, 58 Atl. 1068, 67 L. R. A. 475; *Burnett v. Ft. Worth Lt., etc., Co.*, 102 Tex. 31, 112 S. W. 1040, 19 L. R. A. (N. S.) 504; *Delahunt v. United Tel., etc., Co.*, 215 Pa. 241, 64 Atl. 515, 114 Am. St. Rep. 958; *Abrams v. Seattle*, 60 Wash. 356, 111 Pac. 168, 140 Am. St. Rep. 916; *Snyder v. Wheeling Elec. Co.*, 43 W. Va. 661, 28 S. E. 733, 64 Am. St. Rep. 922, 39 L. R. A. 499; *Runyan v. Kanawha, etc., Lt. Co.*, 68 W. Va. 609, 71 S. E. 259, 35 L. R. A. (N. S.) 430.

<sup>89</sup> *Denver Con. Elec. Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566; *Hebert v. Lake Charles Ice, etc., Co.*, 111 La. 522, 35 South. 731, 100 Am. St. Rep. 505, 64 L. R. A. 101; *Ala. City, etc., R. Co. v. Appleton*, 171 Ala. 324, 54 South. 638, Ann. Cas. 1913A, 1181; *West. U. Tel. Co. v. State*, 82 Md. 293, 33 Atl. 763, 51 Am. St. Rep. 464, 31 L. R. A. 572; *Alexander v. Nanticoke Lt. Co.*, 209 Pa. 571, 58 Atl. 1068, 67 L. R. A. 475; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 19 S. E. 344, 41 Am. St. Rep. 786, 26 L. R. A. 810; *Delahunt v. United Tel., etc., Co.*, 215 Pa. 241, 64 Atl. 515, 114 Am. St. Rep. 958; *Abrams v. Seattle*, 60 Wash. 356, 111 Pac. 168, 140 Am. St. Rep. 916; *Runyan v. Kanawha, etc., Co.*, 68 W. Va. 609, 71 S. E. 259, 35 L. R. A. (N. S.) 430. But see *Lanning v. Pittsburg Ry. Co.*, 229 Pa. 575, 79 Atl. 136, 32 L. R. A. (N. S.) 1043, where doctrine is denied in the case of a traveler on the street injured by an appliance of the company using electricity upon or over the street.

<sup>90</sup> *Arkansas*.—*West. U. Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744.

*Georgia*.—*West. U. Tel. Co. v. Cohen*, 73 Ga. 522.

*Idaho*.—*Strong v. West. U. Tel. Co.*, 18 Idaho, 389, 109 Pac. 910, 30 L. R. A. (N. S.) 409, Ann. Cas. 1912A, 55.

*Illinois*.—*West. U. Tel. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279; *West. U. Tel. Co. v. Hart*, 62 Ill. App. 121; *West. U. Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109.

*Indiana*.—*West. U. Tel. Co. v. Meek*, 49 Ind. 53.

*Iowa*.—*Hise v. West. U. Tel. Co.*, 137 Iowa, 329, 113 N. W. 819; *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 458, 20 Am. Rep. 605.

*Kansas*.—*West. U. Tel. Co. v. Crall*, 38 Kan. 679, 17 Pac. 309, 5 Am. St. Rep. 795; *West. U. Tel. Co. v. Howell*, 38 Kan. 685, 17 Pac. 313.

*Maine*.—*Bartlett v. West. U. Tel. Co.*, 62 Me. 209, 16 Am. Rep. 437; *Ayer v. West. U. Tel. Co.*, 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353.



that an unusual delay has been made in its delivery,<sup>91</sup> or that it has been transmitted but not delivered,<sup>92</sup> or that it has not been

*Mississippi*.—West. U. Tel. Co. v. Goodbar, 7 South. 214.

*Missouri*.—Reed v. West. U. Tel. Co., 135 Mo. 671, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492. But see Cowen Lbr. Co. v. West. U. Tel. Co., 58 Mo. App. 257.

*Nebraska*.—West. U. Tel. Co. v. Kemp, 44 Neb. 194, 62 N. W. 451, 48 Am. St. Rep. 723.

*New Mexico*.—State Bank of Commerce v. West. U. Tel. Co., 19 N. M. 211, 142 Pac. 156, L. R. A. 1915A, 120.

*New York*.—Baldwin v. United States Tel. Co., 45 N. Y. 744, 6 Am. Rep. 165; Pearsall v. West. U. Tel. Co., 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662; Rittenhouse v. Independent Line, 44 N. Y. 263, 4 Am. Rep. 673; Wolfskehl v. West. U. Tel. Co., 46 Hun, 542.

*Ohio*.—West. U. Tel. Co. v. Sullivan, 82 Ohio St. 14, 91 N. E. 867, 137 Am. St. Rep. 754; West. U. Tel. Co. v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500; Bowen v. Lake Erie Tel. Co., 1 Ohio Dec. (Reprint) 574.

*Oklahoma*.—Levy v. Tel. Co., 39 Okl. 416, 135 Pac. 423.

*Pennsylvania*.—Bailey v. West. U. Tel. Co., 227 Pa. 522, 76 Atl. 736, 43 L. R. A. (N. S.) 502, 19 Ann. Cas. 895.

*Texas*.—West. U. Tel. Co. v. Brown (Tex. Civ. App.) 75 S. W. 359; West. U. Tel. Co. v. Hamilton, 36 Tex. Civ. App. 300, 81 S. W. 1052; West. U. Tel. Co. v. Ragland (Tex. Civ. App.) 61 S. W. 421; West. U. Tel. Co. v. Tobin (Tex. Civ. App.) 56 S. W. 540; West. U. Tel. Co. v. Norris, 25 Tex. Civ. App. 43, 60 S. W. 982; West. U. Tel. Co. v. Hines, 22 Tex. Civ. App. 315, 54 S. W. 627; West. U. Tel. Co. v. Harper, 15 Tex. Civ. App. 37, 39 S. W. 599.

*Utah*.—Wertz v. West. U. Tel. Co., 7 Utah, 446, 27 Pac. 172, 13 L. R. A. 510.

*United States*.—West. U. Tel. Co. v. Cook, 61 Fed. 624, 9 C. C. A. 680.

<sup>91</sup> State Bank of Commerce v. West. U. Tel. Co., 19 N. M. 211, 142 Pac. 156, L. R. A. 1915A, 120; Woods v. West. U. Tel. Co., 148 N. C. 1, 61 S. E. 653, 128

<sup>92</sup> State Bank of Commerce v. West. U. Tel. Co., 19 N. M. 211, 142 Pac. 156, L. R. A. 1915A, 120; Little Rock, etc., Tel. Co. v. Davis, 41 Ark. 79; Barrett v. West. U. Tel. Co., 42 Mo. App. 542; West. U. Tel. Co. v. Merrill, 144 Ala. 618, 39 South. 121, 113 Am. St. Rep. 66; Pope v. West. U. Tel. Co., 9 Ill. App. 283; Woods v. West. U. Tel. Co., 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581; West. U. Tel. Co. v. Bertram, 1 White & W. Civ. Cas. Ct. App. § 1152; Hunter v. West. U. Tel. Co., 130 N. C. 602, 41 S. E. 796; Rosser v. West. U. Tel. Co., 130 N. C. 251, 41 S. E. 378; Sherrill v. West. U. Tel. Co., 116 N. C. 655, 21 S. E. 429; Hoaglin v. Telephone Co., 161 N. C. 390, 77 S. E. 417. See West. U. Tel. Co. v. Sullivan, 82 Ohio St. 14, 91 N. E. 867, 137 Am. St. Rep. 754, holding that the burden is upon the plaintiff to show that the receiver was at the place to which the message was addressed in sufficient time to permit of delivery.

*Delay of sender's agent*.—Negligence of a telegraph company may be inferred from its long delay in transmitting a message, but not from the delay which may be imputed to an agency selected by the sender to receive the message. When the sender of the message directed it to be mailed at a certain place, he constituted the post office, the postal officials at that place, his agents to receive and transmit the message, and delivery by the defendant to the postal officials by mailing was a fulfillment of its duty. Lyles v. West. U. Tel. Co., 84 S. C. 1, 65 S. E. 832, 137 Am. St. Rep. 829; Lefler v. West. U. Tel. Co., 131 N. C. 355, 42 S. E. 819, 59 L. R. A. 477; West. U. Tel. Co. v. Shaw, 40 Tex. Civ. App. 277, 90 S. W. 58; Hinson v. West. U. Tel. Co., 91 S. C. 338, 74 S. E. 752, Ann. Cas. 1914A, 114.

transmitted,<sup>93</sup> or that a material word has been omitted in the message,<sup>94</sup> it is presumed that the company has been guilty of negligence, and the burden is on the latter to disprove such negligence.<sup>95</sup> This is the universal rule; and when the plaintiff has

Am. St. Rep. 581; Kirby v. West. U. Tel. Co., 77 S. C. 404, 58 S. E. 10, 122 Am. St. Rep. 580; Ogilvie v. West. U. Tel. Co., 83 S. C. 8, 64 S. E. 860, 137 Am. St. Rep. 790; West. U. Tel. Co. v. Fatman, 73 Ga. 285, 54 Am. Rep. 877; Potter v. West. U. Tel. Co., 138 Iowa, 406, 116 N. W. 130; West. U. Tel. Co. v. Scirele, 103 Ind. 227, 2 N. E. 604; Harkness v. West. U. Tel. Co., 73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672; West. U. Tel. Co. v. Parsons, 72 S. W. 800, 24 Ky. Law Rep. 2008; West. U. Tel. Co. v. Fisher, 107 Ky. 513, 54 S. W. 830, 21 Ky. Law Rep. 1293; Shepard v. West. U. Tel. Co., 143 N. C. 244, 55 S. E. 704, 118 Am. St. Rep. 796; Kendall v. West. U. Tel. Co., 56 Mo. App. 192; Alexander v. West. U. Tel. Co., 141 N. C. 75, 53 S. E. 657; Carter v. West. U. Tel. Co., 141 N. C. 374, 54 S. E. 274; Kirby v. West. U. Tel. Co., 77 S. C. 404, 58 S. E. 10, 122 Am. St. Rep. 580; Green v. West. U. Tel. Co., 136 N. C. 489, 49 S. E. 165, 103 Am. St. Rep. 955, 67 L. R. A. 985, 1 Ann. Cas. 349; Eaker v. West. U. Tel. Co., 75 S. C. 97, 55 S. E. 129; Harrison v. West. U. Tel. Co., 136 N. C. 381, 48 S. E. 772; Arial v. West. U. Tel. Co., 70 S. C. 418, 50 S. E. 6; Cogdell v. West. U. Tel. Co., 135 N. C. 431, 47 S. E. 490; Hellams v. West. U. Tel. Co., 70 S. C. 83, 49 S. E. 12; Poulnot v. West. U. Tel. Co., 69 S. C. 545, 48 S. E. 622; Young v. West. U. Tel. Co., 65 S. C. 93, 43 S. E. 448; Hendricks v. West. U. Tel. Co., 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658; Telephone Co. v. Brown, 104 Tenn. 56, 55 S. W. 155, 78 Am. St. Rep. 906, 50 L. R. A. 277; West. U. Tel. Co. v. Bouchell, 28 Tex. Civ. App. 23, 67 S. W. 159; West. U. Tel. Co. v. Smith, 88 Tex. 9, 28 S. W. 931, 30 S. W. 549; West. U. Tel. Co. v. Carter (Tex. Civ. App.) 20 S. W. 834; West. U. Tel. Co. v. Boots, 10 Tex. Civ. App. 549, 31 S. W. 825; Dorgan v. West. U. Tel. Co., Fed. Cas. No. 4,004; Telephone Co. v. Snell, 3 Ala. App. 263, 56 South. 854; Volquardsen v. Iowa Tel. Co., 148 Iowa, 77, 126 N. W. 928, 28 L. R. A. (N. S.) 554; Baker v. Telephone Co., 87 S. C. 174, 69 S. E. 151; Leppard v. Telephone Co., 88 S. C. 388, 70 S. E. 1004; Garner v. Telephone Co., 87 S. C. 316, 69 S. E. 510; Wilhelm v. Telephone Co., 90 S. C. 536, 73 S. E. 865; Webb v. West. U. Tel. Co., 167 N. C. 483, 83 S. E. 568.

<sup>93</sup> Fowler v. West. U. Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211; State Bank of Commerce v. West. U. Tel. Co., 19 N. M. 211, 142 Pac. 156, L. R. A. 1915A, 120, quoting author.

<sup>94</sup> Fowler v. West. U. Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211. See other cases in note 90, supra.

<sup>95</sup> State Bank of Commerce v. West. U. Tel. Co., 19 N. M. 211, 142 Pac. 156, L. R. A. 1915A, 120, quoting author; West. U. Tel. Co. v. Tyler, 74 Ill. 168, 24 Am. Rep. 279; West. U. Tel. Co. v. Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744; West. U. Tel. Co. v. Scirele, 103 Ind. 227, 2 N. E. 604; Harkness v. West. U. Tel. Co., 73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672; West. U. Tel. Co. v. Chall, 38 Kan. 679, 17 Pac. 309, 5 Am. St. Rep. 795; Cogdell v. West. U. Tel. Co., 135 N. C. 431, 47 S. E. 490; Sherrill v. West. U. Tel. Co., 116 N. C. 655, 21 S. E. 429; West. U. Tel. Co. v. Smith, 88 Tex. 9, 28 S. W. 931, 30 S. W. 549; West. U. Tel. Co. v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500; West. U. Tel. Co. v. Bertram, 1 White & W. Civ. Cas. Ct. App. § 1152; West. U. Tel. Co. v. Cook, 61 Fed. 624, 9 C. C. A. 680; Jackson v. Telephone Co., 174 Mo. App. 70, 156 S. W. 801; Telephone Co. v. Glenn (Tex. Civ. App.) 156 S. W. 1116; Telephone Co. v. Chilton, 100 Ark. 296, 140 S. W. 26; Seddon v. Telephone Co., 146 Iowa, 743, 126 N. W. 969; Lothian v. Telephone Co., 25 S. D. 319, 126 N. W. 621; Telephone Co. v. Ivy, 177 Fed. 63, 100 C. C. A. 481; Garner v. Telephone

shown a delivery to the company and that an error has been made, or that the message has been delayed in its delivery, his case is made out.<sup>96</sup> The reason of the rule is obvious. If the burden were cast upon the plaintiff, he could never make out his case. It would be nothing more nor less than a fight in the dark to impose such a duty upon him, since the proof of these negligent acts are almost always in the sole possession of the defendant company. Being peculiarly within the knowledge of the company, it is no hardship on them to be required to furnish the proof of the causes of errors or delays.<sup>97</sup> Therefore one reason why we think the stipulation in the message blanks requiring the claim for damages to be presented to the company within a certain time is reasonable is that the company may be notified of the injury in time to make a prompt investigation of the matter.<sup>98</sup> The same rule will apply where the suit is against one company, when the error has been made on a connecting line. The burden is on the defendant to show that the connecting line, and not its own negligence, caused the loss.<sup>99</sup>

§ 510. **Same continued—effect of stipulation.**—It has been held that proof of delivery of a message to a telegraph or telephone company for transmission, and an error made in the transmission<sup>100</sup>

Co., 87 S. C. 316, 69 S. E. 510; *Leppard v. Telephone Co.*, 88 S. C. 388, 70 S. E. 1004; *Bailey v. West. U. Tel. Co.*, 227 Pa. 522, 76 Atl. 736, 43 L. R. A. (N. S.) 502, 19 Ann. Cas. 895. See *Potter v. West. U. Tel. Co.*, 138 Iowa, 406, 116 N. W. 130; *Volquardsen v. Iowa Tel. Co.*, 148 Iowa, 77, 126 N. W. 928, 28 L. R. A. (N. S.) 554, failure of telephone company to furnish proper connections within reasonable time.

<sup>96</sup> See § 522.

<sup>97</sup> *State Bank of Commerce v. West. U. Tel. Co.*, 19 N. M. 211, 142 Pac. 156, L. R. A. 1915A, 120, quoting author; *Brown v. West. U. Tel. Co.*, 85 S. C. 495, 67 S. E. 146, 137 Am. St. Rep. 914, need not prove at what point on the line the failure occurred, as in another state, thereby changing the law regarding thereto, *Chattanooga Elec. Ry. Co. v. Mingle*, 103 Tenn. 667, 56 S. W. 23, 76 Am. St. Rep. 703.

<sup>98</sup> *State Bank of Commerce v. West. U. Tel. Co.*, 19 N. M. 211, 142 Pac. 156, L. R. A. 1915A, 120, quoting author.

<sup>99</sup> In *De La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383, the defendant company contended that it was not the first carrier, and that the plaintiff failed to prove that the error in transmission occurred on its line, and showed an expressed provision in its printed blanks that it would not be liable for errors occurring on connecting lines. It was held that, whether defendant was the first carrier or not, it was peculiarly within its power, and it was its duty to prove that the error did not occur on its line. *State Bank of Commerce v. West. U. Tel. Co.*, 19 N. M. 211, 142 Pac. 156, L. R. A. 1915A, 120, quoting author.

<sup>100</sup> *Breese v. United States Tel. Co.*, 48 N. Y. 132, 8 Am. Rep. 526; *Altman v. West. U. Tel. Co.* (Sup.) 84 N. Y. Supp. 54; *Halsted v. Postal Tel. Cable Co.*, 193 N. Y. 293, 85 N. E. 1078, 127 Am. St. Rep. 952, 19 L. R. A. (N. S.) 1021, affirming 120 App. Div. 433, 104 N. Y. Supp. 1016; *Primrose v. West. U. Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; *Jones v. West. U. Tel. Co.* (C. C.)



or an unusual delay in its delivery,<sup>101</sup> will not alone authorize the recovery of more than the price paid for transmission, where the contract of sending contained special limitations of the company's liability.<sup>102</sup> Thus, in some of those jurisdictions which hold the stipulation reasonable which requires the message to be repeated, otherwise the company will not be liable beyond the amount paid for transmission, it is held that such negligence—except for willful misconduct or gross negligence<sup>103</sup>—of the company is not presumed, but that the burden is cast upon the sender to show such by independent facts or by circumstances connected with the principal fact.<sup>104</sup> It was at first, and is now, difficult to show by what method the plaintiff can prove the negligence of these companies; but any independent fact or circumstance, connected with the principal fact, may be resorted to for such proof.<sup>105</sup> It must be

18 Fed. 717. See *Stone v. Cable Co.*, 35 R. I. 498, 87 Atl. 319, 46 L. R. A. (N. S.) 180. Compare *Redington v. Pacific Postal Tel. Co.*, 107 Cal. 317, 40 Pac. 432, 48 Am. St. Rep. 132; *Postal Tel. Cable Co. v. Robertson*, 36 Misc. Rep. 785, 74 N. Y. Supp. 876.

<sup>101</sup> *Birkett v. West. U. Tel. Co.*, 103 Mich. 361, 61 N. W. 645, 50 Am. St. Rep. 374, 33 L. R. A. 404; *Jacob v. West. U. Tel. Co.*, 135 Mich. 600, 98 N. W. 402; *Ayres v. West. U. Tel. Co.*, 65 App. Div. 149, 72 N. Y. Supp. 634; *Riley v. West. U. Tel. Co.*, 8 Misc. Rep. 217, 28 N. Y. Supp. 581. See *Kiley v. West. U. Tel. Co.*, 109 N. Y. 231, 16 N. E. 75. See, also, *Clement v. West. U. Tel. Co.*, 137 Mass. 463; *West. U. Tel. Co. v. Coggin*, 68 Fed. 137, 15 C. C. A. 231.

<sup>102</sup> *Halsted v. Postal Tel. Cable Co.*, 193 N. Y. 293, 85 N. E. 1078, 127 Am. St. Rep. 952, 19 L. R. A. (N. S.) 1021, affirming 120 App. Div. 433, 104 N. Y. Supp. 1016; *Wheelock v. Postal Tel. Cable Co.*, 197 Mass. 119, 83 N. E. 313, 14 Ann. Cas. 188; *Kiley v. West. U. Tel. Co.*, 109 N. Y. 231, 16 N. E. 75; *Ayres v. West. U. Tel. Co.*, 65 App. Div. 149, 72 N. Y. Supp. 634; *Altman v. Telephone Co. (Sup.)* 84 N. Y. Supp. 54.

<sup>103</sup> *Mowry v. West. U. Tel. Co.*, 51 Hun, 126, 4 N. Y. Supp. 666; *Postal Tel. Cable Co. v. Nichols*, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A. (N. S.) 870; *United States Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519; *Fleischner v. Pacific Postal Tel. Cable Co. (C. C.)* 55 Fed. 738; *White v. West. U. Tel. Co. (C. C.)* 14 Fed. 710; *Weld v. Cable Co.*, 148 App. Div. 588, 133 N. Y. Supp. 228; *Lothian v. Telephone Co.*, 25 S. D. 319, 126 N. W. 621. See *Bailey v. West. U. Tel. Co.*, 227 Pa. 522, 76 Atl. 736, 43 L. R. A. (N. S.) 502, 19 Ann. Cas. 895; *Halsted v. Postal Tel. Cable Co.*, 193 N. Y. 293, 85 N. E. 1078, 127 Am. St. Rep. 952, 19 L. R. A. (N. S.) 1021; *Ayres v. West. U. Tel. Co.*, 65 App. Div. 149, 72 N. Y. Supp. 634; *Kiley v. West. U. Tel. Co.*, 109 N. Y. 231, 16 N. E. 75. See, also, *Monsees v. West. U. Tel. Co.*, 127 App. Div. 289, 111 N. Y. Supp. 53.

<sup>104</sup> *Wonnack v. West. U. Tel. Co.*, 58 Tex. 180, 44 Am. Rep. 614; *Aiken v. West. U. Tel. Co.*, 69 Iowa, 31, 28 N. W. 419, 58 Am. Rep. 210; *West. U. Tel. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *Sweatland v. Illinois, etc., Tel. Co.*, 27 Iowa, 433, 1 Am. Rep. 285; *West. U. Tel. Co. v. Bennett*, 1 Tex. Civ. App. 558, 21 S. W. 699; *Redington v. Pacific Postal Tel. Cable Co.*, 107 Cal. 317, 40 Pac. 432, 48 Am. St. Rep. 132. See, also, other cases in note 102, supra.

<sup>105</sup> *Suburban Elec. Co. v. Nugent*, 58 N. J. Law, 658, 34 Atl. 1069, 32 L. R. A. 700.

understood that this rule is only applicable in those jurisdictions where such stipulations are held as being reasonable.<sup>106</sup>

§ 511. **Evidence.**—It does not matter whether the plaintiff sues on the contract of sending, or upon the breach of duty, in order to recover damages for loss or injury sustained by an error made in the transmission or delay in the delivery; he must prove, in general, a delivery of the message to the company,<sup>107</sup> a contract on its part either express or implied to transmit the message, and its failure to perform the duty according to the agreement.<sup>108</sup> In other words, he must show that the company owes him a duty which is imposed on it by law, or which arises out of a contract, and a breach of this duty, whereby he has suffered a loss or an injury.<sup>109</sup> We have elsewhere considered what evi-

<sup>106</sup> West. U. Tel. Co. v. Crall, 38 Kan. 679, 17 Pac. 309, 5 Am. St. Rep. 795; West. U. Tel. Co. v. Tyler, 74 Ill. 168, 24 Am. Rep. 279; Ayer v. West. U. Tel. Co., 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353; Reed v. West. U. Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492; Bartlett v. West. U. Tel. Co., 62 Me. 209, 16 Am. Rep. 437; Sherrill v. West. U. Tel. Co., 116 N. C. 655, 21 S. E. 429; West. U. Tel. Co. v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500; West. U. Tel. Co. v. Cook, 61 Fed. 624, 9 C. C. A. 680; Gillis v. West. U. Tel. Co., 61 Vt. 461, 17 Atl. 736, 15 Am. St. Rep. 917, 4 L. R. A. 611. In a few cases holding such stipulations invalid as against the company's negligence are valid as regard to errors due to unavoidable causes, such as atmospheric interferences, Sweatland v. Illinois, etc., Tel. Co., 27 Iowa, 433, 1 Am. Rep. 285; and the burden is upon the plaintiff to show such negligence, Sweatland v. Illinois, etc., Tel. Co., supra; Aiken v. West. U. Tel. Co., 69 Iowa, 31, 28 N. W. 419, 58 Am. Rep. 210; Postal Tel. Cable Co. v. Sunset Const. Co., 102 Tex. 148, 114 S. W. 98, reversing on other grounds 109 S. W. 265. But see West. U. Tel. Co. v. Tyler, supra; Bartlett v. West. U. Tel. Co., supra.

<sup>107</sup> Alexander v. West. U. Tel. Co., 158 N. C. 473, 74 S. E. 449, 42 L. R. A. (N. S.) 407, acceptance may be found from evidence that, in response to a telephone request, a messenger appeared and took the message. See Graham v. Detroit, etc., R. Co., 151 Mich. 629, 115 N. W. 993, 25 L. R. A. (N. S.) 326. See, also, § 276 et seq.; West. U. Tel. Co. v. Lillard, 86 Ark. 208, 110 S. W. 1035, 17 L. R. A. (N. S.) 836, oral evidence of contents.

<sup>108</sup> Pearsall v. West. U. Tel. Co., 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662; Angell on Carriers (5th Ed.) § 461; Hutchinson on Carriers (2d Ed.) § 759. See, also, West. U. Tel. Co. v. Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; West. U. Tel. Co. v. Lillard, 86 Ark. 208, 110 S. W. 1035, 17 L. R. A. (N. S.) 836.

<sup>109</sup> United States Tel. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519; West. U. Tel. Co. v. Barnes, 95 Tenn. 271, 32 S. W. 207; Ayres v. West. U. Tel. Co., 65 App. Div. 149, 72 N. Y. Supp. 634; Altman v. West. U. Tel. Co. (Sup.) 84 N. Y. Supp. 54; West. U. Tel. Co. v. Smith, 88 Tex. 9, 28 S. W. 931, 30 S. W. 549; West. U. Tel. Co. v. Bennett, 1 Tex. Civ. App. 558, 21 S. W. 699; Hargrave v. West. U. Tel. Co. (Tex. Civ. App.) 60 S. W. 687; West. U. Tel. Co. v. Bertram, 1 White & W. Civ. Cas. Ct. App. § 1152; White v. West. U. Tel. Co. (C. C.) 14 Fed. 710; Hauser v. West. U. Tel. Co., 150 N. C. 557, 64 S. E. 503; Wampum First Nat. Bank v. West. U. Tel. Co., 34 Pa. Super. Ct. R. 488; Slaughter v. West. U. Tel. Co. (Tex. Civ. App.) 112

dence was necessary to constitute a delivery;<sup>110</sup> what necessary to constitute a contract;<sup>111</sup> what presumption arose in such cases;<sup>112</sup> what must be shown where there are connecting lines;<sup>113</sup> and upon whom the burden of proof rests.<sup>114</sup> We shall later consider, at some length, the admissibility of telegrams as evidence,<sup>115</sup> so there is but little to be said at this place. The rule for the admissibility of evidence against telegraph, telephone, and electric companies is the same as that in other cases;<sup>116</sup> the evidence must always be responsive to the issue involved.<sup>117</sup> As we have said, the company may defend by showing that the loss or injury was caused by the act of God, by the public enemy, by public authority,<sup>118</sup> or by the fault or negligence of the plaintiff.<sup>119</sup> Therefore any evidence may be admitted which goes to show that the loss or injury resulted from any one of these causes.<sup>120</sup> These companies may also, as elsewhere stated, limit their common-law duty to a certain extent by a special contract to that effect,<sup>121</sup> or they may limit their other liabilities by stipulations contained in the contract of sending;<sup>122</sup> and when the damages sustained fall within such

S. W. 688; Telephone, etc., Co. v. Glawson, 13 Ga. App. 520, 79 S. E. 488; Cameron v. Telephone Co., 90 S. C. 503, 74 S. E. 929; Telephone Co. v. Cates, 105 Tex. 324, 148 S. W. 281; Mullinax v. Telephone Co., 156 N. C. 541, 72 S. E. 583. As in other civil actions the burden is upon the plaintiff to establish his case. United States Tel. Co. v. Gildersleve, supra; Hauser v. West. U. Tel. Co., supra; West. U. Tel. Co. v. Barnes, supra; White v. West. U. Tel. Co., supra.

<sup>110</sup> See chapter XII.

<sup>111</sup> See chapter XII.

<sup>112</sup> See § 509.

<sup>113</sup> See § 454 et seq.

<sup>114</sup> See § 509.

<sup>115</sup> Chapter XXVII.

<sup>116</sup> See § 513. Evidence the *res gestæ*. Trenton Pass. R. Co. v. Cooper, 60 N. J. Law, 219, 37 Atl. 730, 64 Am. St. Rep. 592, 38 L. R. A. 637; Lewis v. Bowling Green Gas Lt. Co., 135 Ky. 611, 117 S. W. 278, 22 L. R. A. (N. S.) 1169; and the competency and admissibility of expert and opinion evidence, Burns v. Delaware, etc., Tel. Co., 70 N. J. Law, 745, 59 Atl. 220, 592, 67 L. R. A. 956; Block v. Milwaukee St. Ry. Co., 89 Wis. 371, 61 N. W. 1101, 46 Am. St. Rep. 849, 27 L. R. A. 365, holding that a physician is competent to testify that the condition of a person whom he was called upon to attend could have been produced by contact with a wire heavily charged with electricity, and also as to whether in his opinion there was reasonable probability of ultimate recovery from such injury.

<sup>117</sup> See §§ 506, 522.

<sup>118</sup> See chapter XV. See Vinson v. Southern Bell Tel., etc., Co., 188 Ala. 292, 66 South. 100, L. R. A. 1915C, 450, as a result of a cause over which company had no control.

<sup>119</sup> See § 508.

<sup>120</sup> See chapters XII, XIII, XV. See Vinson v. Southern Bell Tel., etc., Co., 188 Ala. 292, 66 South. 100, L. R. A. 1915C, 450.

<sup>121</sup> See chapter XVI.

<sup>122</sup> Id.



limitations or result from a noncompliance with them, evidence which tends to show such facts may be admitted.<sup>123</sup>

§ 512. **Same continued—illustrations.**—No evidence should be admitted which will, in any way, prejudice the rights of either the plaintiff or the company.<sup>124</sup> So it is not proper to admit evidence to show that the defendant is a wealthy corporation; it seems, however, that such evidence may be admitted when there has been a willful injury and exemplary damages are claimed.<sup>125</sup> Evidence which shows the embarrassed financial condition of the sender is inadmissible for the same reason, when the purpose of such is to have a bearing on the question of damages for the loss of a valuable bargain in consequence of the company's negligence.<sup>126</sup> Evidence cannot be admitted to show that, for the alleged negligence, a deduction had been made from the pay of the operator by one of the superior officers.<sup>127</sup> Where the plaintiff sues to recover damages sustained by a failure to deliver a message to a physician, requesting him to visit the former's family, evidence which tends to show that the medical charges were not prepaid according to the physician's practice is inadmissible.<sup>128</sup> The statements, declarations, or acts of the agents or operators of these companies are only admissible when others, similar to these, are allowed in other cases; that is, they can only be admitted when they became a part of the *res gestæ*.<sup>129</sup> The plaintiff may introduce evidence showing that other messages were sent on the same day as his, and were properly transmitted and delivered;<sup>130</sup> and when the action is for mental suffering, caused by the plaintiff being kept away from the

<sup>123</sup> Id.

<sup>124</sup> See § 520.

<sup>125</sup> West. U. Tel. Co. v. Henderson, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148. See § 513. Carmichael v. Southern Bell, etc., Co., 162 N. C. 333, 78 S. E. 507, Ann. Cas. 1915A, 983.

<sup>126</sup> West. U. Tel. Co. v. Way, 83 Ala. 542, 4 South. 844. See § 514.

<sup>127</sup> Grinnell v. West. U. Tel. Co., 113 Mass. 299, 18 Am. Rep. 485.

<sup>128</sup> West. U. Tel. Co. v. Henderson, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148.

<sup>129</sup> Aiken v. West. U. Tel. Co., 5 S. C. 358; West. U. Tel. Co. v. Way, 83 Ala. 542, 4 South. 844; West. U. Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772; West. U. Tel. Co. v. Lydon, 82 Tex. 364, 18 S. W. 701. See, also, Union R., etc., Co. v. Riegel, 73 Pa. 72; Green v. Boston, etc., R. Co., 128 Mass. 221, 35 Am. Rep. 370; Bennett v. Northern Pac. R. Co., 12 Or. 49, 6 Pac. 160; Queen v. Peters, 16 New Bruns. 77; Carmichael v. Southern Bell Tel., etc., Co., 162 N. C. 333, 78 S. E. 507, Ann. Cas. 1915A, 983, holding that, in an action against a telegraph company for wrongful and malicious removal of plaintiff's telephone, evidence of plaintiff's daughter as to the misconduct of defendant's agent in thrusting a bill into her hand and abruptly telling her that he would cut the phone out if it was not paid promptly, was admissible as *res gestæ*.

<sup>130</sup> West. U. Tel. Co. v. Lydon, 82 Tex. 364, 18 S. W. 701.

bedside of his dying mother, evidence may be admitted to show that the plaintiff was the favorite child of the mother.<sup>131</sup> Where the plaintiff's good faith, in making a certain purchase in pursuance of the erroneous telegram, is in question, he may show his understanding of the message and that he acted on the basis of such understanding.<sup>132</sup> It may be said, in conclusion, that all evidence pertinent to the substantial issue involved, and tending in any wise to throw light on the whole transaction, is admissible,<sup>133</sup> subject, however, to the general exclusionary rules of evidence applied in other actions.<sup>134</sup>

§ 513. **Evidence of negligence—wealth or poverty of either party—company.**—It might be well to discuss at this place the admissibility of certain evidence touching on the wealth or poverty of either party to cases arising out of the company's negligence in the transmission and delivery of messages. It is a general rule of evidence that no evidence is admissible save such as is material, relative and pertaining to the allegations contained in the pleadings,<sup>135</sup> and, in a case arising out of negligence, no facts can be

<sup>131</sup> *Id.*

<sup>132</sup> *Aiken v. West. U. Tel. Co.*, 69 Iowa, 31, 28 N. W. 419, 58 Am. Rep. 210.

<sup>133</sup> *Denver Con. Elec. Co. v. Simpson*, 21 Colo. 271, 41 Pac. 499, 31 L. R. A. 566; *Rucker v. Sherman Oil, etc., Co.*, 29 Tex. Civ. App. 418, 68 S. W. 818; *Alabama City R., etc., Co. v. Appleton*, 171 Ala. 324, 54 South. 638, Ann. Cas. 1913A, 1181; *Telephone, etc., Co. v. Abeles*, 94 Ark. 254, 126 S. W. 724, 140 Am. St. Rep. 115, 21 Ann. Cas. 1006; *Dow v. Telephone, etc., Co.*, 157 Cal. 182, 106 Pac. 587; *Electric Co. v. Walters*, 39 Colo. 301, 318, 89 Pac. 815; *Younie v. Water Co.*, 15 Idaho, 56, 96 Pac. 193; *Gas, etc., Co. v. Clark*, 109 Ill. App. 20; *Gas, etc., Co. v. State*, 109 Md. 186, 72 Atl. 651; *Anthony v. Telephone Co.*, 165 Mich. 388, 130 N. W. 659; *Smith v. Telephone Co.*, 113 Mo. App. 429, 87 S. W. 71; *Fish v. Light, etc., Co.*, 189 N. Y. 336, 82 N. E. 150, 13 L. R. A. (N. S.) 226; *Gas, etc., Co. v. Ocon* (Tex. Civ. App.) 130 S. W. 846; *Nagle v. Hake*, 123 Wis. 256, 101 N. W. 409; *Leque v. Gas, etc., Co.*, 133 Wis. 547, 113 N. W. 946; *Railroad, etc., Co. v. Miles*, 88 Miss. 204, 40 South. 748; *Ohrstrom v. Tacoma*, 57 Wash. 121, 106 Pac. 629; *Thompson v. Light, etc., Co.*, 77 N. H. 92, 88 Atl. 216; *Webster v. Light, etc., Co.*, 158 App. Div. 210, 143 N. Y. Supp. 57; *Swan v. Railroad Co.*, 41 Utah, 518, 127 Pac. 267.

<sup>134</sup> *Martinek v. Swift*, 122 Iowa, 611, 98 N. W. 477; *Fitzgerald v. Edison* Ill. Co., 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732; *Alabama City, etc., R. Co. v. Appleton*, 171 Ala. 324, 54 South. 638, Ann. Cas. 1913A, 1181; *Dow v. Telephone, etc., Co.*, 157 Cal. 182, 106 Pac. 587; *Light Co. v. Fredericks*, 109 Md. 595, 72 Atl. 534; *Milne v. Telephone Co.*, 29 R. I. 504, 72 Atl. 716; *Trac-tion Co. v. Daily*, 111 Va. 665, 69 S. E. 963.

<sup>135</sup> *West. U. Tel. Co. v. James*, 31 Tex. Civ. App. 503, 73 S. W. 79; *Whitten v. West. U. Tel. Co.*, 141 N. C. 361, 54 S. E. 289; *West. U. Tel. Co. v. Karr*, 5 Tex. Civ. App. 60, 24 S. W. 302; *West. U. Tel. Co. v. Westmoreland*, 150 Ala. 654, 43 South. 790; *Telephone Co. v. West*, 165 Ala. 399, 51 South. 740; *Telephone Co. v. Henderson*, 62 Tex. Civ. App. 457, 131 S. W. 1153; *Telephone Co. v. Guinn* (Tex. Civ. App.) 130 S. W. 616; *Telephone Co. v. Landry* (Tex. Civ. App.) 134 S. W. 848; *Ellison v. Telephone Co.*, 163 N. C. 5, 79 S. E. 277;

alleged in the pleadings, or admitted in evidence, as a general rule, except such as are descriptive of the negligent act.<sup>136</sup> The first question which presents itself under this subject is whether or not the wealth or poverty of either of the parties should be shown in the case? As a general rule, the wealth of the company cannot be shown in a case arising out of its negligent acts. In the first place, it is not the wealth of the company that causes the negligent act, nor the injury arising therefrom; and for this reason the pleadings would be demurrable if such allegations were contained therein; and another reason would be, if this fact were allowed to remain in the bill as material, or if there were evidence admitted to this effect over the company's objections, it would have the tendency to prejudice the jury against the company. But if the negligent act of the company is alleged to have been willful, for which exemplary or punitive damages are claimed, the wealth of the company may be shown.<sup>137</sup> This kind of damages in the main are im-

Telephone Co. v. Daniels (Tex. Civ. App.) 152 S. W. 1116. See *Marab v. Telephone Co.*, 167 Mich. 192, 132 N. W. 568; *Telephone Co. v. White* (Tex. Civ. App.) 149 S. W. 790. Immaterial or irrelevant evidence inadmissible. *Grinnell v. West. U. Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485; *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844; *West. U. Tel. Co. v. Mellon*, 96 Tenn. 66, 33 S. W. 725; *West. U. Tel. Co. v. Stiles*, 89 Tex. 312, 34 S. W. 438; *West. U. Tel. Co. v. Waller*, 96 Tex. 589, 74 S. W. 751, 97 Am. St. Rep. 936; *West. U. Tel. Co. v. Jackson*, 35 Tex. Civ. App. 419, 80 S. W. 649; *West. U. Tel. Co. v. McMillan* (Tex. Civ. App.) 25 S. W. 821; *Telephone Co. v. Cleveland*, 169 Ala. 131, 53 South. 80, Ann. Cas. 1912B, 534; *Jenkins v. Telephone, etc., Co.*, 7 Ga. App. 484, 67 S. E. 124; *Telephone Co. v. Snell*, 3 Ala. App. 263, 56 South. 854.

<sup>136</sup> *West. U. Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728; *Telephone Co. v. Henderson*, 62 Tex. Civ. App. 457, 131 S. W. 1153; *Woods v. West. U. Tel. Co.*, 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581; *West. U. Tel. Co. v. James*, 31 Tex. Civ. App. 503, 73 S. W. 79; *West. U. Tel. Co. v. Hearne*, 7 Tex. Civ. App. 67, 26 S. W. 478; *West. U. Tel. Co. v. Drake*, 14 Tex. Civ. App. 601, 38 S. W. 632; *Gulf, etc., R. Co. v. Wilson*, 69 Tex. 739, 7 S. W. 653; *West. U. Tel. Co. v. Crawford* (Tex. Civ. App.) 75 S. W. 843; *Pacific Postal Tel. Cable Co. v. Fleischner*, 66 Fed. 899, 14 C. C. A. 166; *Arkansas, etc., R. Co. v. Stroude*, 82 Ark. 117, 100 S. W. 760. See *West. U. Tel. Co. v. Drake*, supra; *West. U. Tel. Co. v. Moran*, 52 Tex. Civ. App. 117, 113 S. W. 625; *Bailey v. West. U. Tel. Co.*, 150 N. C. 316, 63 S. E. 1044; *West. U. Tel. Co. v. Frith*, 105 Tenn. 167, 58 S. W. 118; *West. U. Tel. Co. v. Lydon*, 82 Tex. 364, 18 S. W. 701; *Bolton v. West. U. Tel. Co.*, 76 S. C. 529, 57 S. E. 543; *Sabine Valley Tel. Co. v. Oliver*, 46 Tex. Civ. App. 428, 102 S. W. 925; *Mize v. Rocky Mountain Bell Tel. Co.*, 38 Mont. 521, 100 Pac. 971, 129 Am. St. Rep. 659, 16 Ann. Cas. 1189, not necessary to prove every act of negligence charged, but should show that it directly produced the injury; *Gannon v. Laclede Gas Lt. Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505, variance between allegation and proof not always fatal; *Makay v. Southern Bell Tel., etc., Co.*, 111 Ala. 337, 19 South. 695, 56 Am. St. Rep. 59, 31 L. R. A. 589, direct proof not necessary where defendant impliedly admits the fact.

<sup>137</sup> *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St.



posed on the company by way of punishment for its willful wrongs. In order to impose the proper punishment to meet the injury inflicted, the wealth of the company must be considered; for the greater the wealth of the latter, the greater must be the damages imposed. The most successful way of punishing these and other corporations for their willful wrongs is by awarding damages against them for such wrongs, and the better remedy in deterring the commission of other and similar wrongs is by awarding damages in every case commensurate with their wealth.

§ 514. **Same continued—party injured.**—Where the plaintiff has lost a great bargain in a contract of sale of property, by the company negligently delaying a message concerning such sale, the evidence of the embarrassed financial condition of the sendee is not admissible.<sup>138</sup> Neither could he show the condition of his family, nor his future prospects in other lines of business; but only such evidence could be admitted as pertained to the negligent act of the company. It seems, however, that where the negligent act has been willful, he may show his wealth and standing or reputation. Almost the same reasons may be given why the wealth or reputation of the plaintiff should be shown as those stated above, in the admissibility of evidence of the wealth of the company. Damages in the way of compensation for a willful wrong of the company to a man of limited means or of small reputation, would not be sufficient for a man of greater wealth or more extensive reputation. Therefore, in considering the amount of damages to be awarded for a willful act of the company in the transmission of messages intrusted to its care, the wealth or reputation of the plaintiff may be shown in order to arrive at a proper amount of damages.<sup>139</sup>

§ 515. **Declaration of agents.**—The general principle of law with respect to the admissibility of statements and declarations of agents as against their principals are applicable here. Therefore statements or declarations of agents or employés of these companies are inadmissible as evidence against the company,<sup>140</sup> unless

Rep. 148; *Carmichael v. Southern Bell, etc., Tel. Co.*, 162 N. C. 333, 78 S. E. 507, Ann. Cas. 1915A, 983.

<sup>138</sup> *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844.

<sup>139</sup> See *West. U. Tel. Co. v. Holland*, 11 Ala. App. 510, 66 South. 926.

<sup>140</sup> *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844; *Graddy v. West. U. Tel. Co.*, 43 S. W. 468, 19 Ky. Law Rep. 1455; *Sweatland v. Illinois, etc., Tel. Co.*, 27 Iowa, 433, 1 Am. Rep. 285; *Grinnell v. West. U. Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485; *Aiken v. West. U. Tel. Co.*, 5 S. C. 358; *Southwestern Tel., etc., Co. v. Gotcher*, 93 Tex. 114, 53 S. W. 686; *West. U. Tel. Co. v. Wofford* (Tex. Civ. App.) 42 S. W. 119.

the same is made while acting within the scope of their duties, at the time when the negligent act is alleged to have been committed, and is made with reference to such act.<sup>141</sup> In other words, the declaration or statement must be part of the *res gesta*.<sup>142</sup> Thus a statement made by an agent of a telegraph company is not competent as against the company, to prove that a message was not transmitted, when not made in the performance of any duty relating to its transmission.<sup>143</sup> But a statement that the message had not been delivered, made in answer to an inquiry, has been held to be admissible as a "part of the same transaction," and not relating to past occurrences.<sup>144</sup> Every statement or declaration of an agent of these companies, telling how the negligent act was committed, and made at or during the time of such commission, is admissible as being that of the company, to show how the same was committed.<sup>145</sup> Thus the statement of the company's messenger that he cannot find the addressee—who is the party injured—and made at the time he is looking for the addressee, is admissible against the company;<sup>146</sup> or any statement made by the messenger concerning the contents of the message, and which, it was claimed, the com-

<sup>141</sup> *Evans v. West. U. Tel. Co.*, 102 Iowa, 219, 71 N. W. 219; *West. U. Tel. Co. v. Rowell*, 153 Ala. 295, 45 South. 73; *Alabama City, etc., R. Co. v. Appleton*, 171 Ala. 324, 54 South. 638, Ann. Cas. 1913A, 1181; *Fail v. West. U. Tel. Co.*, 80 S. C. 207, 60 S. E. 697, 61 S. E. 258; *Carland v. West. U. Tel. Co.*, 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280; *Glover v. West. U. Tel. Co.*, 78 S. C. 502, 59 S. E. 526; *West. U. Tel. Co. v. Simmons* (Tex. Civ. App.) 93 S. W. 686; *West. U. Tel. Co. v. Cooper*, 29 Tex. Civ. App. 591, 69 S. W. 427; *West. U. Tel. Co. v. Davis*, 24 Tex. Civ. App. 427, 59 S. W. 46; *West. U. Tel. Co. v. Reeves*, 8 Tex. Civ. App. 37, 27 S. W. 318; *West. U. Tel. Co. v. Bennett*, 1 Tex. Civ. App. 558, 21 S. W. 699; *West. U. Tel. Co. v. Lydon*, 82 Tex. 364, 18 S. W. 701; *Southern Tel., etc., Co. v. Evans*, 54 Tex. Civ. App. 63, 116 S. W. 418; *City of Austin v. Nichols*, 42 Tex. Civ. App. 5, 94 S. W. 336; *Lynchburg Tel. Co. v. Booker*, 103 Va. 594, 50 S. E. 148; *East Tennessee Tel. Co. v. Sims*, 18 Ky. Law Rep. 761, 20 Ky. Law Rep. 1330, 36 S. W. 171, 38 S. W. 131; *West. U. Tel. Co. v. Wells*, 50 Fla. 474, 39 South. 838, 2 L. R. A. (N. S.) 1072, 111 Am. St. Rep. 129, 7 Ann. Cas. 531, not hearsay; *Vinson v. Southern Bell Tel., etc., Co.*, 188 Ala. 292, 66 South. 100, L. R. A. 1915C, 450.

<sup>142</sup> *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844; *Lewis v. Bowling Green Gas L. Co.*, 135 Ky. 611, 117 S. W. 278, 22 L. R. A. (N. S.) 1169; *Harrington v. Com'rs*, 153 N. C. 437, 69 S. E. 399. See other cases in note 141, *supra*. But see *Zentner v. Oshkosh Gas L. Co.*, 126 Wis. 196, 105 N. W. 911; *City of Wynnewood v. Cox*, 31 Okl. 563, 122 Pac. 528, Ann. Cas. 1913E, 349.

<sup>143</sup> *Aiken v. West. U. Tel. Co.*, 5 S. C. 358.

<sup>144</sup> *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844.

<sup>145</sup> See cases in note 141, *supra*.

<sup>146</sup> *Evans v. West. U. Tel. Co.*, 102 Iowa, 219, 71 N. W. 219. See, also, *Carland v. West. U. Tel. Co.*, 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280; *West. U. Tel. Co. v. Lydon*, 82 Tex. 364, 18 S. W. 701.

pany wrongfully and negligently disclosed, and made at the time the messenger was delivering same, is admissible against the company to show that the contents of the message were negligently disclosed.<sup>147</sup>

§ 516. **Subsequent acts of company—of plaintiff.**—Any act of the company made through its agents, and after the time the negligent act of the company is claimed to have been committed, and not connected with said negligence, cannot be shown against the company in an action against it for damages caused by such neglect.<sup>148</sup> Thus, in an action against a telegraph company for negligence in the transmission of a message, evidence is inadmissible against the company to show that, because of the alleged negligence, one of its officers made a deduction from the pay of one of its operators.<sup>149</sup> Or, if one of the operators was discharged a few days after the negligent act, or if new and different machinery or instruments were substituted for those in use at the time of the act, these facts could not be shown in evidence against the company in an action for the negligent act.<sup>150</sup> But any subsequent act of the plaintiff toward the company, disconnected with the business transaction in which the negligent act is claimed to have been committed, yet in the furtherance of the consummation of such business, may be admitted to show the negligence of the company; <sup>151</sup> as, where the sender sends a second message to the

<sup>147</sup> West. U. Tel. Co. v. Bennett, 1 Tex. Civ. App. 558, 21 S. W. 699. See, also, Cocke v. West. U. Tel. Co., 84 Miss. 380, 36 South. 392.

<sup>148</sup> Alabama City, etc., R. Co. v. Appleton, 171 Ala. 324, 54 South. 638, Ann. Cas. 1913A, 1181; Colorado Elec. Co. v. Lubbers, 11 Colo. 505, 19 Pac. 479, 7 Am. St. Rep. 255; Ziehm v. United Elec., etc., P. Co., 104 Md. 48, 64 Atl. 61; Kraatz v. Brush Elec. L. Co., 82 Mich. 457, 46 N. W. 787; City of Wynnewood v. Cocke, 31 Okl. 563, 122 Pac. 528, Ann. Cas. 1913E, 349; Geer v. New York, etc., Tel. Co., 144 App. Div. 874, 129 N. Y. Supp. 784; Harrington v. Com'rs, 153 N. C. 437, 69 S. E. 399; Pennsylvania Tel. Co. v. Varnau (Pa.) 15 Atl. 624; Randall v. Northwestern Tel. Co., 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17. See, also, § 209.

<sup>149</sup> See Cocke v. West. U. Tel. Co., 84 Miss. 380, 36 South. 392.

<sup>150</sup> See § 209.

<sup>151</sup> Ala. City, etc., R. Co. v. Appleton, 171 Ala. 324, 54 South. 638, Ann. Cas. 1913A, 1181; Pennsylvania Tel. Co. v. Varnau (Pa.) 15 Atl. 624; Randall v. Northwestern Tel. Co., 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17. See, also, Wittleder v. Citizens' Elec. Ill. Co., 47 App. Div. 410, 62 N. Y. Supp. 297; Southwestern Tel., etc., Co. v. Thompson (Tex. Civ. App.) 157 S. W. 1185, as to contest of ownership or maintenance of appliance. Subsequent repairs may be incidentally admissible as proof of the conditions existing at the time of the accident. Dow v. Sunset, etc., Tel. Co., 157 Cal. 182, 106 Pac. 587; Kath v. E. St. Louis, etc., R. Co., 232 Ill. 126, 83 N. E. 533, 15 L. R. A. (N. S.) 1109; Consolidated Gas Elec., etc., Co. v. State, 109 Md. 186, 72 Atl. 651. It may be shown that when a certain condition was remedied soon after an accident the difficulty causing the particular injury ceased. Dow v. Sunset,



operator at the destination of the first message with instructions to deliver the first, this act of the plaintiff may be admitted to show the negligent delay in delivering the first.<sup>152</sup> And it has further been held that evidence could be admitted to show that the plaintiff sent another message at the same time to the same place—but to another person—and received a reply to same, in order to show that the company was guilty of negligence in transmitting and delivering the first.<sup>153</sup>

**§ 517. Evidence of plaintiff's good faith—erroneous messages.** When a message has been erroneously transmitted and acted on by the plaintiff to his injury, any evidence as to his understanding of the message may be admitted for the purpose of showing his good faith in relying on it, as understood, and that he acted on the basis of that understanding.<sup>154</sup> Thus the plaintiff, who receives in reply to a message to his stockholder a message stating the price of cattle, and buys according to his understanding of the message in such a way as to make a profit on them, may introduce, as evidence, the telegram received, to show whether or not the error was such as would lead a careful and prudent man to act thereon as he acted, and thereby to show his good or bad faith.<sup>155</sup> And where the meaning of a telegram is couched in such terms as to be ambiguous to persons not engaged in the same business as that of the plaintiff, it may be explained by the testimony of the sender.<sup>156</sup> Thus evidence as to the price of goods in certain markets on a specified day, by a person who testifies that he knew the fact, is competent to go to the jury in the absence of evidence that he did not know such fact. The object in introducing such latter evidence is to prove that the price had advanced in the meantime, and that plaintiff was therefore obliged to pay a higher price than would have been necessary had the first message been sent promptly.

etc., Tel. Co., *supra*; Union L., etc., Power Co. v. Lakeman, 156 Ky. 33, 160 S. W. 723, in which the court said: "Changes, repairs, or precautions after an injury are not admissible to show negligence, or as amounting to an admission of negligence. But one well-settled exception to the rule is that such evidence is admissible to show that the condition complained of caused the injury." See § 209. See, also, Vinson v. Southern Bell Tel., etc., Co., 188 Ala. 292, 66 South. 100, L. R. A. 1915C, 450.

<sup>152</sup> Grinnell v. West. U. Tel. Co., 113 Mass. 299, 18 Am. Rep. 485.

<sup>153</sup> West. U. Tel. Co. v. Frith, 105 Tenn. 167, 58 S. W. 118.

<sup>154</sup> West. U. Tel. Co. v. Lydon, 82 Tex. 364, 18 S. W. 701; Aiken v. West. U. Tel. Co., 69 Iowa, 31, 28 N. W. 419, 58 Am. Rep. 210; U. S. Tel. Co. v. Wenger, 55 Pa. 262, 93 Am. Dec. 751.

<sup>155</sup> West. U. Tel. Co. v. Lydon, 82 Tex. 364, 18 S. W. 701; Henry v. West. U. Tel. Co., 73 Wash. 260, 131 Pac. 812, 46 L. R. A. (N. S.) 412.

<sup>156</sup> Aiken v. West. U. Tel. Co., 69 Iowa, 31, 28 N. W. 419, 58 Am. Rep. 210.

§ 518. **Same continued—other cases.**—In an action against a telegraph company for failure to deliver a message, if the defendant attempts to justify itself under the plea that the plaintiff was an obscure and unknown person, the latter may testify as to the nature of his business, or introduce evidence to show a want of due diligence on the part of the company to ascertain his whereabouts.<sup>157</sup> He may tender and introduce in evidence business cards, letter heads and envelopes (particularly after he has testified, without objection, that he so used them), for the purpose of showing that he had used the ordinary means of advertising himself, and that defendant, in the exercise of reasonable diligence, might have found some person who could give information as to his address.<sup>158</sup> Evidence of the proximity of the place of business and the residence of the plaintiff to the office to which the message was transmitted,<sup>159</sup> and that it could have been forwarded to him from either place in time to prevent the loss, is competent.<sup>160</sup> Where the message on which suit is brought for failure to deliver was addressed to a physician, the company cannot introduce evidence in its defense that it was the custom of such physician not to make certain calls without prepayment of his professional charges.<sup>161</sup> Since it is not right for these companies to speculate on the chances that such summons will or will not be obeyed, they cannot, therefore, introduce evidence respecting such speculations, or evidence which would furnish no excuse for the negligence com-

<sup>157</sup> Messenger informed, *West. U. Tel. Co. v. Waller*, 37 Tex. Civ. App. 515, 84 S. W. 695; *West. U. Tel. Co. v. Bell*, 48 Tex. Civ. App. 359, 107 S. W. 570, well known; *West. U. Tel. Co. v. James*, 31 Tex. Civ. App. 503, 73 S. W. 79; *West. U. Tel. Co. v. Drake*, 14 Tex. Civ. App. 601, 38 S. W. 632; *Gulf, etc., R. Co. v. Wilson*, 69 Tex. 739, 7 S. W. 653, by witness; *West. U. Tel. Co. v. James*, supra; *Martin v. West. U. Tel. Co.*, 81 S. C. 432, 62 S. E. 833, no inquiry was made of him; *Arkansas, etc., R. Co. v. Stroude*, 82 Ark. 117, 100 S. W. 760; *West. U. Tel. Co. v. James*, supra. But see *West. U. Tel. Co. v. Craig*, 44 Tex. Civ. App. 214, 90 S. W. 681.

<sup>158</sup> *West. U. Tel. Co. v. Collins*, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515, note. See, also, *Carland v. West. U. Tel. Co.*, 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280. See *West. U. Tel. Co. v. Waller* (Tex. Civ. App.) 72 S. W. 264.

<sup>159</sup> *West. U. Tel. Co. v. James*, 31 Tex. Civ. App. 503, 73 S. W. 79; *West. U. Tel. Co. v. Woods*, 56 Kan. 737, 44 Pac. 989. Where other telegrams had been delivered to him, *West. U. Tel. Co. v. Manker*, 145 Ala. 418, 41 South. 850; without difficult search, *West. U. Tel. Co. v. Davis*, 24 Tex. Civ. App. 427, 59 S. W. 46; if inquiry had been made, information would have been given, *West. U. Tel. Co. v. Drake*, 14 Tex. Civ. App. 601, 38 S. W. 632. But see *West. U. Tel. Co. v. Redinger*, 22 Tex. Civ. App. 362, 54 S. W. 417, not within the delivery limits.

<sup>160</sup> *Gulf, etc., R. Co. v. Wilson*, 69 Tex. 739, 7 S. W. 653.

<sup>161</sup> *West. U. Tel. Co. v. Woods*, 56 Kan. 737, 44 Pac. 989.

plained of.<sup>162</sup> Letters and statements of the addressee as to the reasons for his failure to purchase stock for the plaintiff, ordered by letter and telegram, have been held to be inadmissible in any action for failure to deliver the telegram.<sup>163</sup> When a telegraph company contracts to furnish an oil broker with accurate quotations of prices of oil, and to transmit his message for purchases and sales, he may show, when sued on the contract, the quotations furnished and directions given in reliance thereon.<sup>164</sup> And his testimony as to purchases and sales made under such directions, at places where he was not personally present, is admissible, and cannot be excluded under the rule requiring the production of the best evidence, as the purpose of the rule is to exclude evidence merely substitutional in its character.<sup>165</sup> On failure to deliver a message, it is not error to exclude evidence which shows that the message was sent by telephone, where it was not delivered.<sup>166</sup>

**§ 519. Questions for the court.**—Questions of law arising in actions against telegraph, telephone, and electric companies are for the determination of the court.<sup>167</sup> It is the duty of the court to construe the pleadings as a matter of law and to determine the issue made, the sufficiency of the allegations, and whether they are sufficiently denied.<sup>168</sup> The question whether there is variance between the pleadings and the proof is also for the court to determine. The court should determine the admissibility, materiality, relevancy, or competency of evidence, or the competency of witnesses. If, on the one hand, no material or essential matter in the pleadings is supported by evidence, or, on the other, the evidence is clear and without conflict, the court may direct a verdict or grant a nonsuit,<sup>169</sup> and should do so if requested.<sup>170</sup> The

<sup>162</sup> West. U. Tel. Co. v. Henderson, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; Telephone Co. v. Cleveland, 169 Ala. 131, 53 South. 80, Ann. Cas. 1912B, 534.

<sup>163</sup> West. U. Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728.

<sup>164</sup> U. S. Tel. Co. v. Wenger, 55 Pa. 262, 93 Am. Dec. 751.

<sup>165</sup> West. U. Tel. Co. v. Stevenson, 128 Pa. 442, 18 Atl. 441, 15 Am. St. Rep. 687, 5 L. R. A. 515.

<sup>166</sup> West. U. Tel. Co. v. Jones, 69 Miss. 658, 13 South. 471, 30 Am. St. Rep. 579.

<sup>167</sup> Heimann v. West. U. Tel. Co., 57 Wis. 562, 16 N. W. 32; West. U. Tel. Co. v. Lehman, 105 Md. 442, 66 Atl. 296, measure of damages, a question of law.

<sup>168</sup> West. U. Tel. Co. v. Saunders, 164 Ala. 234, 51 South. 176, 137 Am. St. Rep. 35.

<sup>169</sup> Brumfield v. West. U. Tel. Co., 97 Iowa, 693, 66 N. W. 898; Hartstein v.

<sup>170</sup> West. U. Tel. Co. v. Elliott, 131 Ky. 340, 115 S. W. 228, 22 L. R. A. (N. S.) 761; West. U. Tel. Co. v. Housewright, 5 Tex. Civ. App. 1, 23 S. W. 824; Cutts v. West. U. Tel. Co., 71 Wis. 46, 36 N. W. 627.



construction of the contracts of transmission<sup>171</sup> and other writing<sup>172</sup> in the case is a question of law, and it is the duty of the court to construe them, and state to the jury their terms and legal effect. It has ordinarily been held that the reasonableness of stipulations contained in the contracts of transmission limiting the common-law liability of telegraph companies, and the rules and regulations of these companies which affect the conduct of their business regarding their office hours<sup>173</sup> are questions of law to be determined by the court. However, it has been held that it was a question for the jury whether a certain stipulation which is ordinarily valid would be unreasonable in its application to the facts and circumstances of a particular case.<sup>174</sup>

§ 520. **Questions for the jury.**—It is a general rule that all questions of fact should be left to the jury.<sup>175</sup> Thus it is usually a question for the jury to determine, under proper instructions from the court, whether, under the circumstances of a given case, the company on the one hand was guilty of the acts and omissions

West. U. Tel. Co., 89 Wis. 531, 62 N. W. 412; *Petty v. Telephone Co.*, 138 Ga. 314, 75 S. E. 152; *Telephone Co. v. Calhoun*, 13 Ga. App. 479, 79 S. E. 371; *Wells v. West. U. Tel. Co.*, 144 Iowa, 605, 123 N. W. 371, 24 L. R. A. (N. S.) 1045, 138 Am. St. Rep. 317.

<sup>171</sup> *Thompson v. West. U. Tel. Co.*, 10 Tex. Civ. App. 120, 30 S. W. 250.

<sup>172</sup> *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844.

<sup>173</sup> *West. U. Tel. Co. v. Ford*, 77 Ark. 531, 92 S. W. 528; *West. U. Tel. Co. v. Love Banks Co.*, 73 Ark. 205, 83 S. W. 949, 3 Ann. Cas. 712; *West. U. Tel. Co. v. Crider*, 107 Ky. 600, 54 S. W. 963, 21 Ky. Law Rep. 1336; *West. U. Tel. Co. v. Scott*, 87 S. W. 289, 27 Ky. Law Rep. 975; *West. U. Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608, 21 S. W. 638; *Id.* (Tex. Civ. App.) 30 S. W. 494; *Heimann v. West. U. Tel. Co.*, 57 Wis. 562, 16 N. W. 32; *Smith v. West. U. Tel. Co.*, 109 Ark. 35, 158 S. W. 975. *Contra*, *Brown v. West. U. Tel. Co.*, 6 Utah, 219, 21 Pac. 988.

<sup>174</sup> *West. U. Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608, 21 S. W. 638, 30 S. W. 494; *West. U. Tel. Co. v. Timmons* (Tex. Civ. App.) 136 S. W. 1169. See *Ogilvie v. West. U. Tel. Co.*, 83 S. C. 8, 64 S. E. 860, 137 Am. St. Rep. 790.

<sup>175</sup> *West. U. Tel. Co. v. Gillis*, 89 Ark. 483, 117 S. W. 749, 131 Am. St. Rep. 115; *Garrett v. West. U. Tel. Co.*, 83 Iowa, 257, 49 N. W. 88; *West. U. Tel. Co. v. Merrill*, 144 Ala. 618, 39 South. 121, 113 Am. St. Rep. 66; *Taylor v. West. U. Tel. Co.*, 101 S. W. 969, 31 Ky. Law Rep. 240; *West. U. Tel. Co. v. Burns*, 164 Ala. 252, 51 South. 373; *Larsen v. Cable Co.*, 150 Iowa, 748, 130 N. W. 813; *Salinger v. Telephone Co.*, 147 Iowa, 484, 126 N. W. 362; *Telephone Co. v. Chilton*, 100 Ark. 296, 140 S. W. 26; *West. U. Tel. Co. v. Sledge*, 7 Ala. App. 650, 62 South. 390. See *Marriott v. West. U. Tel. Co.*, 84 Neb. 443, 121 N. W. 241, 133 Am. St. Rep. 633; *Knowlton v. Des Moines Edison L. Co.*, 117 Iowa, 451, 90 N. W. 818; *Barker v. Boston Elec. L. Co.*, 178 Mass. 503, 60 N. E. 2; *Com. Elec. Co. v. Rose*, 214 Ill. 545, 73 N. E. 780; *Rowe v. Electric Co.*, 114 Ill. App. 535; *Id.*, 213 Ill. 318, 72 N. E. 711; *Telephone Co. v. Sokola*, 34 Ind. App. 429, 72 N. E. 143; *Musolf v. Electric Co.*, 108 Minn. 369, 122 N. W. 499, 24 L. R. A. (N. S.) 451; *Brubaker v. Light Co.*, 130 Mo. App. 439, 110 S. W. 12; *Walters v. R. R. Co.*, 178 N. Y. 50, 70 N. E. 98; *Braun v. Electric Co.*, 200 N. Y. 484, 94 N. E. 206, 34 L. R. A. (N. S.) 1089, 140 Am. St. Rep. 645, 21 Ann. Cas. 370; *Leque v.*

complained of,<sup>176</sup> and whether the plaintiff on the other hand was guilty of contributory negligence and such as to defeat his

Gas, etc., Co., 133 Wis. 547, 113 N. W. 946; Sykes v. Portland, 177 Mich. 290, 143 N. W. 326. See Laughlin v. Service Corp., 83 S. C. 62, 64 S. E. 1010; Ohlstrom v. Tacoma, 57 Wash. 121, 106 Pac. 629; Abrams v. Seattle, 60 Wash. 356, 111 Pac. 168, 140 Am. St. Rep. 916.

<sup>176</sup> Economy L., etc., Co. v. Hiller, 203 Ill. 518, 68 N. E. 72, affirming 106 Ill. App. 306; Walters v. Denver Consolidated Elec. L. Co., 12 Colo. App. 145, 54 Pac. 960; Lexington R. Co. v. Fain, 71 S. W. 628, 24 Ky. Law Rep. 1443; Barker v. Boston Elec. L. Co., 178 Mass. 503, 60 N. E. 2; Lutolf v. United Elec. L. Co., 184 Mass. 53, 67 N. E. 1025; Wagner v. Brooklyn Heights R. Co., 174 N. Y. 520, 66 N. E. 1117, affirming 69 App. Div. 349, 74 N. Y. Supp. 809; Hovey v. Michigan Tel. Co., 124 Mich. 607, 83 N. W. 600; Wolpers v. New York, etc., Elec. L. Co., 91 App. Div. 424, 86 N. Y. Supp. 845; Wittleder v. Citizens Elec. Ill. Co., 47 App. Div. 410, 62 N. Y. Supp. 297; Fitzgerald v. Edison Elec. Ill. Co., 207 Pa. 118, 56 Atl. 350; Boyd v. Portland Elec. Co., 40 Or. 126, 66 Pac. 576, 57 L. R. A. 619; Griffith v. New England, etc., Tel., 72 Vt. 441, 48 Atl. 643, 52 L. R. A. 919; Lighting Co. v. Sullivan, 22 App. D. C. 115; Telephone, etc., Co. v. Bruce, 89 Ark. 581, 117 S. W. 564; Dow v. Telephone, etc., Co., 157 Cal. 182, 106 Pac. 587; Pierce v. Gas, etc., Co., 161 Cal. 176, 118 Pac. 700; Alabama City, etc., R. Co. v. Appleton, 171 Ala. 324, 54 South. 638, Ann. Cas. 1913A, 1181; Hausler v. Electric Co., 240 Ill. 201, 88 N. E. 561; Seith v. Electric Co., 241 Ill. 252, 89 N. E. 425, 132 Am. St. Rep. 204, 24 L. R. A. (N. S.) 978; Snyder v. Telephone Co., 135 Iowa, 215, 112 N. W. 776, 14 L. R. A. (N. S.) 321; Lewis v. Gas Light Co., 135 Ky. 611, 117 S. W. 278, 22 L. R. A. (N. S.) 1169; Evans v. Telephone Co., 124 Ky. 620, 99 S. W. 936, 30 Ky. Law Rep. 833; Light Co. v. Dean, 142 Ky. 678, 134 S. W. 1115; Warren v. Railroad Co., 141 Mich. 298, 104 N. W. 613; Linton v. Light, etc., Co., 188 Mass. 276, 74 N. E. 321; Johnson v. City, 164 Mich. 251, 129 N. W. 29, Ann. Cas. 1912B, 866; Musolf v. Electric Co., 108 Minn. 369, 122 N. W. 499, 24 L. R. A. (N. S.) 451; Steindorff v. Gas L. Co., 92 Minn. 496, 100 N. W. 221; Birsch v. Elec. Co., 36 Mont. 574, 93 Pac. 940; Booker v. Railroad Co., 144 Mo. App. 273, 128 S. W. 1012; Brooks v. Gas Co., 70 N. J. Law, 211, 57 Atl. 396; Lydston v. Light, etc., Co., 75 N. H. 23, 70 Atl. 385, 21 Ann. Cas. 1236; Lee v. Railroad Co., 140 App. Div. 779, 125 N. Y. Supp. 840; Miller v. Light, etc., Co., 212 Pa. 593, 62 Atl. 32; Crowe v. Light Co., 209 Pa. 580, 58 Atl. 1071; Telephone Co. v. Thomas, 45 Tex. Civ. App. 20, 99 S. W. 879; Railroad Co. v. Rubin, 102 Va. 809, 47 S. E. 834; Light Co. v. Halliburton (Tex. Civ. App.) 136 S. W. 584; Traction Co. v. Daily, 111 Va. 665, 69 S. E. 963; Thornburg v. Railroad Co., 65 W. Va. 379, 64 S. E. 358; Anderson v. Railroad Co., 36 Wash. 387, 78 Pac. 1013, 104 Am. St. Rep. 962; Williams v. Lumber Co., 124 Wis. 328, 102 N. W. 589; Gas, etc., Co. v. Letson, 135 Fed. 969, 68 C. C. A. 453; Gas, etc., Co. v. Bell, 152 Fed. 677, 82 C. C. A. 25; Shank v. Power Co., 205 Fed. 833, 124 C. C. A. 35; Webster v. Light, etc., Co., 158 App. Div. 210, 143 N. Y. Supp. 57; Dugan v. Electric Co., 241 Pa. 565, 88 Atl. 437; Hayes v. Power Co., 95 S. C. 230, 78 S. E. 956; Telephone, etc., Co. v. Shirley (Tex. Civ. App.) 155 S. W. 663; Swan v. Ry. Co., 41 Utah. 518, 127 Pac. 267; Lyles v. West. U. Tel. Co., 84 S. C. 1, 65 S. E. 832, 137 Am. St. Rep. 829; Ogilvie v. West. U. Tel. Co., 83 S. C. 8, 64 S. E. 860, 137 Am. St. Rep. 790; Klopff v. West. U. Tel. Co., 100 Tex. 540, 101 S. W. 1072, 123 Am. St. Rep. 831, 10 L. R. A. (N. S.) 498; Box v. Postal Tel. Cable Co., 165 Fed. 138, 91 C. C. A. 172, 28 L. R. A. (N. S.) 566; West. U. Tel. Co. v. Price, 137 Ky. 758, 126 S. W. 1100, 29 L. R. A. (N. S.) 836; Cumberland Tel., etc., Co. v. Peachier Mill Co., 129 Tenn. 374, 164 S. W. 1145, L. R. A. 1915A, 1045; Bergin v. So. New England Tel. Co., 70 Conn. 54, 38 Atl. 888, 39 L. R. A. 192; Illingsworth v. Boston Elec. L. Co., 161 Mass. 583, 37 N. E. 778, 25 L. R.

right to recover.<sup>177</sup> It is necessary that sufficient evidence be introduced to support either the plaintiff's cause of action<sup>178</sup> or to

A. 552; *Mize v. Rocky Mountain Bell Tel. Co.*, 38 Mont. 521, 100 Pac. 791, 129 Am. St. Rep. 659, 16 Am. Cas. 1189; *Braun v. Electric Co.*, 200 N. Y. 484, 94 N. E. 206, 140 Am. St. Rep. 645, 21 Am. Cas. 370, 34 L. R. A. (N. S.) 1089; *Perham v. Electric Co.*, 33 Or. 451, 53 Pac. 14, 24, 72 Am. St. Rep. 730, 40 L. R. A. 799; *Abrams v. Seattle*, 60 Wash. 356, 111 Pac. 168, 140 Am. St. Rep. 916; *Block v. Milwaukee St. Ry. Co.*, 89 Wis. 371, 61 N. W. 1101, 46 Am. St. Rep. 849, 27 L. R. A. 365.

The jury must determine the extent to which wires should be insulated, or otherwise guarded, *Parsons v. Charleston Consolidated R., etc., Co.*, 69 S. C. 305, 48 S. E. 284, 104 Am. St. Rep. 800; *Dumphy v. Montreal L., etc., Co.*, 9 Am. Cas. 749; whether proper safety devices have been furnished, *Southwestern Tel., etc., Co. v. Abeles*, 94 Ark. 254, 126 S. W. 724, 140 Am. St. Rep. 115, 21 Am. Cas. 1006; duty as to inspection and repair of appliances, *Lewis v. Bowling Green Gas L. Co.*, 135 Ky. 611, 117 S. W. 278, 22 L. R. A. (N. S.) 1169; *Alabama City, etc., R. Co. v. Appleton*, supra; *Perham v. Electric Co.*, supra. *Macon v. Paducah St. Ry. Co.*, 62 S. W. 496, 23 Ky. Law Rep. 46, whether defendant was grossly negligent thereby authorizing punitive damages.

<sup>177</sup> *Texarkana Gas. etc., Co. v. Orr*, 59 Ark. 215, 27 S. W. 66, 43 Am. St. Rep. 30; *Electric Co. v. Lubbers*, 11 Colo. 505, 19 Pac. 479, 7 Am. St. Rep. 255; *Giraudi v. San Jose Elec., etc., Co.*, 107 Cal. 120, 40 Pac. 108, 48 Am. St. Rep. 114, 28 L. R. A. 596; *Brush Elec. Lighting Co. v. Kelley*, 126 Ind. 220, 25 N. E. 812, 10 L. R. A. 250; *Lewis v. Bowling Green Gas L. Co.*, 135 Ky. 611, 117 S. W. 278, 22 L. R. A. (N. S.) 1169; *Barto v. Iowa Tel. Co.*, 126 Iowa, 241, 101 N. W. 876, 106 Am. St. Rep. 347; *Bourget v. Cambridge*, 156 Mass. 391, 31 N. E. 290, 16 L. R. A. 605; *Illingsworth v. Boston Elec. L. Co.*, 161 Mass. 583, 37 N. E. 778, 25 L. R. A. 552; *Griffin v. United Elec. L. Co.*, 164 Mass. 492, 41 N. E. 675, 49 Am. St. Rep. 477, 32 L. R. A. 400; *Hodgins v. Bay City*, 156 Mich. 687, 121 N. W. 274, 132 Am. St. Rep. 546; *Stevens v. United Gas, etc., Co.*, 73 N. H. 159, 60 Atl. 848, 70 L. R. A. 119; *Fox v. Manchester*, 183 N. Y. 141, 75 N. E. 1116, 2 L. R. A. (N. S.) 474; *Braun v. Electric Co.*, 200 N. Y. 484, 94 N. E. 206, 140 Am. St. Rep. 645, 21 Am. Cas. 370, 34 L. R. A. (N. S.) 1089; *Gentzkow v. Portland Ry. Co.*, 54 Or. 114, 102 Pac. 614, 135 Am. St. Rep. 821; *Fitzgerald v. Edison Elec. Ill. Co.*, 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732; *Herron v. Pittsburg*, 204 Pa. 509, 54 Atl. 311, 92 Am. St. Rep. 798; *Griffith v. New England, etc., Tel. Co.*, 72 Vt. 441, 48 Atl. 643, 52 L. R. A. 919; *Miner v. Franklin County Tel. Co.*, 83 Vt. 311, 75 Atl. 653, 23 L. R. A. (N. S.) 1195; *Anderson v. Railroad Co.*, 36 Wash. 387, 78 Pac. 1013, 104 Am. St. Rep. 962.

<sup>178</sup> *Sultan v. West. U. Tel. Co.*, 92 Miss. 785, 46 South. 827; *Potter v. West. U. Tel. Co.*, 138 Iowa, 406, 116 N. W. 130; *Reynolds v. West. U. Tel. Co.*, 81 Mo. App. 223; *Mims v. West. U. Tel. Co.*, 82 S. C. 247, 64 S. E. 236; *Willis v. West. U. Tel. Co.*, 150 N. C. 318, 64 S. E. 11; *Balderston v. West. U. Tel. Co.*, 79 S. C. 160, 60 S. E. 435; *Klopf v. West. U. Tel. Co.*, 100 Tex. 540, 101 S. W. 1072, 123 Am. St. Rep. 831, 10 L. R. A. (N. S.) 498; *West. U. Tel. Co. v. Hankins*, 50 Tex. Civ. App. 513, 110 S. W. 539; *Barefoot v. West. U. Tel. Co.*, 28 Tex. Civ. App. 457, 67 S. W. 912; *West. U. Tel. Co. v. Merrill* (Tex. Civ. App.) 22 S. W. 826; *Box v. Postal Tel. Cable Co.*, 165 Fed. 138, 91 C. C. A. 172, 28 L. R. A. (N. S.) 566; *Gannon v. Laclede Gas L. Co.*, 145 Mo. 502, 46 S. W. 948, 47 S. W. 907, 43 L. R. A. 505; *Telephone Co. v. Johnson*, 164 Ala. 229, 51 South. 230; *Guess v. Telephone Co.*, 102 Miss. 691, 59 South. 876; *Stone v. Postal Tel. Cable Co.*, 35 R. I. 498, 87 Atl. 319, 46 L. R. A. (N. S.) 180.

*Mental anguish cases.*—See *West. U. Tel. Co. v. Hanley*, 85 Ark. 263, 107 S. W. 1168; *West. U. Tel. Co. v. Caldwell*, 126 Ky. 42, 102 S. W. 840, 31 Ky. Law



sustain the defense relied upon by the defendant,<sup>179</sup> and so, if such has been submitted and there is a conflict therein,<sup>180</sup> it is the duty of the court to submit the case to the jury under proper instructions. Occasionally the question arises whether the party who receives a message for transmission is the agent of the company, when it does the jury should pass on the question.<sup>181</sup> Very frequently the question is to be determined whether a telegraph or telephone company has been guilty of negligence<sup>182</sup> in the transmission<sup>183</sup> or delivery<sup>184</sup> of a message intrusted to its care, or

Rep. 497, 12 L. R. A. (N. S.) 748; *Gerock v. West. U. Tel. Co.*, 142 N. C. 22, 54 S. E. 782; *West. U. Tel. Co. v. Gulick*, 48 Tex. Civ. App. 78, 106 S. W. 698.

<sup>179</sup> *Garrett v. West. U. Tel. Co.*, 83 Iowa, 257, 49 N. W. 88; *Hinson v. West. U. Tel. Co.*, 91 S. C. 338, 74 S. E. 752, Ann. Cas. 1914A, 114.

<sup>180</sup> *West. U. Tel. Co. v. Bowman*, 141 Ala. 175, 37 South. 493; *West. U. Tel. Co. v. Rowell*, 153 Ala. 295, 45 South. 73; *West. U. Tel. Co. v. Gillis*, 89 Ark. 483, 117 S. W. 749, 131 Am. St. Rep. 115; *Roberts v. West. U. Tel. Co.*, 76 S. C. 275, 56 S. E. 960; *Hunter v. West. U. Tel. Co.*, 130 N. C. 602, 41 S. E. 796; *West. U. Tel. Co. v. Merrill*, 144 Ala. 618, 39 South. 121, 113 Am. St. Rep. 66; *Wiggs v. Southwestern Tel., etc., Co.* (Tex. Civ. App.) 110 S. W. 179. See *West. U. Tel. Co. v. Haley*, 143 Ala. 586, 39 South. 386; *Cumberland Tel., etc., Co. v. Peacher Mill Co.*, 129 Tenn. 374, 164 S. W. 1145, L. R. A. 1915A, 1045, opinion evidence ultimate fact for jury.

<sup>181</sup> *West. U. Tel. Co. v. McLeod* (Tex. Civ. App.) 22 S. W. 988; *West. U. Tel. Co. v. Craven* (Tex. Civ. App.) 95 S. W. 633; *Brandon v. Tel., etc., Co.*, 146 Ky. 639, 143 S. W. 11.

<sup>182</sup> *West. U. Tel. Co. v. Edsall*, 63 Tex. 668; *West. U. Tel. Co. v. Elliott*, 7 Tex. Civ. App. 482, 27 S. W. 219; *Potter v. West. U. Tel. Co.*, 138 Iowa, 406, 116 N. W. 130; *Barnes v. West. U. Tel. Co.* (C. C.) 120 Fed. 550; *Beasley v. West. U. Tel. Co.* (C. C.) 39 Fed. 181; *Markley v. West. U. Tel. Co.*, 144 Iowa, 105, 122 N. W. 136, 138 Am. St. Rep. 263; *Telephone Co. v. Wilson*, 97 Ark. 198, 133 S. W. 845; *Seddon v. Telephone Co.*, 146 Iowa, 743, 126 N. W. 969; *Beggs v. Cable Co.*, 258 Ill. 238, 101 N. E. 612; *Bank v. Tel. Co.*, 159 Iowa, 720, 139 N. W. 552, Ann. Cas. 1915D, 243; *Guess v. Telephone Co.*, 102 Miss. 691, 59 South. 876; *Telephone Co. v. Parham* (Tex. Civ. App.) 152 S. W. 819.

<sup>183</sup> *Box v. Postal Tel. Cable Co.*, 165 Fed. 138, 91 C. C. A. 172, 28 L. R. A. (N. S.) 566; *Beasley v. West. U. Tel. Co.* (C. C.) 39 Fed. 181; *West. U. Tel. Co. v. McGown*, 42 Tex. Civ. App. 565, 93 S. W. 710; *Faubion v. West. U. Tel. Co.*, 36 Tex. Civ. App. 98, 81 S. W. 56; *Telephone Co. v. Griffith*, 161 Ala. 241, 50 South. 91; *Telephone Co. v. Louisell*, 161 Ala. 231, 50 South. 87; *Mackorell v. Telephone Co.*, 90 S. C. 498, 73 S. E. 359, 875.

<sup>184</sup> *Potter v. West. U. Tel. Co.*, 138 Iowa, 406, 116 N. W. 130; *Ark., etc., R. Co. v. Stroude*, 82 Ark. 117, 100 S. W. 760; *Hurlburt v. West. U. Tel. Co.*, 123 Iowa, 295, 98 N. W. 794; *West. U. Tel. Co. v. Timmons*, 93 Ga. 345, 20 S. E. 649; *Kernodle v. West. U. Tel. Co.*, 141 N. C. 436, 54 S. E. 423, 8 Ann. Cas. 469; *Lyne v. West. U. Tel. Co.*, 123 N. C. 129, 31 S. E. 350; *Thomas v. West. U. Tel. Co.*, 120 Ky. 194, 85 S. W. 760, 27 Ky. Law Rep. 569; *Glover v. West. U. Tel. Co.*, 78 S. C. 502, 59 S. E. 526; *Postal Tel. Cable Co. v. Pratt*, 85 S. W. 225, 27 Ky. Law Rep. 430; *Poulnot v. West. U. Tel. Co.*, 69 S. C. 545, 48 S. E. 622; *West. U. Tel. Co. v. Daniels*, 15 Ky. Law Rep. 815; *Klopf v. West. U. Tel. Co.*, 100 Tex. 540, 101 S. W. 1072, 123 Am. St. Rep. 831, 10 L. R. A. (N. S.) 498; *Brown v. West. U. Tel. Co.*, 6 Utah, 219, 21 Pac. 988; *West. U. Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728; *West. U. Tel. Co. v. De Jarles*, 8 Tex. Civ. App. 109, 27 S. W. 792; *Evans v. West. U.*

whether it negligently made an error in transmission,<sup>185</sup> and whether such negligence, in either case, was the proximate cause of the injury,<sup>186</sup> it is held in all such cases to be a question of fact for the jury. It is a question for the jury whether the conduct of the company has been so gross, wanton, or willful as to warrant the recovery of exemplary damages.<sup>187</sup> It is a question for the determination of the jury whether the defendant company has submitted sufficient evidence to rebut any negligence which may

Tel. Co. (Tex. Civ. App.) 56 S. W. 609; *Thompson v. West. U. Tel. Co.*, 10 Tex. Civ. App. 120, 30 S. W. 250; *West. U. Tel. Co. v. Jones*, 81 Tex. 271, 16 S. W. 1006; *West. U. Tel. Co. v. Northcutt*, 158 Ala. 539, 48 South. 553, 132 Am. St. Rep. 38; *West. U. Tel. Co. v. Lehman*, 105 Md. 442, 66 Atl. 266; *Southwestern Tel., etc., Co. v. McCoy* (Tex. Civ. App.) 114 S. W. 387; *West. U. Tel. Co. v. Davis* (Tex. Civ. App.) 51 S. W. 258; *West. U. Tel. Co. v. Hill*, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058; *Telephone Co. v. Griffith*, 161 Ala. 241, 50 South. 91; *Telephone Co. v. Jackson*, 163 Ala. 9, 50 South. 316; *Telephone Co. v. Snell*, 3 Ala. App. 263, 56 South. 854; *Marab v. Telephone Co.*, 167 Mich. 192, 132 N. W. 568; *Telephone Co. v. Wilson*, 97 Ark. 198, 133 S. W. 845; *Kivett v. Telephone Co.*, 156 N. C. 296, 72 S. E. 388; *Telephone Co. v. McMullin*, 98 Ark. 347, 135 S. W. 909; *Owen v. Telephone Co.*, 89 S. C. 190, 71 S. E. 782; *Baker v. Telephone Co.*, 87 S. C. 174, 69 S. E. 151; *Hoaglin v. Telephone Co.*, 161 N. C. 390, 77 S. E. 417; *Telephone Co. v. Boteler*, 183 Ala. 457, 62 South. 821; *Wall v. Telephone Co.*, 92 S. C. 449, 75 S. E. 690; *Robertson v. Telephone Co.*, 95 S. C. 356, 78 S. E. 977.

<sup>185</sup> *West. U. Tel. Co. v. Edsall*, 63 Tex. 668; *Hart v. West. U. Tel. Co.* (Cal.) 4 Pac. 657; *Sherrerd v. Telephone Co.*, 146 Wis. 197, 131 N. W. 341.

<sup>186</sup> *Dempsey v. West. U. Tel. Co.*, 77 S. C. 399, 58 S. E. 9; *Garrett v. West. U. Tel. Co.*, 83 Iowa, 257, 49 N. W. 88; *Toale v. West. U. Tel. Co.*, 76 S. C. 248, 57 S. E. 117; *Marsh v. West. U. Tel. Co.*, 65 S. C. 430, 43 S. E. 953; *Beasley v. West. U. Tel. Co.* (C. C.) 39 Fed. 181; *Cordell v. West. U. Tel. Co.*, 149 N. C. 402, 63 S. E. 71, 22 L. R. A. (N. S.) 540; *Providence-Wash. Ins. Co. v. West. U. Tel. Co.*, 247 Ill. 84, 93 N. E. 134, 30 L. R. A. (N. S.) 1170, 139 Am. St. Rep. 314; *West. U. Tel. Co. v. Sights*, 34 Okl. 461, 126 Pac. 234, Ann. Cas. 1914C, 204, 42 L. R. A. (N. S.) 419; *Kivett v. Telephone Co.*, 156 N. C. 296, 72 S. E. 388; *Telephone Co. v. Ford*, 8 Ga. App. 514, 70 S. E. 65; *Seddon v. Telephone Co.*, 146 Iowa, 743, 126 N. W. 969; *Mullinax v. Telephone Co.*, 156 N. C. 541, 72 S. E. 583; *Telephone Co. v. Evans*, 108 Ark. 39, 156 S. W. 424; *Ahern v. Oregon Tel., etc., Co.*, 24 Or. 276, 33 Pac. 403, 35 Pac. 549, 22 L. R. A. 635.

*Electric companies.*—See *Musolf v. Electric Co.*, 108 Minn. 369, 122 N. W. 499, 24 L. R. A. (N. S.) 451; *Block v. Milwaukee, etc., R. Co.*, 89 Wis. 371, 61 N. W. 1101, 46 Am. St. Rep. 849, 27 L. R. A. 365; *Huber v. La Crosse City R. Co.*, 92 Wis. 636, 66 N. W. 708, 53 Am. St. Rep. 940, 31 L. R. A. 583. See *Mitchell v. Electric Co.*, 129 N. C. 166, 39 S. E. 801, 85 Am. St. Rep. 735, 55 L. R. A. 398, when negligence shown and no contributory negligence of plaintiff, court may charge jury. Compare *Brown v. Chesapeake, etc., R. Co.*, 135 Ky. 798, 123 S. W. 298, 25 L. R. A. (N. S.) 717.

<sup>187</sup> *Mims v. West. U. Tel. Co.*, 82 S. C. 247, 64 S. E. 236; *West. U. Tel. Co. v. Cunningham*, 99 Ala. 314, 14 South. 579; *Glover v. West. U. Tel. Co.*, 78 S. C. 502, 59 S. E. 526; *Marsh v. West. U. Tel. Co.*, 65 S. C. 430, 43 S. E. 953; *Wilhelm v. Telephone Co.*, 90 S. C. 536, 73 S. E. 865; *Trapp v. Telephone Co.*, 92 S. C. 214, 75 S. E. 210; *Cable Co. v. Christian*, 102 Miss. 845, 59 South. 933; *Ogilvie v. West. U. Tel. Co.*, 83 S. C. 8, 64 S. E. 860, 137 Am. St. Rep. 790. See § 618 et seq.

be presumed.<sup>188</sup> The jury should determine whether the company had any information,<sup>189</sup> derived from any source,<sup>190</sup> of special circumstances which would warrant the recovery of special damages. Where the question arises in regard to the rules, regulations and limitations of the company, it is a question for the jury; so, whether certain regulations were established,<sup>191</sup> and what they were,<sup>192</sup> whether the plaintiff had notice of such regulations or limitations,<sup>193</sup> and whether he assented to these,<sup>194</sup> whether he presented his claim in time and in accordance to the company's stipulation in this respect,<sup>195</sup> or whether any of such stipulations, regulations, or limitations were waived, are questions for the jury.<sup>196</sup> In cases where damages are sought to be recovered for mental anguish, the jury should decide whether such injury has been sustained<sup>197</sup> as the direct and proximate result of the company's negligence.<sup>198</sup> Thus, in actions brought to recover

<sup>188</sup> *Hunter v. West. U. Tel. Co.*, 130 N. C. 602, 41 S. E. 796; *Hart v. West. U. Tel. Co. (Colo.)* 4 Pac. 657; *West. U. Tel. Co. v. Edsall*, 63 Tex. 668; *West. U. Tel. Co. v. Brown* (Tex. Civ. App.) 75 S. W. 359; *White v. West. U. Tel. Co. (C. C.)* 14 Fed. 710. But see *West. U. Tel. Co. v. Elliott*, 131 Ky. 340, 115 S. W. 228, 22 L. R. A. (N. S.) 761, presumption overcome.

<sup>189</sup> *West. U. Tel. Co. v. Merritt*, 55 Fla. 462, 46 South. 1024, 127 Am. St. Rep. 169; *McNeil v. Postal Tel. Cable Co.*, 154 Iowa, 241, 134 N. W. 611, Ann. Cas. 1014A, 1294, 38 L. R. A. (N. S.) 727; *West. U. Tel. Co. v. True*, 105 Tex. 344, 148 S. W. 561, 41 L. R. A. (N. S.) 1188.

<sup>190</sup> *West U. Tel. Co. v. May*, 8 Tex. Civ. App. 176, 27 S. W. 760; *Wolff v. West. U. Tel. Co.*, 42 Tex. Civ. App. 30, 94 S. W. 1062; *Wallingford v. West. U. Tel. Co.*, 60 S. C. 201, 38 S. E. 443, 629.

<sup>191</sup> *West. U. Tel. Co. v. Love Banks Co.*, 73 Ark. 205, 83 S. W. 949, 3 Ann. Cas. 712.

<sup>192</sup> *Id.*

<sup>193</sup> *Webbe v. West. U. Tel. Co.*, 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 207.

<sup>194</sup> *West. U. Tel. Co. v. De Golyer*, 27 Ill. App. 489; *Webbe v. West. U. Tel. Co.*, 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 207; *Beggs v. Cable Co.*, 258 Ill. 238, 101 N. E. 612.

<sup>195</sup> *West. U. Tel. Co. v. De Golyer*, 27 Ill. App. 489; *West. U. Tel. Co. v. Piner*, 9 Tex. Civ. App. 152, 29 S. W. 66, whether night or day message, different stipulations therein.

<sup>196</sup> *West. U. Tel. Co. v. Hines*, 96 Ga. 688, 23 S. E. 845, 51 Am. St. Rep. 159; *Wheelock v. Postal Tel. Cable Co.*, 197 Mass. 119, 83 N. E. 313, 14 Ann. Cas. 188; *West. U. Tel. Co. v. Stevenson*, 128 Pa. 442, 18 Atl. 441, 15 Am. St. Rep. 687, 5 L. R. A. 515.

<sup>197</sup> *West. U. Tel. Co. v. Merrill*, 144 Ala. 618, 39 South. 121, 113 Am. St. Rep. 66; *West. U. Tel. Co. v. Benson*, 159 Ala. 254, 48 South. 712; *West. U. Tel. Co. v. Blair*, 51 Tex. Civ. App. 427, 113 S. W. 164; *Busbee v. Telephone Co.*, 89 S. C. 567, 72 S. E. 499; *Telephone Co. v. Cleveland*, 169 Ala. 131, 53 South. 80, Ann. Cas. 1912B, 534; *Telephone Co. v. Bennett*, 3 Ala. App. 275, 57 South. 87; *Telephone Co. v. Sisson*, 155 Ky. 624, 160 S. W. 168; *Ellison v. Telephone Co.*, 163 N. C. 5, 79 S. E. 277.

<sup>198</sup> *West. U. Tel. Co. v. Caldwell*, 126 Ky. 42, 102 S. W. 840, 31 Ky. Law Rep. 497, 12 L. R. A. (N. S.) 748; *West. U. Tel. Co. v. Merrill*, 144 Ala. 618, 39 South. 121, 113 Am. St. Rep. 66; *Willis v. West. U. Tel. Co.*, 69 S. C. 531,



damages for mental anguish suffered in consequence of the company failing to transmit and deliver in time a message announcing the serious illness, death or burial of some person related to the plaintiff, it is ordinarily a question for the jury whether the plaintiff could and would have gone if the message had been delivered in time,<sup>199</sup> and whether, under the circumstances, he could and would have arrived in time.<sup>200</sup> So also, where the message is one summoning a physician, it is a question for the jury whether he could have arrived in time to treat the patient if the message had been delivered in time.<sup>201</sup> The jury should also pass on the question whether the plaintiff was in any wise guilty of negligence in the particular case, and whether he has exercised reasonable care in minimizing the resulting injury or loss.<sup>202</sup> The constitution and statutory laws of another state are facts to be proved as are any other facts in the case by the party who seeks to take advantage of any difference that may exist between them and the law of the forum.<sup>203</sup> And when the law of a foreign country is to be determined by considering numerous decisions which may be more or less conflicting, or which bear upon the subject only collaterally or by way of analogy, and where inferences may be drawn from them, the question is one of fact to be determined by the jury.<sup>204</sup>

48 S. E. 538, 104 Am. St. Rep. 828, 2 Ann. Cas. 52; *Wiggs v. Southwestern Tel., etc., Co.* (Tex. Civ. App.) 110 S. W. 179; *Beasley v. West. U. Tel. Co.* (C. C.) 39 Fed. 181; *Telephone Co. v. Griffith*, 161 Ala. 241, 50 South. 91; *West. U. Tel. Co. v. Bickerstaff*, 100 Ark. 1, 138 S. W. 997, Ann. Cas. 1913B, 242; *Poe v. Telephone Co.*, 160 N. C. 315, 76 S. E. 81.

<sup>199</sup> *West. U. Tel. Co. v. Ridenour*, 35 Tex. Civ. App. 574, 80 S. W. 1030; *Roberts v. West. U. Tel. Co.*, 76 S. C. 275, 56 S. E. 960; *West. U. Tel. Co. v. May*, 8 Tex. Civ. App. 176, 27 S. W. 760; *Telephone Co. v. Robbins*, 3 Ala. App. 234, 56 South. 879.

<sup>200</sup> *Wiggs v. Southwestern Tel. Co.* (Tex. Civ. App.) 110 S. W. 179; *West. U. Tel. Co. v. Merrill*, 144 Ala. 618, 39 South. 121, 113 Am. St. Rep. 66; *Beasley v. West. U. Tel. Co.* (C. C.) 39 Fed. 181; *Telephone Co. v. Jarrell* (Tex. Civ. App.) 138 S. W. 1165; *Kivett v. Telephone Co.*, 156 N. C. 296, 72 S. E. 388. But see *West. U. Tel. Co. v. Housewright*, 5 Tex. Civ. App. 1, 23 S. W. 824, evidence without conflict.

<sup>201</sup> *West. U. Tel. Co. v. Haley*, 143 Ala. 586, 39 South. 386.

*Contract would have been accepted.*—The addressee may testify that if the message had been delivered he would have accepted the offer contained therein. *West. U. Tel. Co. v. Sights*, 34 Okl. 461, 126 Pac. 234, Ann. Cas. 1914C, 204, 42 L. R. A. (N. S.) 419.

<sup>202</sup> *Willis v. West. U. Tel. Co.*, 73 S. C. 379, 53 S. E. 639; *Dempsey v. West. U. Tel. Co.*, 77 S. C. 399, 58 S. E. 9; *West. U. Tel. Co. v. Johnsey*, 49 Tex. Civ. App. 487, 109 S. W. 251; *Cobb v. Telephone Co.*, 85 S. C. 430, 67 S. E. 549.

<sup>203</sup> *Woods v. West. U. Tel. Co.*, 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581.

<sup>204</sup> *Elec. Welding Co. v. Prince*, 200 Mass. 386, 86 N. E. 947, 128 Am. St.

§ 521. *Instructions.*—The jury being in possession of all the evidence in the case, it is the duty of the court to instruct them fully, clearly, and correctly on the law pertaining to the issue involved;<sup>205</sup> but the manner in which this is done is not different from that in other cases.<sup>206</sup> In charging the jury, the court is confined to the issue involved and made by the pleadings and the evidence.<sup>207</sup> The charge must be given in the manner pre-

Rep. 434. Compare *Wylie v. Cotter*, 170 Mass. 356, 49 N. E. 746, 64 Am. St. Rep. 305; *Wickersham v. Johnston*, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118.

<sup>205</sup> West. U. Tel. Co. v. *Northeutt*, 158 Ala. 539, 48 South. 553, 132 Am. St. Rep. 38; West. U. Tel. Co. v. *Scott*, 87 S. W. 289, 27 Ky. Law Rep. 975; West. U. Tel. Co. v. *Benson*, 159 Ala. 254, 48 South. 712; West. U. Tel. Co. v. *Herning*, 71 S. W. 642, 24 Ky. Law Rep. 1433; *Hinson v. Postal Tel. Cable Co.*, 132 N. C. 460, 43 S. E. 945; West. U. Tel. Co. v. *Lehman*, 105 Md. 442, 66 Atl. 266; *Thompson v. West. U. Tel. Co.*, 106 N. C. 549, 11 S. E. 269; *Mitchell v. West. U. Tel. Co.*, 12 Tex. Civ. App. 262, 33 S. W. 1016; West. U. Tel. Co. v. *Stubbs*, 43 Tex. Civ. App. 132, 94 S. W. 1083; West. U. Tel. Co. v. *McDonald*, 42 Tex. Civ. App. 229, 95 S. W. 691; West. U. Tel. Co. v. *Rawls* (Tex. Civ. App.) 62 S. W. 136; *Telephone Co. v. Chilton*, 100 Ark. 296, 140 S. W. 26; *Weld v. Cable Co.*, 148 App. Div. 588, 133 N. Y. Supp. 228; *Telephone Co. v. Gilliland* (Tex. Civ. App.) 130 S. W. 212; *Telephone Co. v. Guinn* (Tex. Civ. App.) 130 S. W. 616; *Telephone, etc., Co. v. Carter*, 1 Tenn. Civ. App. 750; *Telephone Co. v. Wilson* (Tex. Civ. App.) 152 S. W. 1169; West. U. Tel. Co. v. *Price*, 137 Ky. 758, 126 S. W. 1100, 29 L. R. A. (N. S.) 836; *Carmichael v. So. Bell Tel., etc., Co.*, 162 N. C. 333, 78 S. E. 507, Ann. Cas. 1915A, 983. See, also, § 619.

<sup>206</sup> *Perham v. Electric Co.*, 33 Or. 451, 53 Pac. 14, 24, 72 Am. St. Rep. 730, 40 L. R. A. 799; *Harrison v. Electric L. Co.*, 195 Mo. 606, 93 S. W. 951, 7 L. R. A. (N. S.) 293; *Runyan v. Kanawha, etc., Co.*, 68 W. Va. 609, 71 S. E. 259, 35 L. R. A. (N. S.) 430; *Ergo v. Merced, etc., Gas, etc., Co.*, 161 Cal. 334, 119 Pac. 101, 41 L. R. A. (N. S.) 79; *Hodgins v. Bay City*, 156 Mich. 687, 121 N. W. 274, 132 Am. St. Rep. 546; *Mitchell v. Power Co.*, 45 S. C. 146, 22 S. E. 767, 31 L. R. A. 577; *Snyder v. Electric Co.*, 43 W. Va. 661, 28 S. E. 733, 64 Am. St. Rep. 922, 39 L. R. A. 499; *Southwestern Tel., etc., Co. v. Abeles*, 94 Ark. 254, 126 S. W. 724, 140 Am. St. Rep. 115, 21 Ann. Cas. 1006.

*Burden of proof.*—An instruction is erroneous which places the burden of proof upon the wrong party. *Dehougne v. West. U. Tel. Co.* (Tex. Civ. App.) 84 S. W. 1066; West. U. Tel. Co. v. *Smith* (Tex. Civ. App.) 26 S. W. 216; West. U. Tel. Co. v. *Bennett*, 1 Tex. Civ. App. 558, 21 S. W. 699.

<sup>207</sup> Ark., etc., *R. Co. v. Stroude*, 82 Ark. 117, 100 S. W. 760; West. U. Tel. Co. v. *Daniels*, 15 Ky. Law Rep. 813; West. U. Tel. Co. v. *Benson*, 159 Ala. 254, 48 South. 712; West. U. Tel. Co. v. *Northeutt*, 158 Ala. 539, 48 South. 553, 132 Am. St. Rep. 38; West. U. Tel. Co. v. *Morgan*, 92 Miss. 108, 45 South. 427; West. U. Tel. Co. v. *Manker*, 145 Ala. 418, 41 South. 850; *Bolton v. West. U. Tel. Co.*, 76 S. C. 529, 57 S. E. 543; West. U. Tel. Co. v. *McNair*, 120 Ala. 99, 23 South. 801; *Landry v. West. U. Tel. Co.*, 102 Tex. 67, 113 S. W. 10; *Id.* (Tex. Civ. App.) 108 S. W. 461; West. U. Tel. Co. v. *Bowen*, 97 Tex. 621, 81 S. W. 27, reversing (Tex. Civ. App.) 76 S. W. 613; West. U. Tel. Co. v. *Wisdom*, 85 Tex. 261, 20 S. W. 56, 34 Am. St. Rep. 805; West. U. Tel. Co. v. *Gulick*, 48 Tex. Civ. App. 78, 106 S. W. 698; West. U. Tel. Co. v. *Johnsey*, 49 Tex. Civ. App. 487, 109 S. W. 251; West. U. Tel. Co. v. *Ayers*, 41 Tex. Civ. App. 627, 93 S. W. 199; West. U. Tel. Co. v. *Adams*.

scribed by the law of the forum, and, if in accordance with this, it is given orally, it must not be argumentative<sup>208</sup> or in any manner misleading,<sup>209</sup> and must not be an invasion of the province of the jury.<sup>210</sup> Requested instructions should be given if they conform to the issue involved,<sup>211</sup> otherwise they should be refused;<sup>212</sup>

39 Tex. Civ. App. 517, 87 S. W. 1060; *Seffel v. West*, U. Tel. Co. (Tex. Civ. App.) 65 S. W. 897; *West. U. Tel. Co. v. Newnum* (Tex. Civ. App.) 78 S. W. 700; *West. U. Tel. Co. v. Norton* (Tex. Civ. App.) 62 S. W. 1081; *West. U. Tel. Co. v. Redinger*, 22 Tex. Civ. App. 362, 54 S. W. 417; *West. U. Tel. Co. v. Thompson*, 18 Tex. Civ. App. 609, 45 S. W. 429; *West. U. Tel. Co. v. Waller* (Tex. Civ. App.) 47 S. W. 396; *West. U. Tel. Co. v. Lyles* (Tex. Civ. App.) 42 S. W. 636; *West. U. Tel. Co. v. Housewright*, 5 Tex. Civ. App. 1, 23 S. W. 824; *West. U. Tel. Co. v. Drake* (Tex. Civ. App.) 29 S. W. 919; *West. U. Tel. Co. v. Cocks* (Tex. Civ. App.) 22 S. W. 1005; *Cutts v. West. U. Tel. Co.*, 71 Wis. 46, 36 N. W. 627; *Washington, etc., Tel. Co. v. Hobson*, 15 Grat. (Va.) 122; *West. U. Tel. Co. v. Bickerstaff*, 100 Ark. 1, 138 S. W. 997, Ann. Cas. 1913B, 242; *Telephone Co. v. Conder* (Tex. Civ. App.) 138 S. W. 447. See *Boyd v. Electric Co.*, 40 Or. 126, 66 Pac. 576, 57 L. R. A. 619; *Denver v. Sherret*, 88 Fed. 226, 31 C. C. A. 499; *Geismann v. Electric Co.*, 173 Mo. 654, 73 S. W. 654; *Pierce v. Gas, etc., Co.*, 161 Cal. 176, 118 Pac. 700.

<sup>208</sup> *West. U. Tel. Co. v. Northcutt*, 158 Ala. 539, 48 South. 553, 132 Am. St. Rep. 38; *West. U. Tel. Co. v. Benson*, 159 Ala. 254, 48 South. 712; *Postal Tel. Cable Co. v. Lathrop*, 131 Ill. 575, 23 N. E. 583, 19 Am. St. Rep. 55, 7 L. R. A. 474; *Telephone Co. v. Rowell*, 166 Ala. 651, 51 South. 880; *Telephone Co. v. Archer*, 96 Ark. 213, 131 S. W. 702, Ann. Cas. 1912B, 593.

<sup>209</sup> *West. U. Tel. Co. v. Harvey*, 67 Kan. 729, 74 Pac. 250; *West. U. Tel. Co. v. McNairy*, 34 Tex. Civ. App. 389, 78 S. W. 969; *Thompson v. West. U. Tel. Co.*, 106 N. C. 549, 11 S. E. 269; *West. U. Tel. Co. v. Drake*, 14 Tex. Civ. App. 601, 38 S. W. 632; *Mitchell v. West. U. Tel. Co.*, 12 Tex. Civ. App. 262, 33 S. W. 1016; *West. U. Tel. Co. v. Lehman*, 105 Md. 442, 66 Atl. 266; *West. U. Tel. Co. v. Hope*, 11 Ill. App. 289; *West. U. Tel. Co. v. Benson*, 159 Ala. 254, 48 South. 712; *Arkansas, etc., R. Co. v. Stroude*, 82 Ark. 117, 100 S. W. 760; *West. U. Tel. Co. v. Ford*, 77 Ark. 531, 92 S. W. 528; *West. U. Tel. Co. v. Northcutt*, 158 Ala. 539, 48 South. 553, 132 Am. St. Rep. 38; *West. U. Tel. Co. v. Rowell*, 153 Ala. 295, 45 South. 73; *Telephone Co. v. Archer*, 96 Ark. 213, 131 S. W. 702, Ann. Cas. 1912B, 593; *Telephone Co. v. Burns*, 164 Ala. 252, 51 South. 373; *Markley v. Telephone Co.*, 151 Iowa, 612, 132 N. W. 37; *Hoaglin v. Telephone Co.*, 161 N. C. 390, 77 S. E. 417.

<sup>210</sup> *West. U. Tel. Co. v. Hope*, 11 Ill. App. 289; *Kernodle v. West. U. Tel. Co.*, 141 N. C. 436, 54 S. E. 423, 8 Ann. Cas. 469; *West. U. Tel. Co. v. Northcutt*, 158 Ala. 539, 48 South. 553, 132 Am. St. Rep. 38; *Sherrill v. West. U. Tel. Co.*, 116 N. C. 655, 21 S. E. 429; *West. U. Tel. Co. v. Benson*, 159 Ala. 254, 48 South. 712; *West. U. Tel. Co. v. Lydon*, 82 Tex. 364, 18 S. W. 701; *West. U. Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728; *Reed v. West. U. Tel. Co.*, 31 Tex. Civ. App. 116, 71 S. W. 389; *West. U. Tel. Co. v. Johnson*, 16 Tex. Civ. App. 546, 41 S. W. 367; *Mitchell v. West. U. Tel. Co.*, 12 Tex. Civ. App. 262, 33 S. W. 1016; *West. U. Tel. Co. v. Karr*, 5 Tex. Civ. App. 60, 24 S. W. 302; *Boyd v. Electric Co.*, 41 Or. 336, 68 Pac. 810.

<sup>211</sup> *Sherrill v. West. U. Tel. Co.*, 116 N. C. 655, 21 S. E. 429; *West. U. Tel.*

<sup>212</sup> *West. U. Tel. Co. v. Northcutt*, 158 Ala. 539, 48 South. 553, 132 Am. St. Rep. 38; *West. U. Tel. Co. v. Benson*, 159 Ala. 254, 48 South. 712; *Arkansas, etc., R. Co. v. Stroude*, 82 Ark. 117, 100 S. W. 760; *Telephone Co. v. Wilson*, 97 Ark. 198, 133 S. W. 845.



and if the law has been covered by other instructions, such requested instructions should be refused.<sup>213</sup> In a great number of cases brought against these companies for damages, it is generally alleged that the loss or injury is the result of the company's negligence, and more especially is this so where the action is for a breach of duty. Negligence being a question for the jury<sup>214</sup> and to be determined from all the facts and circumstances theretofore submitted, it would be proper for the court to instruct them that the company should not be held liable if they should believe from such evidence that it used that degree of care a reasonably prudent man would have used in his own behalf under like circumstances.<sup>215</sup> If the object of a message could not have been accomplished, even though the company had not been guilty of negligently transmitting or delivering it, the company should not be held liable, and the jury should be so instructed.<sup>216</sup> Where the action is to recover damages for mental or physical suffering, it is proper for the court to distinguish between suffering actually endured and the suffering which is necessarily an incident to the inducing cause of such suffering.<sup>217</sup> Thus, in an action brought to recover damages for injuries to a wife by the failure of a telegraph company to deliver a message sent to her physician, the court should charge the jury in such a way as to distinguish between suffering actually endured by her and the suffering necessarily incident to her confine-

Co. v. Weniski, 84 Ark. 457, 106 S. W. 486; Thompson v. West. U. Tel. Co., 106 N. C. 549, 11 S. E. 269; Southwestern Tel., etc., Co. v. Gotcher, 93 Tex. 114, 53 S. W. 686; West. U. Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728; West. U. Tel. Co. v. Thompson Milling Co., 41 Tex. Civ. App. 223, 91 S. W. 307; Robertson v. Telephone Co., 95 S. C. 356, 78 S. E. 977; Lyles v. West. U. Tel. Co., 84 S. C. 1, 65 S. E. 832, 137 Am. St. Rep. 829.

<sup>213</sup> West. U. Tel. Co. v. Johnsey, 49 Tex. Civ. App. 487, 109 S. W. 251; Arkansas, etc., R. Co. v. Stroude, 82 Ark. 117, 100 S. W. 760; West. U. Tel. Co. v. Adams, 39 Tex. Civ. App. 517, 87 S. W. 1060; Erie Tel., etc., Co. v. Grimes, 82 Tex. 89, 17 S. W. 831; West. U. Tel. Co. v. Odom, 21 Tex. Civ. App. 537, 52 S. W. 632; Herlitzke v. Telephone Co., 145 Wis. 185, 130 N. W. 59; Carmichael v. So. Bell. Tel., etc., Co., 162 N. C. 333, 78 S. E. 507, Ann. Cas. 1915A, 983, insufficient in supplying omission of another given.

<sup>214</sup> See § 920.

<sup>215</sup> Gulf, etc., R. Co. v. Wilson, 69 Tex. 739, 7 S. W. 653.

<sup>216</sup> West. U. Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772.

<sup>217</sup> West. U. Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772. See, also, Harrison v. West. U. Tel. Co., 136 N. C. 381, 48 S. E. 772; Glover v. West. U. Tel. Co., 78 S. C. 502, 59 S. E. 526; West. U. Tel. Co. v. Johnson, 164 Ala. 229, 51 South. 230; Shepard v. West. U. Tel. Co., 143 N. C. 244, 55 S. E. 704, 118 Am. St. Rep. 796, of considering questions of instruction in mental anguish cases.

ment.<sup>218</sup> If the plea of the defendant should contain averments to the effect that the plaintiff contributed to the loss or injury, and there is evidence to sustain the averment, it will be error for the court to charge the jury that the defendant is liable, if they find that it negligently transmitted or delivered the message.<sup>219</sup>

§ 522. **Weight and sufficiency.**—In actions against telegraph, telephone, and electric companies, as in other civil cases, the plaintiff must make out his case by a preponderance of the evidence.<sup>220</sup> In all actions based upon contract or tort, there are several essential matters which must be alleged and proved; that is to say, it must be shown that there is a valid enforceable contract between the plaintiff and the company and that out of which the action arises, or that the company owes a duty to the plaintiff in the particular instance,<sup>221</sup> and that the contract or tort has been breached through the negligence of the company, and thereby proximately causing the injury complained of<sup>222</sup> to plaintiff's damage.<sup>223</sup> In establishing each of these facts, it must be done by a preponderance of evidence. The plaintiff must prove by a preponderance of the evidence facts and circumstances sufficient to recover exemplary damages<sup>224</sup> or damages for mental anguish<sup>225</sup> where ei-

<sup>218</sup> West. U. Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772.

<sup>219</sup> West. U. Tel. Co. v. McNair, 120 Ala. 99, 23 South. 801.

<sup>220</sup> Newsome v. West. U. Tel. Co., 144 N. C. 178, 56 S. E. 863; Slaughter v. West. U. Tel. Co. (Tex. Civ. App.) 112 S. W. 688; Graham v. Detroit, etc. R. Co., 151 Mich. 629, 115 N. W. 993, 25 L. R. A. (N. S.) 326; West. U. Tel. Co. v. True, 105 Tex. 344, 148 S. W. 561, 41 L. R. A. (N. S.) 1188; Telephone, etc., Co. v. Jarrell (Tex. Civ. App.) 138 S. W. 1165; Herlitzke v. Telephone Co., 145 Wis. 185, 130 N. W. 59; Smith v. Telephone, etc., Co., 109 Ark. 35, 158 S. W. 975; Goodwin v. Telephone Co. (Tex. Civ. App.) 160 S. W. 107.

<sup>221</sup> Sweatland v. Illinois, etc., Tel. Co., 27 Iowa, 433, 1 Am. Rep. 285; Aiken v. West. U. Tel. Co., 69 Iowa, 31, 28 N. W. 419, 58 Am. Rep. 210; Ayres v. West. U. Tel. Co., 65 App. Div. 149, 72 N. Y. Supp. 634; West. U. Tel. Co. v. Barnes, 95 Tenn. 271, 32 S. W. 207; Telephone Co. v. Wright, 169 Ala. 104, 53 South. 95; Telephone, etc., Co. v. Kelly, 103 Ark. 442, 147 S. W. 457; Telephone Co. v. McFrancis (Tex. Civ. App.) 149 S. W. 574; Bertuch v. Telephone, etc., Co., 79 Misc. Rep. 10, 139 N. Y. Supp. 289.

<sup>222</sup> Newsome v. West. U. Tel. Co., 144 N. C. 178, 56 S. E. 863; Hauser v. West. U. Tel. Co., 150 N. C. 557, 64 S. E. 503; Slaughter v. West. U. Tel. Co. (Tex. Civ. App.) 112 S. W. 688; Telephone Co. v. Duke, 108 Ark. 8, 156 S. W. 452.

<sup>223</sup> West. U. Tel. Co. v. Morris (Tex. Civ. App.) 33 S. W. 1025; West. U. Tel. Co. v. Waxelbaum, 113 Ga. 1017, 39 S. E. 443, 56 L. R. A. 741; West. U. Tel. Co. v. Bertram, 1 White & W. Civ. Cas. Ct. App. § 1152; West. U. Tel. Co. v. Williams, 163 Fed. 513, 90 C. C. A. 143.

<sup>224</sup> Johnson v. West. U. Tel. Co., 82 S. C. 87, 63 S. E. 1. See Busbee v. Telephone Co., 89 S. C. 567, 72 S. E. 499.

<sup>225</sup> Hauser v. West. U. Tel. Co., 150 N. C. 557, 64 S. E. 503; West. U. Tel. Co. v. Long, 90 Ark. 203, 118 S. W. 495; Telephone Co. v. Johnson, 164 Ala.

ther kind is claimed. Where the defendant is relying on affirmative defense,<sup>226</sup> or where there is a *prima facie* case of negligence to be overcome by him,<sup>227</sup> he must submit sufficient evidence to preponderate that of the plaintiff. It devolves upon the plaintiff to show by a preponderance of evidence that the company has been guilty of negligence,<sup>228</sup> and that such negligence was the proximate cause of the injury or loss.<sup>229</sup> Whether this has been done must be determined by the evidence in each particular case. So also the same rule applies where it is attempted to be shown that there was no contributory negligence,<sup>230</sup> or that there is enough evidence to support the verdict for the plaintiff.<sup>231</sup>

§ 522a. **Expert evidence—cause of death.**—Opinions of witnesses specially qualified to testify to matters involving scientific or technical knowledge of electrical currents not possessed by an ordinary witness are frequently received in actions against electrical companies. If, in such cases, the jury are equally capable with the witness of forming an opinion from the facts stated, such evidence is inadmissible.<sup>232</sup> Furthermore, to render such evidence admissible, the witness must be specially qualified to give

229, 51 South. 230; Telephone Co. v. Moore (Tex. Civ. App.) 139 S. W. 1020; Telephone Co. v. Wright, 169 Ala. 104, 53 South. 95; Ellison v. Telephone Co., 163 N. C. 5, 79 S. E. 277; Telephone Co. v. Glenn (Tex. Civ. App.) 156 S. W. 1116. See §§ 601, 602.

<sup>226</sup> West. U. Tel. Co. v. Olivarri (Tex. Civ. App.) 110 S. W. 930; Kendall v. West. U. Tel. Co., 56 Mo. App. 192; West. U. Tel. Co. v. Smith (Tex. Civ. App.) 33 S. W. 742.

<sup>227</sup> See § 509.

<sup>228</sup> Light, etc., Co. v. Sheridan, 200 Ill. 439, 65 N. E. 1070; Owensboro v. Knox, 76 S. W. 191, 25 Ky. Law Rep. 680; West. U. Tel. Co. v. State, 82 Md. 293, 33 Atl. 763, 51 Am. St. Rep. 464, 31 L. R. A. 572; Braham v. Electric Co., 72 App. Div. 456, 76 N. Y. Supp. 578; Ludwig v. Metropolitan, etc., R. Co., 71 App. Div. 210, 75 N. Y. Supp. 667; Boyd v. Electric Co., 41 Or. 336, 68 Pac. 810; Herron v. Pittsburg, 204 Pa. 509, 54 Atl. 311, 93 Am. St. Rep. 798; Fisher v. New Bern, 140 N. C. 506, 53 S. E. 342, 5 L. R. A. (N. S.) 542, 111 Am. St. Rep. 857.

<sup>229</sup> Atlanta Consol., etc., R. Co. v. Owings, 97 Ga. 663, 25 S. E. 377, 33 L. R. A. 798; Paine v. Elec. Ill. Co., 64 App. Div. 477, 72 N. Y. Supp. 279; Electric, etc., Co. v. McCoy (Tex. Civ. App.) 149 S. W. 534.

<sup>230</sup> Knowlton v. Des Moines, etc., L. Co., 117 Iowa, 451, 90 N. W. 818; Clements v. Electric L. Co., 44 La. Ann. 692, 11 South. 51, 32 Am. St. Rep. 348, 16 L. R. A. 43; Electric L. Co. v. Johnson, 67 Neb. 393, 93 N. W. 778; Snyder v. Telephone Co., 135 Iowa, 215, 112 N. W. 776, 14 L. R. A. (N. S.) 321; Gas, etc., Co. v. State, 109 Md. 186, 72 Atl. 655; Von Trebra v. Gas L. Co., 209 Mo. 648, 108 S. W. 559; Dutcher v. Electric Co., 123 App. Div. 765, 108 N. Y. Supp. 567; Davenport v. Electric Co., 242 Mo. 111, 145 S. W. 454; Crosby v. Railroad Co., 53 Or. 496, 100 Pac. 300, 101 Pac. 204.

<sup>231</sup> See § 511 et seq.

<sup>232</sup> Thus the stringing of wires from one pole to another through branches of



it,<sup>233</sup> and the question involved must be material and one which requires special knowledge.<sup>234</sup> Even then, when such evidence is admissible, the question must ultimately be determined by the jury.<sup>235</sup> Electrical experts are sometimes called to testify to matters concerning the safety or danger of certain electrical constructions, such as the installation of interior fixtures,<sup>236</sup> or the construction of the line.<sup>237</sup> Then, there are certain incidents in the management of electric lighting and heating systems which may be beyond the knowledge of jurors so as to require the evidence of such witnesses.<sup>238</sup> Experts may testify as to the nature and cause of electrical currents,<sup>239</sup> and the effect thereof upon objects coming in contact therewith.<sup>240</sup> It is sometimes difficult in determining whether an electrical shock is the cause of the death of a per-

intervening trees. *Flynn v. Boston Elec. L. Co.*, 171 Mass. 395, 50 N. E. 937; *Meehan v. Holyoke, etc., Ry. Co.*, 186 Mass. 511, 72 N. E. 61. See *Drown v. New England Tel., etc., Co.*, 81 Vt. 358, 70 Atl. 599.

<sup>233</sup> See *Electric Co. v. Corbin*, 109 Md. 442, 72 Atl. 606; *Anthony v. Cass Co. Home Tel. Co.*, 165 Mich. 388, 130 N. W. 659; *Monds v. Dunn*, 163 N. C. 108, 79 S. E. 303; *Denison, etc., Power Co. v. Patton* (Tex. Civ. App.) 135 S. W. 1040.

<sup>234</sup> See *Anthony v. Cass Co. Home Tel. Co.*, 165 Mich. 388, 130 N. W. 659.

<sup>235</sup> *Electric L., etc., Co. v. State*, 109 Md. 186, 72 Atl. 651; *Swan v. Salt Lake, etc., R. Co.*, 41 Utah, 518, 127 Pac. 267. But see *Clark v. Johnson County Tel. Co.*, 146 Iowa, 428, 123 N. W. 327; *Cumberland Tel., etc., Co. v. Peacher Mill Co.*, 129 Tenn. 374, 164 S. W. 1145, L. R. A. 1915A, 1045, a witness cannot give his opinion that a fire was probably caused by the lightning following the wires.

<sup>236</sup> See *Fish v. Electric L., etc., Co.*, 189 N. Y. 336, 82 N. E. 150, 13 L. R. A. (N. S.) 226; *Excelsior Elec. Co. v. Sweet*, 57 N. J. Law, 224, 30 Atl. 553, to explain the imperfections in certain constructions; *German-American Ins. Co. v. Electric L., etc., P. Co.*, 103 App. Div. 310, 93 N. Y. Supp. 46, affirmed in 185 N. Y. 581, 78 N. E. 1103; *Webster v. Richmond L., etc., Co.*, 158 App. Div. 210, 143 N. Y. Supp. 57.

<sup>237</sup> *Southwestern Tel., etc., Co. v. Luckie* (Tex. Civ. App.) 153 S. W. 1158; *Warren v. City Electric Ry. Co.*, 141 Mich. 298, 104 N. W. 613; *Murphy v. Pacific Tel., etc., Co.*, 68 Wash. 643, 124 Pac. 114; *Electric Co. v. Walters*, 39 Colo. 301, 89 Pac. 815; *Citizens' Tel. Co. v. Thomas*, 45 Tex. Civ. App. 20, 99 S. W. 879; *Fritz v. West. U. Tel. Co.*, 25 Utah, 263, 71 Pac. 209; *Bernier v. St. Paul Gas L. Co.*, 92 Minn. 214, 99 N. W. 778; *Kansas City, etc., R. Co. v. Rogers*, 203 Fed. 462, 121 C. C. A. 586; *Barrett v. New England, etc., Tel. Co.*, 201 Mass. 117, 87 N. E. 565.

<sup>238</sup> *Jacksonville Elec. Co. v. Sloan*, 52 Fla. 257, 42 South. 516; *Cleburne Elec., etc., Co. v. McCoy* (Tex. Civ. App.) 149 S. W. 534; *Consolidated Gas, etc., Co. v. State*, 109 Md. 186, 72 Atl. 651.

<sup>239</sup> *Prince v. Lowell Elec. L. Corp.*, 201 Mass. 276, 87 N. E. 558; *Riley v. City of Independence*, 258 Mo. 671, 167 S. W. 1022, Ann. Cas. 1915D, 748; *Nolan v. Newton St. Ry. Co.*, 206 Mass. 384, 92 N. E. 505; *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269.

<sup>240</sup> *Escambia Co. Elec. L., etc., Co. v. Sutherland*, 61 Fla. 167, 55 South. 83; *Anthony v. Cass Co. Home Tel. Co.*, 165 Mich. 388, 130 N. W. 659.

son in the absence of eyewitness to the accident; but the rule is that, where a person is found dead in proximity to an electrical appliance, contact with which is capable of producing death, and no cause for his death other than the electric current is presented, the jury may be authorized to find that death was caused by an electric current passing from the appliance.<sup>241</sup>

§ 523. **Appeal and error.**—It is a general rule of law that a party cannot have a case reversed on an error which has not been prejudicial to him.<sup>242</sup> So, where such error results from the admission of certain evidence<sup>243</sup> or the giving of certain instructions<sup>244</sup> to the jury, and the appellant is not harmed or prejudiced in his cause thereby, he could not obtain a reversal therefor. All evidence must be submitted on the trial of the case and not in the appellate court,<sup>245</sup> and so, if the evidence has thus been omitted in the first court, it would be no ground for a reversal of the case. The case cannot be reversed on the fact that the verdict was based upon conflicting evidence,<sup>246</sup> provided there was enough to support the verdict.<sup>247</sup> However, if there is not enough evidence to support such a verdict, it would be grounds for reversing the

<sup>241</sup> *Staab v. Rocky Mountain Bell Tel. Co.*, 23 Idaho, 314, 129 Pac. 1078; *Indianapolis, etc., Co. v. Dolby*, 47 Ind. App. 406, 92 N. E. 739; *Smith v. Twin City Rapid Transit Co.*, 102 Minn. 4, 112 N. W. 1001; *Suburban Elec. Co. v. Nugent*, 58 N. J. Law, 658, 34 Atl. 1069, 32 L. R. A. 700; *Morgan v. Westmoreland Elec. Co.*, 213 Pa. 151, 62 Atl. 638; *Citizens' Tel. Co. v. Thomas*, 45 Tex. Civ. App. 20, 99 S. W. 879; *Ohrstrom v. Tacoma*, 57 Wash. 121, 106 Pac. 629; *Economy, etc., Power Co. v. Sheridan*, 200 Ill. 439, 65 N. E. 1070; *Martin v. Des Moines, etc., L. Co.*, 131 Iowa, 724, 106 N. W. 359; *Byerly v. Light, etc., Co.*, 130 Mo. App. 593, 109 S. W. 1065.

<sup>242</sup> *Hasbrouck v. West. U. Tel. Co.*, 107 Iowa, 160, 77 N. W. 1034, 70 Am. St. Rep. 181; *Cumberland Tel., etc., Co. v. Quigley*, 129 Ky. 788, 112 S. W. 897, 19 L. R. A. (N. S.) 575.

<sup>243</sup> *West. U. Tel. Co. v. Littlejohn*, 72 Miss. 1025, 18 South. 418; *Roberts v. West. U. Tel. Co.*, 76 S. E. 275, 56 S. E. 960; *West. U. Tel. Co. v. Hamilton*, 36 Tex. Civ. App. 300, 81 S. W. 1052.

<sup>244</sup> *Postal Tel. Cable Co. v. Lathrop*, 131 Ill. 575, 23 N. E. 583, 19 Am. St. Rep. 55, 7 L. R. A. 474; *Hasbrouck v. West. U. Tel. Co.*, 107 Iowa, 160, 77 N. W. 1034, 70 Am. St. Rep. 181; *West. U. Tel. Co. v. Lehman*, 105 Md. 442, 66 Atl. 266; *Sherrill v. West. U. Tel. Co.*, 117 N. C. 352, 23 S. E. 277; *Southwestern Tel., etc., Co. v. Owens* (Tex. Civ. App.) 116 S. W. 89; *West. U. Tel. Co. v. Stephens*, 2 Tex. Civ. App. 129, 21 S. W. 148; *West. U. Tel. Co. v. Edmonson* (Tex. Civ. App.) 40 S. W. 622; *Telephone, etc., Co. v. Smithdeal*, 104 Tex. 258, 136 S. W. 1049.

<sup>245</sup> *West. U. Tel. Co. v. De Golyer*, 27 Ill. App. 489; *West. U. Tel. Co. v. Hopkins*, 49 Ind. 223.

<sup>246</sup> *West. U. Tel. Co. v. Jones*, 81 Tex. 271, 16 S. W. 1006.

<sup>247</sup> *West. U. Tel. Co. v. Jones*, 81 Tex. 271, 16 S. W. 1006; *Harper v. West. U. Tel. Co.*, 92 Mo. App. 304; *Gulf, etc., R. Co. v. Wilson*, 69 Tex. 739, 7 S. W. 653.

case.<sup>248</sup> So also, if an error has been made, and the judgment rendered thereon can be corrected, or where it is partially wrong and the bad part can be separated from the good, the case will not be subject to a reversal.<sup>249</sup>

<sup>248</sup> Gulf, etc., R. Co. v. Wilson, 69 Tex. 739, 7 S. W. 653.

<sup>249</sup> Pacific Postal Tel. Cable Co. v. Fleischner, 66 Fed. 899, 14 C. C. A. 166.



## CHAPTER XX

## MEASURE OF DAMAGES

- § 524. Scope of chapter.
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548. Same continued—deprived of the addressee’s consolation.
549. Damages which might have been prevented.
550. Same—damages which could not have been prevented—contributory negligence.

§ 524. **Scope of chapter.**—It is our purpose, in this chapter, to discuss at some length the amount of damages which may be recovered against telegraph companies for breaches of their contractual or public duties, and the means by which the measurement of same may be ascertained. While commenting upon this subject, it may be proper to state at the outset that there is no visible distinction between the rule laid down and generally followed by all courts and text-writers to ascertain these facts in cases against telegraph companies and that in actions against other corporations<sup>1</sup> and private persons; for this reason it will not be necessary to

<sup>1</sup> See § 526. See, also, *West. U. Tel. Co. v. Foy*, 32 Okl. 801, 124 Pac. 305, 49 L. R. A. (N. S.) 343.

discuss extensively the common and accepted rule whereby the measure of damages is ascertained in such cases, but simply to explain and illustrate this rule as it is applicable particularly to actions against telegraph companies.

§ 525. **Damages defined—nominal damages.**—The term “damages” means a pecuniary satisfaction which a party may recover against another, in an action wherein it is alleged that the latter has infringed upon some of the former’s legal rights to his loss or injury. So it may be seen that there must be an infringement of some legal right before an action can successfully be maintained;<sup>2</sup> and, where there has been an infringement of these rights, damages inevitably result. It is the act of infringement of these legal rights, and not the consequence of such act, which makes out the case, yet it is necessary to know the consequences in order to determine the amount of damages to be recovered. The general rule is that damages are in the nature of a compensation; so it follows from this that the plaintiff can recover, at the utmost, only such damages as are coextensive with the loss or injury sustained. If it cannot be shown that there is an injury or loss sustained by the act of infringement, only nominal damages, if any, can be recovered. So, where a telegraph company has made a contract to transmit and deliver a message, but has failed to carry out such contract, the party whose rights are violated thereby would be entitled to recover nominal damages, at least, although he does not show any actual damages,<sup>3</sup> but only nominal damages could be recovered if he fails to show any actual recoverable damages.<sup>4</sup> The party thus injured may be allowed to recover as actual damages,<sup>5</sup> the charges

<sup>2</sup> *Rocky Mountain Bell Tel. Co. v. Utah Ind. Tel. Co.*, 31 Utah, 377, 88 Pac. 26, 8 L. R. A. (N. S.) 1153.

<sup>3</sup> *West. U. Tel. Co. v. Haley*, 143 Ala. 586, 39 South. 386; *Richmond Hosiery Mills v. West. U. Tel. Co.*, 123 Ga. 216, 51 S. E. 290; *West. U. Tel. Co. v. Westmoreland*, 150 Ala. 654, 43 South. 790; *Glenn v. West. U. Tel. Co.*, 1 Ga. App. 821, 58 S. E. 83; *Denham v. West. U. Tel. Co.*, 87 S. W. 788, 27 Ky. Law Rep. 999; *West. U. Tel. Co. v. Bryant*, 17 Ind. App. 70, 46 N. E. 358; *Gerock v. West. U. Tel. Co.*, 147 N. C. 1, 60 S. E. 637; *West. U. Tel. Co. v. Hendricks*, 26 Tex. Civ. App. 366, 63 S. W. 341; *Hall v. West. U. Tel. Co.*, 139 N. C. 369, 52 S. E. 50; *Hibbard v. West. U. Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 775; *Reynolds v. West. U. Tel. Co.*, 81 Mo. App. 223; *Howard v. West. U. Tel. Co.*, 106 Ark. 559, 153 S. W. 803.

<sup>4</sup> *Merrill v. West. U. Tel. Co.*, 78 Me. 97, 2 Atl. 847; *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126; *Beatty Lbr. Co. v. West. U. Tel. Co.*, 52 W. Va. 410, 44 S. E. 309; *Walser v. West. U. Tel. Co.*, 114 N. C. 440, 19 S. E. 366; *Cherokee Tanning Extract Co. v. West. U. Tel. Co.*, 143 N. C. 376, 55 S. E. 777, 118 Am. St. Rep. 806; *West. U. Tel. Co. v. Williams*, 163 Fed. 513, 90 C. C. A. 143; *Larsen v. Postal Tel. Cable Co.*, 150 Iowa, 748, 130 N. W. 813.

<sup>5</sup> *West. U. Tel. Co. v. Lawson*, 66 Kan. 660, 72 Pac. 283; *Beal v. West. U.*

paid for transmission,<sup>6</sup> whether the action is in contract or tort,<sup>7</sup> provided said charges have been actually paid by him;<sup>8</sup> however, this is the limit of his recovery where no actual damages are shown.<sup>9</sup>

§ 526. **General rule—Hadley v. Baxendale.**—It being presumed that the plaintiff has been injured in some of his rights, and that he is entitled to be compensated in damages therefor, the question which then presents itself is, By what method can the amount to be awarded be measured; or, in other words, by what means can the loss or injury sustained be measured or determined, so that the plaintiff may be awarded an amount in damages equivalent to, or coextensive with, the loss or injury as a compensation therefor? The rule laid down on this subject, and the one to be followed in this work, is so generally used that it has become a proverb in law, and is universally recognized and accepted as a fundamental principle in the law of damages for a negligent breach of a contract. The rule upon which all cases of this nature have been based is that given in the well-known English case of *Hadley v. Baxendale*, and the exact statement of the rule therein given is that, "When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, either as arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."<sup>10</sup> As can be seen, this rule excludes the

Tel. Co., 153 N. C. 331, 69 S. E. 247; *Bailey v. West. U. Tel. Co.*, 227 Pa. 522, 76 Atl. 736, 43 L. R. A. (N. S.) 502, 19 Ann. Cas. 895. See § 628.

<sup>6</sup> *West. U. Tel. Co. v. Lawson*, 66 Kan. 660, 72 Pac. 283; *West. U. Tel. Co. v. Crumpton*, 138 Ala. 632, 36 South. 517; *Taliferro v. West. U. Tel. Co.*, 52 S. W. 825, 21 Ky. Law Rep. 1290; *Abeles v. West. U. Tel. Co.*, 37 Mo. App. 554; *Beaupre v. Pacific, etc., Tel. Co.*, 21 Minn. 155; *Kennon v. West. U. Tel. Co.*, 126 N. C. 232, 35 S. E. 468; *West. U. Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844. See § 628.

<sup>7</sup> *West. U. Tel. Co. v. Westmoreland*, 150 Ala. 654, 43 South. 790. See § 628.

<sup>8</sup> *Bass v. Postal Tel. Cable Co.*, 127 Ga. 423, 56 S. E. 465, 12 L. R. A. (N. S.) 489.

<sup>9</sup> *Beaupre v. Pacific, etc., Tel. Co.*, 21 Minn. 155; *Hughes v. West. U. Tel. Co.*, 114 N. C. 70, 19 S. E. 100, 41 Am. St. Rep. 782; *Pennington v. West. U. Tel. Co.*, 67 Iowa, 631, 24 N. W. 45, 25 N. W. 838, 56 Am. Rep. 367; *Levy v. West. U. Tel. Co.*, 35 Mo. App. 170; *West. U. Tel. Co. v. Parks* (Tex. Civ. App.) 25 S. W. 813; *Cutts v. West. U. Tel. Co.*, 71 Wis. 46, 36 N. W. 627. See § 628.

<sup>10</sup> *Hadley v. Baxendale*, 9 Exch. 341; *Stone v. Postal Tel. Cable Co.*, 35 R. I. 498, 87 Atl. 319, 46 L. R. A. (N. S.) 180.



consideration of all damages which are remote or speculative, and only such as are the proximate consequence of the injury complained of can be recovered. The rule itself is a definite statement of what damages the breach of a contract is the proximate cause,<sup>11</sup> and the accepted maxim, *Causa proxima non remota spectatur*, excludes the consideration of all damages which are not the proximate result of the injury alleged to have been committed. Hence it may be stated as a general rule that a telegraph company is liable for such damages as naturally and proximately arise from its negligent failure to transmit and deliver a message without unreasonable delay.<sup>12</sup>

<sup>11</sup> *Primrose v. West. U. Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; *Pacific Postal Tel. Cable Co. v. Fleischner*, 66 Fed. 899, 14 C. C. A. 166; *McBride v. Sunset Tel. Co. (C. C.)* 96 Fed. 81; *West. U. Tel. Co. v. Henley*, 23 Ind. App. 14, 54 N. E. 775. Compare *Squire v. West. U. Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157; *Postal Tel. Cable Co. v. Barwise*, 11 Colo. App. 328, 53 Pac. 252; *Chapman v. West. U. Tel. Co.*, 90 Ky. 265, 13 S. W. 880; *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126; *Bartlett v. West. U. Tel. Co.*, 62 Me. 209, 16 Am. Rep. 437; *West. U. Tel. Co. v. Church*, 3 Neb. (Unof.) 22, 90 N. W. 878, 57 L. R. A. 909; *Mackay v. West. U. Tel. Co.*, 16 Nev. 226; *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *Curtin v. West. U. Tel. Co.*, 14 Misc. Rep. 459, 36 N. Y. Supp. 1111; *Barnesville First Nat. Bank v. West. U. Tel. Co.*, 30 Ohio St. 565, 27 Am. Rep. 485; *West. U. Tel. Co. v. Edmondson*, 91 Tex. 206, 42 S. W. 549; *Rowell v. West. U. Tel. Co.*, 75 Tex. 26, 12 S. W. 534; *West. U. Tel. Co. v. Murray*, 29 Tex. Civ. App. 207, 68 S. W. 549; *Fisher v. West. U. Tel. Co.*, 119 Wis. 146, 96 N. W. 545.

<sup>12</sup> *Kagy v. West. U. Tel. Co.*, 37 Ind. App. 73, 76 N. E. 792, 117 Am. St. Rep. 278; *West. U. Tel. Co. v. Cunningham*, 99 Ala. 314, 14 South. 579; *Little Rock, etc., Tel. Co. v. Davis*, 41 Ark. 79; *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589; *Postal Tel. Cable Co. v. Barwise*, 11 Colo. App. 328, 53 Pac. 252; *West. U. Tel. Co. v. Hyer*, 22 Fla. 637, 1 South. 129, 1 Am. St. Rep. 222; *West. U. Tel. Co. v. Fontaine*, 58 Ga. 433; *West. U. Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480; *Tyler v. West. U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *West. U. Tel. Co. v. Kemp*, 55 Ill. App. 583; *West. U. Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; *West. U. Tel. Co. v. Buchanan*, 35 Ind. 429, 9 Am. Rep. 744; *Bierhaus v. West. U. Tel. Co.*, 8 Ind. App. 246, 34 N. E. 581; *West v. West. U. Tel. Co.*, 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530; *Bartlett v. West. U. Tel. Co.*, 62 Me. 209, 16 Am. Rep. 437; *Birney v. N. Y., etc., Ptg. Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607; *Grinnell v. West. U. Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485; *West. U. Tel. Co. v. Carew*, 15 Mich. 525; *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *Baldwin v. West. U. Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *Green v. West. U. Tel. Co.*, 136 N. C. 489, 49 S. E. 165, 103 Am. St. Rep. 955, 67 L. R. A. 985, 1 Ann. Cas. 349; *West. U. Tel. Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500; *Wolf v. West. U. Tel. Co.*, 62 Pa. 83, 1 Am. Rep. 387; *West. U. Tel. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *West. U. Tel. Co. v. Joke*, 6 Tex. Civ. App. 403, 25 S. W. 168, 1036; *West. U. Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715; *Hibbard v. West. U. Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 775; *West. U. Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744; *West. U. Tel. Co. v. Crumpton*, 138 Ala. 632, 36 South. 517; *West. U. Tel. Co. v. Reed*, 3 Ala. App. 253, 57 South.

§ 527. Same continued—not only actual but contemplative damages.—It is not so difficult to understand the rule, as it is very clear that the injured party should recover all the damages caused as a proximate result of a breach of a contract, but it is its application to the different cases which puzzles and confuses the courts.<sup>13</sup> The rule does not become much more comprehensive when it further states that the damages must flow directly and naturally from the breach and that they must be certain, both in this nature, and in respect to the cause from which they proceed. Under this rule, only such damages can be recovered as may fairly be supposed to have entered into the contemplation of the parties' minds at the time of making the contract, as might naturally be expected to arise from its breach.<sup>14</sup> As was very ably said on this subject: "It is not

83; *Cain v. Tel. Co.*, 89 Kan. 787, 133 Pac. 874; *West. U. Tel. Co. v. Foy*, 32 Okl. 801, 124 Pac. 305, 49 L. R. A. (N. S.) 343; *Cordell v. West. U. Tel. Co.*, 149 N. C. 402, 63 S. E. 71, 22 L. R. A. (N. S.) 540; *West. U. Tel. Co. v. Milton*, 53 Fla. 484, 43 South. 495, 11 L. R. A. (N. S.) 560, 125 Am. St. Rep. 1077; *Stone v. Postal Tel. Cable Co.*, 35 R. I. 498, 87 Atl. 319, 46 L. R. A. (N. S.) 180; *Bailey v. West. U. Tel. Co.*, 227 Pa. 522, 76 Atl. 736, 43 L. R. A. (N. S.) 502, 19 Ann. Cas. 895; *Cumberland Tel., etc., Co. v. Quigley*, 129 Ky. 788, 112 S. W. 897, 19 L. R. A. (N. S.) 575; *West. U. Tel. Co. v. Crawford*, 20 Okl. 143, 116 Pac. 925, 35 L. R. A. (N. S.) 930; *West. U. Tel. Co. v. Caldwell*, 126 Ky. 42, 102 S. W. 840, 12 L. R. A. (N. S.) 748; *West. U. Tel. Co. v. Price*, 137 Ky. 758, 126 S. W. 1100, 29 L. R. A. (N. S.) 836; *Providence-Washington Ins. Co. v. West. U. Tel. Co.*, 247 Ill. 84, 93 N. E. 134, 30 L. R. A. (N. S.) 1170, 139 Am. St. Rep. 314; *Postal Tel. Cable Co. v. Nichols*, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A. (N. S.) 870, 14 Ann. Cas. 369; *Kolliner v. West. U. Tel. Co.*, 126 Minn. 122, 147 N. W. 961, 52 L. R. A. (N. S.) 1180; *West. U. Tel. Co. v. Barlow*, 51 Fla. 351, 40 South. 491, 4 L. R. A. (N. S.) 262; *Stewart v. Postal Tel. Cable Co.*, 131 Ga. 31, 61 S. E. 1045, 18 L. R. A. (N. S.) 692, 127 Am. St. Rep. 205; *Strong v. West. U. Tel. Co.*, 18 Idaho, 389, 109 Pac. 910, 30 L. R. A. (N. S.) 409, Ann. Cas. 1912A, 55; *Henry v. West. U. Tel. Co.*, 73 Wash. 260, 131 Pac. 812, 46 L. R. A. (N. S.) 412; *Clark Mfg. Co. v. West. U. Tel. Co.*, 152 N. C. 157, 67 S. E. 329, 27 L. R. A. (N. S.) 643; *Bass v. Postal Tel. Cable Co.*, 127 Ga. 423, 56 S. E. 465, 12 L. R. A. (N. S.) 489; *Carmichael v. Southern Bell Tel. Co.*, 157 N. C. 21, 72 S. E. 619, 39 L. R. A. (N. S.) 651, Ann. Cas. 1913B, 1117.

<sup>13</sup> *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. 44, 19 L. Ed. 65.

<sup>14</sup> *Postal Tel. Cable Co. v. Barwise*, 11 Colo. App. 328, 53 Pac. 252; *West. U. Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744; *West. U. Tel. Co. v. Hogue*, 79 Ark. 33, 94 S. W. 924; *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126; *Hildreth v. West. U. Tel. Co.*, 56 Fla. 387, 47 South. 820; *Beaupre v. Pacific, etc., Tel. Co.*, 21 Minn. 155; *McColl v. West. U. Tel. Co.*, 44 N. Y. Super. Ct. 487, 7 Abb. N. C. 151; *Hughes v. West. U. Tel. Co.*, 79 Mo. App. 133; *Kennon v. West. U. Tel. Co.*, 126 N. C. 232, 35 S. E. 468; *Williams v. West. U. Tel. Co.*, 136 N. C. 82, 48 S. E. 559, 1 Ann. Cas. 359; *West. U. Tel. Co. v. Pratt*, 18 Okl. 274, 89 Pac. 237; *Postal Tel. Cable Co. v. Sunset Constr. Co.*, 102 Tex. 148, 114 S. W. 98, reversing (Civ. App.) 109 S. W. 265; *Kirby v. West. U. Tel. Co.*, 77 S. C. 404, 58 S. E. 10, 122 Am. St. Rep. 580; *West. U. Tel. Co. v. Twaddell*, 47 Tex. Civ. App. 51, 103 S. W.

required that the parties must have contemplated the actual damages which are to be allowed. But the damages must be such as the parties may fairly be supposed to have contemplated when they made the contract, \* \* \* as both parties are usually equally bound to know and be informed of the facts pertaining to the execution or breach of a contract which they have entered into. I think a more precise statement of this rule is that a party is liable for all the direct damages which both parties to the contract would have contemplated as flowing from its breach, if, at the time they entered into it, they had bestowed proper attention upon the subject and had been fully informed of the facts."<sup>15</sup> It is questionable in considering this subject—and much more so is it the case, when apply-

1120; *Key v. West. U. Tel. Co.*, 76 S. C. 301, 56 S. E. 962; *McBride v. Sunset Tel. Co. (C. C.)* 96 Fed. 81; *Hall v. West. U. Tel. Co.*, 59 Fla. 275, 51 South. 819, 27 L. R. A. (N. S.) 639; *McMillan v. West. U. Tel. Co.*, 60 Fla. 131, 53 South. 329, 29 L. R. A. (N. S.) 891; *West. U. Tel. Co. v. Sullivan*, 82 Ohio St. 14, 91 N. E. 867, 137 Am. St. Rep. 754; *Fitch v. West. U. Tel. Co.*, 150 Mo. App. 149, 130 S. W. 44; *West. U. Tel. Co. v. Young (Tex. Civ. App.)* 130 S. W. 257; *West. U. Tel. Co. v. Burris (Tex. Civ. App.)* 147 S. W. 1173; *West. U. Tel. Co. v. Graham*, 1 Colo. 230, 9 Am. Rep. 136; *Tyler v. West. U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *Manville v. West. U. Tel. Co.*, 37 Iowa, 214, 18 Am. Rep. 8; *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 458, 20 Am. Rep. 605; *Squire v. West. U. Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157; *Lee v. West. U. Tel. Co.*, 51 Mo. App. 375; *West. U. Tel. Co. v. Mullins*, 44 Neb. 732, 62 N. W. 880; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *First National Bank v. West. U. Tel. Co.*, 30 Ohio St. 555, 27 Am. Rep. 485; *Smith v. West. U. Tel. Co.*, 150 Pa. 561, 24 Atl. 1049; *West. U. Tel. Co. v. Campbell*, 36 Tex. Civ. App. 276, 81 S. W. 580; *Kopperl v. West. U. Tel. Co. (Tex. Civ. App.)* 85 S. W. 1018; *West. U. Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479; *Kagy v. West. U. Tel. Co.*, 37 Ind. App. 73, 76 N. E. 792, 117 Am. St. Rep. 278; *Parks v. Alta Cal. Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589; *West. U. Tel. Co. v. Shotter*, 71 Ga. 760; *Tyler v. West. U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *West. U. Tel. Co. v. Valentine*, 18 Ill. App. 57; *West. U. Tel. Co. v. Harris*, 19 Ill. App. 347; *Hadley v. West. U. Tel. Co.*, 115 Ind. 191, 15 N. E. 845; *Sprague v. West. U. Tel. Co.*, 6 Daly (N. Y.) 200; *Mowry v. West. U. Tel. Co.*, 51 Hun. 126, 4 N. Y. Supp. 666; *United States Tel. Co. v. Wenger*, 55 Pa. 262, 93 Am. Dec. 751; *Marr v. West. U. Tel. Co.*, 85 Tenn. 529, 3 S. W. 496; *Pepper v. West. U. Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699.

*Statutory provision—effect of.*—A statute making a company liable for "all damages occasioned" does away with the requirements of the general rule that notice of the special circumstances must be given from which special damages would be likely to result. *Fisher v. West. U. Tel. Co.*, 119 Wis. 146, 96 N. W. 545. All damages are the natural and proximate result. *Barker v. West. U. Tel. Co.*, 134 Wis. 147, 114 N. W. 439, 14 L. R. A. (N. S.) 533, 126 Am. St. Rep. 1017. But, on the contrary, see *Hughes v. West. U. Tel. Co.*, supra; *Wheelock v. Postal Tel. Cable Co.*, 197 Mass. 119, 83 N. E. 313, 14 Ann. Cas. 188.

<sup>15</sup> *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *West. U. Tel. Co. v. Church*, 3 Neb. (Unof.) 22, 90 N. W. 878, 57 L. R. A. 909; *West. U. Tel. Co. v. Edmondson*, 91 Tex. 206, 42 S. W. 549.



ing the rule to actions against telegraph companies—as to the extent of the information which the company may have of the nature of the message, and the effect in negligently transmitting or delivering it.<sup>16</sup> It is very often the case that messages are couched in such language as to be wholly unintelligible to the company. They may be entirely clear and easily understood, both by the sender and the addressee, but at the same time the company or the operator may be altogether ignorant of the purposes of them. So it follows from the general rule that, in order to hold these companies liable for damages flowing directly and proximately from the breach of the contract of sending, they must have had some knowledge of the nature of the contract and the damages which may be supposed to have entered into the contemplation of the parties' minds at the time the contract was made, as may have been expected as would be the result of its breach.<sup>17</sup> The reason of this is obvious; since, if the nature and object of the message had been known, the parties might have specially provided for the breach of the contract by special terms as to damages in that case.<sup>18</sup>

**§ 528. Actions in contract and in tort—applicable to both.—**

While actions against telegraph companies are not necessarily or usually brought for a breach of their contracts, but for the breach of a public duty, yet the latter, as said, depends somewhat upon the former, since it would not have occurred had it not been that the company violated its contractual duties.<sup>19</sup> The general rule, however, for ascertaining the measure of damages is applicable in both kinds of actions.<sup>20</sup> In an action in tort, or for a breach of a public duty, the damages which a plaintiff can recover are in satisfaction of the natural and proximate consequence of the defendant's act;<sup>21</sup> in other words, they are in satisfaction of the loss that might reasonably have been expected under the particular circumstances to occur.<sup>22</sup> While this rule is applicable to both kinds of actions, it

<sup>16</sup> See §§ 529, 534.

<sup>17</sup> See §§ 529, 534. See, also, *Kolliner v. West. U. Tel. Co.*, 126 Minn. 122, 147 N. W. 961, 52 L. R. A. (N. S.) 180.

<sup>18</sup> Id.

<sup>19</sup> *West. U. Tel. Co. v. Hogue*, 79 Ark. 33, 94 S. W. 924.

<sup>20</sup> *Kennon v. West. U. Tel. Co.*, 126 N. C. 232, 35 S. E. 468; *West. U. Tel. Co. v. Hogue*, 79 Ark. 33, 94 S. W. 924; *Poteet v. West. U. Tel. Co.*, 74 S. C. 491, 55 S. E. 113; *Newsome v. West. U. Tel. Co.*, 153 N. C. 153, 69 S. E. 10. See, also, cases cited in note 14, *supra*. See *Phillips v. West. U. Tel. Co.* (Mo. App.) 184 S. W. 958, messenger running into woman on return from delivering a message.

<sup>21</sup> *Sutherland on Dam.* 21.

<sup>22</sup> *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126, holding that the rule does not require that the parties must have contemplated such dam-

must be understood, however, that the character or the nature of the damages may be different in each. For instance, punitive damages may be recovered in an action of tort, where it was committed with a malicious motive, but it cannot be recovered in an action *ex contractu*.<sup>23</sup> So also, as it will be further discussed later,<sup>24</sup> it seems that the company need not have had the same information of the nature of the message and the probable result which would arise in a failure to transmit or deliver it, as it would in an action brought for a breach of its contract, in order to hold it liable in an action in tort. In other words, where the action is in contract, the damages are restricted to a more narrow limit than in actions in tort. As was said: "In all actions sounding in tort, the injured party is not limited to damages which might reasonably have been within the contemplation of the parties, but recovery may be had for all the injurious results which flow therefrom, by ordinary, natural sequence, without the interposition of any other negligent act or overpowering force."<sup>25</sup>

§ 529. Same continued—character of damages arising from each—kind of actions—amount of information.—The amount and nature of information of the purpose of a telegram, necessary to hold these companies liable in actions in contract and in tort, may be different, or unequal, as coming from different sources, of some of which the company is presumed to take cognizance. Having certain public duties to perform, on a failure to properly discharge

ages, but it does require that the damages may be such that the parties may fairly be supposed to have contemplated, or, at least, would have contemplated as following from the breach of duty if they had been informed of all facts.

<sup>23</sup> See chapter XXIV.

<sup>24</sup> See § 529.

<sup>25</sup> *Mentzer v. West. U. Tel. Co.*, 93 Iowa, 757, 62 N. W. 1, 57 Am. St. Rep. 294, 28 L. R. A. 72; *West. U. Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; *West. U. Tel. Co. v. Allen*, 66 Miss. 549, 6 South. 461; *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226; *West. U. Tel. Co. v. Fenton*, 52 Ind. 1; *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126; *Miliken v. West. U. Tel. Co.*, 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281; *Young v. West. U. Tel. Co.*, 107 N. C. 370, 11 S. E. 1044, 22 Am. St. Rep. 883, 9 L. R. A. 669, note; *West. U. Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844; *McPeck v. West. U. Tel. Co.*, 107 Iowa, 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214; *Cordell v. West. U. Tel. Co.*, 149 N. C. 402, 63 S. E. 71, 22 L. R. A. (N. S.) 540; *Fitch v. West. U. Tel. Co.*, 150 Mo. App. 149, 130 S. W. 44; *Wiggs v. Telephone, etc., Co.* (Tex. Civ. App.) 110 S. W. 179; *Kerns v. Telephone Co.*, 170 Mo. App. 642, 157 S. W. 106; *West. U. Tel. Co. v. Milton*, 53 Fla. 484, 43 South. 495, 11 L. R. A. (N. S.) 560, 125 Am. St. Rep. 1077; *Penn v. West. U. Tel. Co.*, 159 N. C. 306, 75 S. E. 16, 41 L. R. A. (N. S.) 223; *American Ex. Co. v. Postal Tel. Cable Co.*, 97 Neb. 701, 151 N. W. 240.

them, they will be liable to any one injured thereby. For instance, they hold themselves out as being ready and willing to transmit all proper messages tendered to them; and, as people seldom resort to these companies for their services unless the matter is of much importance and must be attended to quickly, it is presumed that they will transmit the message in the exact words in which it was delivered to them, and deliver it to the addressee as promptly and speedily as it is possible for them to do. This is a public duty which they owe to every one who applies to them for services, and one which they must take daily cognizance of; and, when they fail to discharge this duty, it is supposed that they contemplated, at the time of accepting this service, the result of such failure. It is further presumed that they know—where no information is given them to the contrary—that all messages delivered to them are of importance, and that great loss or injury may be the result of a failure on their part to properly discharge their duty, and that they, therefore, are supposed to have contemplated all the damages flowing naturally and directly from such failure, although they may not have had any actual knowledge of what damages might result at the time of accepting the message. In an action brought against them for a breach of their contract, they are not held liable for a breach of their public duty, but are responsible for only such damages as may have been the direct and proximate result of the breach of contract, and such as may have been contemplated at the time of making the contract. The information of the importance of the message and the probable consequences of its not being properly sent and delivered do not come, as in actions in tort, from the public position which they occupy.<sup>26</sup>

§ 530. **Remote damages.**—It is presumed that the reader has had cause ere this to study and master, to a certain extent, the difference between proximate and remote damages; for this reason—and for the further reason that the subject is, in a sense, foreign to the scope of this work—we shall refrain from entering into it at any great length. While there is a distinction between the two kinds of damages, yet in many instances the distinction is so slight that it is difficult to decide on which side the damages belong.<sup>27</sup> The damages must be the natural and direct result of the breach, or such as flow therefrom by ordinary and natural sequence;<sup>28</sup> if there is an addition of any other negligent act or over-

<sup>26</sup> *West. U. Tel. Co. v. Milton*, 53 Fla. 484, 43 South. 495, 11 L. R. A. (N. S.) 560, 125 Am. St. Rep. 1077, citing author.

<sup>27</sup> *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126.

<sup>28</sup> *Wilson v. West. U. Tel. Co.*, 124 Ga. 131, 52 S. E. 153; *Champion Chem.*



powering force, intervening and aiding in any wise the result, the damages will be too remote to be recovered.<sup>29</sup> The law does not hold these companies liable for every possible consequence of their negligence, but only for such as are the proximate and natural results of their wrongful acts.<sup>30</sup>

Wks. v. Postal Tel. Cable Co., 123 Ill. App. 20; Hildreth v. West. U. Tel. Co., 56 Fla. 387, 47 South. 820; West. U. Tel. Co. v. Cornwell, 2 Colo. App. 491, 31 Pac. 393; Postal Tel. Cable Co. v. Barwise, 11 Colo. App. 328, 53 Pac. 252; Smith v. West. U. Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126; Beaupre v. Pacific, etc., Tel. Co., 21 Minn. 155; Bennett v. West. U. Tel. Co., 129 Iowa. 607, 106 N. W. 13; Walser v. West. U. Tel. Co., 114 N. C. 440, 19 S. E. 366; Yazoo, etc., R. Co. v. Foster (Miss.) 23 South. 581; Lowery v. West. U. Tel. Co., 60 N. Y. 198, 19 Am. Rep. 154; Fisher v. West. U. Tel. Co., 119 Wis. 146, 96 N. W. 545; Cutts v. West. U. Tel. Co., 71 Wis. 46, 36 N. W. 627; West. U. Tel. Co. v. Hall, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479; McMillan v. West. U. Tel. Co., 60 Fla. 131, 53 South. 329, 29 L. R. A. (N. S.) 891; West. U. Tel. Co. v. Emerson, 161 Ala. 221, 49 South. 820; Volquardsen v. Iowa Tel. Co., 148 Iowa, 77, 126 N. W. 928, 28 L. R. A. (N. S.) 554; West. U. Tel. Co. v. Rhett (Miss.) 50 South. 696; West. U. Tel. Co. v. Crawford, 29 Okl. 143, 116 Pac. 925, 35 L. R. A. (N. S.) 930; Johnson v. West. U. Tel. Co., 75 S. C. 54, 54 S. E. 826; Anderson v. West. U. Tel. Co., 85 S. C. 252, 67 S. E. 232, 477; West. U. Tel. Co. v. Lawson, 182 Fed. 369, 105 C. C. A. 451; Sturtevant v. Telephone Co., 109 Me. 479, 84 Atl. 998; Hoaglin v. West. U. Tel. Co., 161 N. C. 390, 77 S. E. 417; Davies v. West. U. Tel. Co., 93 S. C. 318, 76 S. E. 820; Hall v. West. U. Tel. Co., 59 Fla. 279, 51 South. 819, 27 L. R. A. (N. S.) 639; West. U. Tel. Co. v. Barlow, 51 Fla. 351, 40 South. 491, 4 L. R. A. (N. S.) 262.

*Effect of statutory provision.*—The rule not affected by making companies liable for "all damages occasioned," *Fisher v. West. U. Tel. Co.*, supra; *Cutts v. West. U. Tel. Co.*, supra; or "liable for special damages," *Hughes v. West. U. Tel. Co.*, 79 Mo. App. 133; or for the damages "actually caused" by their negligence, *Wheelock v. Postal Tel. Cable Co.*, 197 Mass. 119, 83 N. E. 313, 14 Ann. Cas. 188.

<sup>29</sup> *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126; *West. U. Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479; *West. U. Tel. Co. v. Graham*, 1 Colo. 230, 9 Am. Rep. 136; *Hadley v. West. U. Tel. Co.*, 115 Ind. 191, 15 N. E. 845; *West. U. Tel. Co. v. Crall*, 39 Kan. 580, 18 Pac. 719; *Squire v. West. U. Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157; *Landsberger v. Magnetic Tel. Co.*, 32 Barb. (N. Y.) 530; *McColl v. West. U. Tel. Co.*, 44 N. Y. Super. Ct. 487, 7 Abb. N. C. 151; *Lowery v. United States Tel. Co.*, 60 N. Y. 198, 19 Am. Rep. 154; *First Nat. Bank v. Tel. Co.*, 30 Ohio St. 555, 27 Am. Rep. 485; *Reliance Lumber Co. v. West. U. Tel. Co.*, 58 Tex. 394, 44 Am. Rep. 620; *West. U. Tel. Co. v. Munford*, 87 Tenn. 190, 10 S. W. 318, 2 L. R. A. 601, 10 Am. St. Rep. 630; *Hibbard v. West. U. Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 775; *Stevenson v. Montreal Tel. Co.*, 16 U. C. Q. B. 530; *Kinghorne v. Montreal Tel. Co.*, 18 Id. 60; *McAllen v. West. U. Tel. Co.*, 70 Tex. 243, 7 S. W. 715; *West. U. Tel. Co. v. Smith*, 76 Tex. 253, 13 S. W. 169; *Bodkin v. West. U. Tel. Co.* (C. C.) 31 Fed. 134; *West. U. Tel. Co. v. Cornwell*, 2 Colo. App. 491, 31 Pac. 393; *Lowery v. West. U. Tel. Co.*, 60 N. Y. 198, 19 Am. Rep. 154; *Ross v. West. U. Tel. Co.*, 81 Fed. 676, 26 C. C. A. 564; *Bennett v. West. U. Tel. Co.*, 129 Iowa. 607, 106 N. W. 13; *Walser v. West. U. Tel. Co.*, 114 N. C. 440, 19 S. E. 366; *Milling Co. v. West. U. Tel. Co.*, 9 Ga. App. 728, 72 S. E. 179; *Higdon v. West. U. Tel. Co.*, 132 N. C. 726, 44 S. E. 558; *Willoughby v. Telephone Co.* (Sup.) 133 N. Y. Supp. 268.

<sup>30</sup> *Reed v. West. U. Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609,

§ 531. **Same continued—speculative damages.**—It must be borne in mind that, in order to recover damages from telegraph companies for their wrongful acts, the damages must be the result of the most probable and natural consequences of the act, and such as a man of ordinary care and foresight would have contemplated at the time the contract was made as a probable result of a breach thereof, and not such as depended upon the happening of some possible event.<sup>31</sup> The company's negligence may have had some causal connection with the damages complained of, and may have exerted a material influence in producing the final result, yet the company cannot be held liable for such damages when subsequent intervening causes took advantage of such negligence, and ultimately brought about the result of which complaint is made.<sup>32</sup> So, if the damages are uncertain, speculative, contingent, or too remote,<sup>33</sup> or, if no actual loss has been sustained, recovery will

34 L. R. A. 492; *Hays v. West. U. Tel. Co.*, 7 S. C. 16, 48 S. E. 608, 106 Am. St. Rep. 731, 67 L. R. A. 481, 3 Ann. Cas. 424; *Brooks v. West. U. Tel. Co.*, 26 Utah, 147, 72 Pac. 499; *Postal Tel. Cable Co. v. Lathrop*, 33 Ill. App. 400, affirmed in 131 Ill. 575, 23 N. E. 583, 19 Am. St. Rep. 55, 7 L. R. A. 474; *Hildreth v. West. U. Tel. Co.*, 56 Fla. 387, 47 South. 820; *West. U. Tel. Co. v. Merritt*, 55 Fla. 462, 46 South. 1024, 127 Am. St. Rep. 169; *West. U. Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480; *West. U. Tel. Co. v. Milton*, 53 Fla. 484, 43 South. 495, 125 Am. St. Rep. 1077, 11 L. R. A. (N. S.) 560; *West. U. Tel. Co. v. Auslet*, 53 Tex. Civ. App. 264, 115 S. W. 624; *West. U. Tel. Co. v. Edsall*, 74 Tex. 329, 12 S. W. 41, 15 Am. St. Rep. 835; *Texas, etc., Tel., etc., Co. v. Mackenzie*, 36 Tex. Civ. App. 178, 81 S. W. 581; *West. U. Tel. Co. v. Hines*, 22 Tex. Civ. App. 315, 54 S. W. 627; *West. U. Tel. Co. v. Wofford*, 32 Tex. Civ. App. 427, 72 S. W. 620, 74 S. W. 943; *McMillan v. West. U. Tel. Co.*, 60 Fla. 131, 53 South. 329, 29 L. R. A. (N. S.) 891; *Kolliner v. West. U. Tel. Co.*, 126 Minn. 122, 147 N. W. 961, 52 L. R. A. (N. S.) 1180; *Cumberland Tel., etc., Co. v. Jackson*, 95 Miss. 79, 48 South. 614; *Stiles v. West. U. Tel. Co.*, 2 Ariz. 308, 15 Pac. 712; *West. U. Tel. Co. v. Graham*, 1 Colo. 230, 9 Am. Rep. 136; *Hoeker v. West. U. Tel. Co.*, 45 Fla. 363, 34 South. 901; *Savannah, etc., Towboat Co. v. West. U. Tel. Co.*, 124 Ga. 478, 52 S. E. 766; *Wolf v. West. U. Tel. Co.*, 24 Pa. Super. Ct. 129; *West. U. Tel. Co. v. Gossett*, 15 Tex. Civ. App. 52, 38 S. W. 536.

<sup>31</sup> See cases cited in notes, 28, 29, and 30, *supra*.

Such as are capable of computation with reasonable certainty. *Walser v. West. U. Tel. Co.*, 114 N. C. 440, 19 S. E. 366; *McMillan v. West. U. Tel. Co.*, 60 Fla. 131, 53 South. 329, 29 L. R. A. (N. S.) 891.

<sup>32</sup> See *Beaupre v. Pacific, etc., Tel. Co.*, 21 Minn. 155; *Postal Tel. Cable Co. v. Barwise*, 11 Colo. App. 328, 53 Pac. 252; *Kiley v. West. U. Tel. Co.*, 39 Hun (N. Y.) 158, affirmed in 109 N. Y. 231, 16 N. E. 75; *McMillan v. West. U. Tel. Co.*, 60 Fla. 131, 53 South. 329, 29 L. R. A. (N. S.) 891. See, also, *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126.

<sup>33</sup> *Kenyon v. West. U. Tel. Co.*, 100 Cal. 454, 35 Pac. 75; *West. U. Tel. Co. v. Watson*, 94 Ga. 202, 21 S. E. 457, 47 Am. St. Rep. 151; *Postal Tel. Co. v. Barwise*, 11 Colo. App. 328, 53 Pac. 252; *James v. West. U. Tel. Co.*, 86 Ark. 339, 111 S. W. 276; *West. U. Tel. Co. v. Cornwell*, 2 Colo. App. 491, 31 Pac. 393; *West. U. Tel. Co. v. Crall*, 39 Kan. 580, 18 Pac. 719; *Bennett v. West. U. Tel. Co.*, 129 Iowa, 607, 106 N. W. 13; *Chapman v. West. U. Tel. Co.*, 90 Ky. 265,

be denied.<sup>34</sup> So also a recovery will be denied where uncertain, speculative, or contingent profits are attempted to be recovered and the same are such as might or might not have been made;<sup>35</sup> however, damages may be recovered for all gains prevented or losses actually sustained,<sup>36</sup> provided they are certain and such as might naturally be expected to arise in consequence of the breach of duty complained of.<sup>37</sup> If, on the other hand, an effort is being made to recover the profits on the expected bargain or purchase of stocks, grain, or cotton which was never made, but which, it is claimed, might have been consummated, had the company discharged its duty in promptly delivering the message regarding same, the recovery will be denied.<sup>38</sup> So, if an agent or broker of the plaintiff is directed by him by telegram to buy or sell short and the message is delayed and the transaction directed is never entered into, a recovery would be denied;<sup>39</sup> but if the message

13 S. W. 880, 12 Ky. Law Rep. 265; *Beaupre v. Pacific, etc., Tel. Co.*, 21 Minn. 155; *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126; *Kiley v. West. U. Tel. Co.*, 39 Hun (N. Y.) 158, affirmed in 109 N. Y. 231, 16 N. E. 75; *West. U. Tel. Co. v. Connelly*, 2 Willson, Civ. Cas. Ct. App. (Tex.) 113; *Walser v. West. U. Tel. Co.*, 114 N. C. 440, 19 S. E. 366; *West. U. Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479; *Alexander v. West. U. Tel. Co. (C. C.)* 126 Fed. 445; *McMillan v. West. U. Tel. Co.*, 60 Fla. 131, 53 South. 329, 29 L. R. A. (N. S.) 891; *Volquardsen v. Iowa Tel. Co.*, 148 Iowa, 77, 126 N. W. 928, 28 L. R. A. (N. S.) 554; *West. U. Tel. Co. v. Young (Tex. Civ. App.)* 130 S. W. 257; *Lebanon, etc., Tel. Co. v. Lanban Lumber Co.*, 131 Ky. 718, 115 S. W. 824, 21 L. R. A. (N. S.) 115, 18 Ann. Cas. 1066.

<sup>34</sup> *Bass v. Postal Tel. Cable Co.*, 127 Ga. 423, 56 S. E. 465, 12 L. R. A. (N. S.) 489; *Pacific Pine Lumber Co. v. West. U. Tel. Co.*, 123 Cal. 428, 56 Pac. 103; *West. U. Tel. Co. v. Watson*, 82 Miss. 101, 33 South. 76.

<sup>35</sup> *Bennett v. West. U. Tel. Co.*, 129 Iowa, 607, 106 N. W. 13; *West. U. Tel. Co. v. Crall*, 39 Kan. 580, 18 Pac. 719; *West. U. Tel. Co. v. Graham*, 1 Colo. 230, 9 Am. Rep. 136; *West. U. Tel. Co. v. Lehman*, 106 Md. 318, 67 Atl. 241, 14 Ann. Cas. 736; *Johnson v. West. U. Tel. Co.*, 79 Miss. 58, 29 South. 787, 89 Am. St. Rep. 584; *Beaupre v. Pacific, etc., Tel. Co.*, 21 Minn. 155; *Bird v. West. U. Tel. Co.*, 76 S. C. 345, 56 S. E. 973; *McMillan v. West. U. Tel. Co.*, 60 Fla. 131, 53 South. 329, 29 L. R. A. (N. S.) 891; *Larsen v. Postal Cable Co.*, 150 Iowa, 748, 130 N. W. 813; *Newsome v. West. U. Tel. Co.*, 153 N. C. 153, 69 S. E. 10.

<sup>36</sup> *Manville v. West. U. Tel. Co.*, 37 Iowa, 214, 18 Am. Rep. 8; *Kerns v. Telephone Co.*, 170 Mo. App. 642, 157 S. W. 106.

<sup>37</sup> *West. U. Tel. Co. v. Wilhelm*, 48 Neb. 910, 67 N. W. 870; *Manville v. West. U. Tel. Co.*, 37 Iowa, 214, 18 Am. Rep. 8; *Hays v. West. U. Tel. Co.*, 70 S. C. 16, 48 S. E. 608, 106 Am. St. Rep. 731, 67 L. R. A. 481, 3 Ann. Cas. 424; *West. U. Tel. Co. v. Williams (Tex. Civ. App.)* 137 S. W. 148; *West. U. Tel. Co. v. Lawson*, 182 Fed. 369, 105 C. C. A. 451. See, also, *West. U. Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 18 Ky. Law Rep. 995, 66 Am. St. Rep. 361, 36 L. R. A. 711; *West. U. Tel. Co. v. Auslet*, 53 Tex. Civ. App. 264, 115 S. W. 624.

<sup>38</sup> *Hibbard v. West. U. Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 775; *West. U. Tel. Co. v. Fellner*, 58 Ark. 29, 22 S. W. 917, 41 Am. St. Rep. 81; *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126.

<sup>39</sup> *Hibbard v. West. U. Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 775; *West. U. Tel.*



had been promptly delivered, thereby enabling the plaintiff to have purchased at a lower price than he was compelled to do as a result of a delay in the delivery of such message, an actual loss is sustained for which a recovery may be had.<sup>40</sup>

§ 532. **Intervening causes.**—If a subsequent intervening cause<sup>41</sup> takes advantage of the negligence of the company, which may have had a causal connection with the result, and ultimately produces the damages complained of, the company will not be liable.<sup>42</sup> In other words, damages cannot be recovered which are the result of the consequences of secondary and remote causes indirectly growing out of a breach of the contract.<sup>43</sup> Thus, where the loss is occasioned by two causes—the shortcoming of the telegraph company in not delivering the message and the felonious,<sup>44</sup> fraudulent,<sup>45</sup> or negligent<sup>46</sup> act of a third person—the company will not be liable. In one of these cases a telegram was delivered to the company asking a remittance of \$500 from the addressee. Through the negligence of the company the message was changed so as to read \$5,000, and this amount was sent to the sendee who, on receiving this, absconded; it was held that the company was not liable. The court said: “The embezzlement could not reasonably have been expected, and did not naturally flow from the wrong of the defendant. The cause of the loss was the criminal act of

*Co. v. Fellner*, 58 Ark. 29, 22 S. W. 917, 41 Am. St. Rep. 81; *West. U. Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479; *Cahn v. West. U. Tel. Co.*, 48 Fed. 810, 1 C. C. A. 107.

<sup>40</sup> *United States Tel. Co. v. Wenger*, 55 Pa. 262, 93 Am. Dec. 751; *Pearsall v. West. U. Tel. Co.*, 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662; *Swan v. West. U. Tel. Co.*, 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153.

<sup>41</sup> *Lowery v. West. U. Tel. Co.*, 60 N. Y. 198, 19 Am. Rep. 154; *Ross v. West. U. Tel. Co.*, 81 Fed. 676, 26 C. C. A. 564; *Bodkin v. West. U. Tel. Co. (C. C.)* 31 Fed. 134, storms or floods.

<sup>42</sup> *Ross v. West. U. Tel. Co.*, 81 Fed. 676, 26 C. C. A. 564; *Bodkin v. West. U. Tel. Co. (C. C.)* 31 Fed. 134. But see *Providence-Washington Ins. Co. v. West. U. Tel. Co.*, 247 Ill. 84, 93 N. E. 134, 30 L. R. A. (N. S.) 1170, 139 Am. St. Rep. 314; *West. U. Tel. Co. v. Milton*, 53 Fla. 484, 43 South. 495, 11 L. R. A. (N. S.) 560, 125 Am. St. Rep. 1077, falling market not intervening cause.

<sup>43</sup> *Pegram v. West. U. Tel. Co.*, 100 N. C. 28, 6 S. E. 770, 6 Am. St. Rep. 557; *West. U. Tel. Co. v. Crawford*, 29 Okl. 143, 116 Pac. 925, 35 L. R. A. (N. S.) 930; *Providence-Washington Ins. Co.*, 247 Ill. 84, 93 N. E. 134, 30 L. R. A. (N. S.) 1171, 139 Am. St. Rep. 314; *Hall v. West. U. Tel. Co.*, 59 Fla. 275, 51 South. 819, 27 L. R. A. (N. S.) 639.

<sup>44</sup> *Lowery v. West. U. Tel. Co.*, 60 N. Y. 198, 19 Am. Rep. 154; *Ross v. West. U. Tel. Co.*, 81 Fed. 676, 26 C. C. A. 564.

<sup>45</sup> *Lowery v. West. U. Tel. Co.*, 60 N. Y. 198, 19 Am. Rep. 154; *Strahorn, etc., Comn. Co. v. West. U. Tel. Co.*, 101 Mo. App. 500, 74 S. W. 876.

<sup>46</sup> *Hidgon v. West. U. Tel. Co.*, 132 N. C. 726, 44 S. E. 558; *West. U. Tel. Co. v. Briscoe*, 18 Ind. App. 22, 47 N. E. 473.

Brown, conceived and executed after the defendant had ceased to have any relation to the money. The plaintiff's right of action for the negligence was complete before the money was misappropriated by Brown; and if suit had then been brought, the damages would not have been measured by the amount of money sent by the plaintiff. The most that can be said is that by the negligence of the company an opportunity was afforded Brown to commit a fraud upon the plaintiff. This does not, within the cases, make the company chargeable with the loss resulting from the conversion."<sup>47</sup> The same ruling was held in a case similar to the above, where the plaintiff sent a message inquiring as to the financial standing of certain parties who had presented drafts to them and concluded: "If everything is all right, you need not dispatch. If not right, answer by Saturday evening (13th)." On Monday at 4:55 p. m. a reply was delivered to the company stating: "Parties will accept if bill of lading accompanies draft. Parties stand fair." This message was never transmitted and before 3 o'clock on the same day, the plaintiff, having received no reply, cashed the drafts, which were eventually lost. The court held that the dishonesty of the parties who drew the draft, and not the negligence of the company, was the cause of the loss.<sup>48</sup>

§ 533. **Effect of special circumstances—notice.**—It must ever be kept in mind, while considering the amount of damages to be recovered from a telegraph company for negligently transmitting or delivering a message, that only such can be recovered as might be supposed to have entered into the contemplation of the parties' minds at the time of making the contract, as would be the most probable and natural result of such negligence.<sup>49</sup> If there were special circumstances connected with the sending of the message which would be the cause of a greater loss or injury in case it was not correctly transmitted and promptly delivered, the company will not be liable on account of these facts, unless it should have notice of such at the time the contract of sending was made.<sup>50</sup> It

<sup>47</sup> *Lowery v. West. U. Tel. Co.*, 60 N. Y. 198, 19 Am. Rep. 154.

<sup>48</sup> *First Nat. Bank v. West. U. Tel. Co.*, 30 Ohio St. 555, 27 Am. Rep. 485.

<sup>49</sup> *West. U. Tel. Co. v. Milton*, 53 Fla. 484, 43 South. 495, 11 L. R. A. (N. S.) 560, 125 Am. St. Rep. 1077, quoting author. See, also, other cases cited in note 14, *supra*.

*Mental anguish.*—See § 587.

<sup>50</sup> *West. U. Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744; *Postal Tel. Cable Co. v. Barwise*, 11 Colo. App. 328, 53 Pac. 252; *West. U. Tel. Co. v. Hogue*, 79 Ark. 33, 94 S. W. 924; *McColl v. West. U. Tel. Co.*, 44 N. Y. Super. Ct. 487; *Beaupre v. Pacific, etc., Tel. Co.*, 21 Minn. 155; *Hildreth v. West. U. Tel. Co.*, 56 Fla. 387, 47 South. 820; *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126; *Taylor v. West. U. Tel. Co.*, 101 S. W. 969, 31 Ky. Law Rep.

is not supposed that in every possible loss the company's negligence may be, to a certain extent, the cause; but it is only such results as a man of ordinary understanding might have contemplated would be the natural and probable result. So, if the special circumstances connected with the sending of the message were such as would not have been contemplated by the company as being a probable result of its negligence, the same cannot be considered in the awarding of damages. Thus, where plaintiff sent a message to her husband, requesting him to come home to their sick child, but the husband failed to reach home as soon as he would have done in case the message had been promptly delivered to him, the plaintiff cannot recover damages for physical and mental suffering brought about by reason of her pregnancy, while nursing the child,

240; *Cañon v. West. U. Tel. Co.*, 77 S. C. 157, 57 S. E. 722; *West. U. Tel. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896; *Clio Gin Co. v. West. U. Tel. Co.*, 82 S. C. 405, 64 S. E. 426; *Lewin-Cole Comm. Co. v. West. U. Tel. Co.* (Tex. Civ. App.) 115 S. W. 313; *West. U. Tel. Co. v. Twaddell*, 47 Tex. Civ. App. 51, 103 S. W. 1120; *West. U. Tel. Co. v. Clifton*, 68 Miss. 307, 8 South. 746; *Clark Mfg. Co. v. West. U. Tel. Co.*, 152 N. C. 157, 67 S. E. 329, 27 L. R. A. (N. S.) 643; *Stone v. Postal Tel. Cable Co.*, 35 R. I. 498, 87 Atl. 319, 46 L. R. A. (N. S.) 180; *West. U. Tel. Co. v. True*, 101 Tex. 236, 106 S. W. 315; *West. U. Tel. Co. v. Woods* (Tex. Civ. App.) 133 S. W. 440; *Guilford v. West. U. Tel. Co.*, 163 Ala. 1, 50 South. 112; *West. U. Tel. Co. v. Askew*, 92 Ark. 133, 122 S. W. 107; *Bashinsky v. West. U. Tel. Co.*, 1 Ga. App. 761, 58 S. E. 91; *Illinois Smelting, etc., Co. v. West. U. Tel. Co.*, 146 Ill. App. 163; *Wells v. West. U. Tel. Co.*, 144 Iowa, 605, 123 N. W. 371, 24 L. R. A. (N. S.) 1045, 138 Am. St. Rep. 317; *Postal Tel. Cable Co. v. Louisville Cotton Oil Co.*, 136 Ky. 843, 122 S. W. 852, 125 S. W. 266; *Marriott v. West. U. Tel. Co.*, 84 Neb. 443, 121 N. W. 241, 133 Am. St. Rep. 633; *West. U. Tel. Co. v. Pratt*, 18 Okl. 274, 89 Pac. 237; *West. U. Tel. Co. v. Mellor*, 33 Tex. Civ. App. 264, 76 S. W. 249; *West. U. Tel. Co. v. Biggerstaff*, 177 Ind. 168, 97 N. E. 531; *Fitch v. Telephone Co.*, 150 Mo. App. 149, 130 S. W. 44; *Christmon v. Telephone Co.*, 159 N. C. 195, 74 S. E. 325; *West. U. Tel. Co. v. Farrington* (Tex. Civ. App.) 131 S. W. 609; *Telephone Co. v. Barkley*, 62 Tex. Civ. App. 573, 131 S. W. 849; *Lyles v. West. U. Tel. Co.*, 77 S. C. 174, 57 S. E. 725, 12 L. R. A. (N. S.) 534; *Foreman v. West. U. Tel. Co.*, 141 Iowa, 32, 116 N. W. 724, 19 L. R. A. (N. S.) 374; *West. U. Tel. Co. v. Garlington*, 101 Ark. 487, 142 S. W. 854, 49 L. R. A. (N. S.) 300; *West. U. Tel. Co. v. Glover*, 138 Ky. 500, 128 S. W. 587, 49 L. R. A. (N. S.) 308; *Thurman v. West. U. Tel. Co.*, 127 Ky. 137, 105 S. W. 155, 14 L. R. A. (N. S.) 499; *Middleton v. West. U. Tel. Co.*, 183 Ala. 213, 62 South. 744, 49 L. R. A. (N. S.) 305; *West. U. Tel. Co. v. Oastler*, 90 Ark. 268, 119 S. W. 285, 49 L. R. A. (N. S.) 325; *Anniston Cordage Co. v. West. U. Tel. Co.*, 161 Ala. 216, 49 South. 770, 30 L. R. A. (N. S.) 1116, 135 Am. St. Rep. 124; *West. U. Tel. Co. v. True*, 105 Tex. 344, 148 S. W. 561, 41 L. R. A. (N. S.) 1188; *McNeil v. Postal Tel. Cable Co.*, 154 Iowa, 241, 134 N. W. 611, 38 L. R. A. (N. S.) 727, Ann. Cas. 1914A, 1294; *Providence-Washington Ins. Co. v. West. U. Tel. Co.*, 247 Ill. 84, 93 N. E. 134, 30 L. R. A. (N. S.) 1170, 139 Am. St. Rep. 314. See § 554, note 19.

*May recover where notice given.*—But where the company had such notice, recovery may be had if the loss was the proximate consequence of the company's negligent act and was, or should have been, contemplated as probable or likely to follow negligence. *West. U. Tel. Co. v. Hoyt*, 89 Ark. 118, 115 S.



when the company had no knowledge of her pregnancy.<sup>51</sup> So, where the plaintiff received a message telling him that his trial was set for such a day, but the company negligently changed the date set for the trial, which caused the plaintiff to make a trip to the place at which the trial was to be had on the date stated in the message, it was held that he could not recover damages for his mill being necessarily kept idle during his absence, when the company had no information that this would be the result.<sup>52</sup> He may, however, be allowed his necessary expenses incurred in such a trip,<sup>53</sup> including a reasonable attorney's fee.<sup>54</sup>

§ 534. **How communicated to the company—information.**—It is immaterial as to how the special circumstances may be communicated to the company; if it was sufficiently informed of this fact at the time the message was delivered, it will be liable for all damages arising directly therefrom.<sup>55</sup> The information may be com-

W. 941; West. U. Tel. Co. v. Milton, 53 Fla. 484, 43 South. 495, 125 Am. St. Rep. 1077, 11 L. R. A. (N. S.) 560; West. U. Tel. Co. v. Merritt, 55 Fla. 462, 46 South. 1024, 127 Am. St. Rep. 169; Postal Tel. Cable Co. v. Rhett (Miss.) 35 South. 829; Sultan v. West. U. Tel. Co., 92 Miss. 785, 46 South. 827; McGregor v. West. U. Tel. Co., 85 Mo. App. 308; Bailey v. West. U. Tel. Co., 227 Pa. 522, 76 Atl. 736, 43 L. R. A. (N. S.) 502, 19 Ann. Cas. 895; West. U. Tel. Co. v. Houston Rice Mill Co. (Tex. Civ. App.) 93 S. W. 1084; Postal Tel. Cable Co. v. Levy (Tex. Civ. App.) 102 S. W. 134; Postal Tel. Cable Co. v. Sunset Constr. Co., 102 Tex. 148, 114 S. W. 98; Brooks v. West. U. Tel. Co., 26 Utah, 147, 72 Pac. 499.

<sup>51</sup> West. U. Tel. Co. v. Pearce, 82 Miss. 487, 34 South. 152. See § 587.

<sup>52</sup> West. U. Tel. Co. v. Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 741.

<sup>53</sup> See § 543.

<sup>54</sup> West. U. Tel. Co. v. McLaurin, 70 Miss. 26, 13 South. 36.

<sup>55</sup> West. U. Tel. Co. v. Henley, 23 Ind. App. 14, 54 N. E. 775; West. U. Tel. Co. v. Merritt, 55 Fla. 462, 46 South. 1024, 127 Am. Rep. 169; McPeck v. West. U. Tel. Co., 107 Iowa, 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214; Herron v. West. U. Tel. Co., 90 Iowa, 129, 57 N. W. 696; Thomas v. West. U. Tel. Co., 120 Ky. 194, 85 S. W. 760, 27 Ky. Law Rep. 569; Mackay v. West. U. Tel. Co., 16 Nev. 222; Smith v. West. U. Tel. Co., 80 Neb. 395, 114 N. W. 288; Rittenhouse v. Independent Telephone Line, 44 N. Y. 263, 4 Am. Rep. 673; Sprague v. West. U. Tel. Co., 6 Daly (N. Y.) 200, affirmed in 67 N. Y. 590; Jones v. West. U. Tel. Co., 70 S. C. 539, 50 S. E. 198; Id., 75 S. C. 208, 55 S. E. 318; Dayvis v. West. U. Tel. Co., 139 N. C. 79, 51 S. E. 898; West. U. Tel. Co. v. Hidalgo (Tex. Civ. App.) 99 S. W. 426; Erie Tel., etc., Co. v. Grimes, 82 Tex. 89, 17 S. W. 831; West. U. Tel. Co. v. Bell (Tex. Civ. App.) 90 S. W. 714; West. U. Tel. Co. v. Griffin, 27 Tex. Civ. App. 306, 65 S. W. 661; Postal Tel. Cable Co. v. Nichols, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A. (N. S.) 870; West. U. Tel. Co. v. Vanway (Tex. Civ. App.) 54 S. W. 414; Ward v. West. U. Tel. Co. (Tex. Civ. App.) 51 S. W. 259; West. U. Tel. Co. v. Nagle, 11 Tex. Civ. App. 539, 32 S. W. 707; West. U. Tel. Co. v. Jobe, 6 Tex. Civ. App. 403, 25 S. W. 168, 1036; West. U. Tel. Co. v. Williford, 2 Tex. Civ. App. 574, 22 S. W. 244; Harrison v. West. U. Tel. Co., 3 Willson, Civ. Cas. Ct. App. (Tex.) § 43; Marriott v. West. U. Tel. Co., 84 Neb. 448, 121 N. W. 241, 133 Am. St. Rep. 633; Heath v. West. U. Tel. Co., 87 S. C. 219, 69 S. E. 283; Goodwin v. Telephone Co. (Tex. Civ. App.) 160 S. W. 107;

municated by the message itself, which may have the nature of the special circumstances on its face.<sup>56</sup> When this is the case, there is no doubt of the company's liability. And the information may be communicated to the operator at the time the message is delivered to him, either by the sender or his agent.<sup>57</sup> If it can be shown that the company or its operator acquired the information at the time the message was delivered for transmission, there is no doubt that this is as good information as if the message itself showed the circumstances on its face.<sup>58</sup> While the rule is that extrinsic evidence cannot be admitted for the purpose of changing the terms of a written contract, yet it may be admitted for the purpose of showing what the intention was. Such evidence may be admitted to show what the parties contemplated, at the making of the contract, would be the supposed probable result of the breach of such contract.<sup>59</sup>

§ 535. Same continued—damages—remote and speculative.—It does not matter whether there were special circumstances connect-

West. U. Tel. Co. v. Milton, 53 Fla. 484, 43 South. 495, 11 L. R. A. (N. S.) 561, 125 Am. St. Rep. 1077; West. U. Tel. Co. v. Pruett (Tex. Civ. App.) 35 S. W. 78; Gulf, etc., R. Co. v. Loonie, 82 Tex. 323, 18 S. W. 221, 27 Am. St. Rep. 891; West. U. Tel. Co. v. Lawson, 182 Fed. 369, 105 C. C. A. 451. See Pope v. West. U. Tel. Co., 14 Ill. App. 531. But see Wheelock v. Postal Tel. Cable Co., 197 Mass. 119, 83 N. E. 313, 14 Ann. Cas. 188; Dorgan v. West. U. Tel. Co., Fed. Cas. No. 4,004.

<sup>56</sup> Hadley v. West. U. Tel. Co., 115 Ind. 191, 15 N. E. 845; West. U. Tel. Co. v. Coffin, 88 Tex. 94, 30 S. W. 896; Postal Tel. Cable Co. v. Lathrop, 131 Ill. 575, 23 N. E. 583, 19 Am. St. Rep. 55, 7 L. R. A. 474; Bierhaus v. West. U. Tel. Co., 8 Ind. App. 246, 34 N. E. 581; Pepper v. West. U. Tel. Co., 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660; Parks v. Alta California Tel. Co., 13 Cal. 422, 73 Am. Dec. 589; West. U. Tel. Co. v. Hines, 96 Ga. 688, 23 S. E. 845, 51 Am. St. Rep. 159; Hadley v. West. U. Tel. Co., 115 Ind. 191, 15 N. E. 845; Manville v. West. U. Tel. Co., 37 Iowa. 214, 18 Am. Rep. 8; True v. International Tel. Co., 60 Me. 9, 11 Am. Rep. 156; Rittenhouse v. Independent, etc., Tel. Co., 44 N. Y. 263, 4 Am. Rep. 673; United States Tel. Co. v. Wenger, 55 Pa. 262, 93 Am. Dec. 751; West. U. Tel. Co. v. Sheffield, 71 Tex. 570, 10 S. W. 752, 10 Am. St. Rep. 790; Martin v. West. U. Tel. Co., 1 Tex. Civ. App. 143, 20 S. W. 860; West. U. Tel. Co. v. Williford, 2 Tex. Civ. App. 574, 22 S. W. 244; West. U. Tel. Co. v. Morrison (Tex. Civ. App.) 33 S. W. 1025; Thompson v. West. U. Tel. Co., 64 Wis. 531, 25 N. W. 789, 54 Am. Rep. 644. See, also, §§ 539, 540, 542, and 543.

<sup>57</sup> See Pope v. West. U. Tel. Co., 14 Ill. App. 531; West. U. Tel. Co. v. Weniski, 84 Ark. 457, 106 S. W. 486; West. U. Tel. Co. v. Merritt, 55 Fla. 462, 46 South. 1024, 127 Am. St. Rep. 169; Fitch v. Telephone Co., 150 Mo. App. 149, 130 S. W. 44; Wiggs v. Telephone, etc., Co. (Tex. Civ. App.) 110 S. W. 179.

<sup>58</sup> See § 587.

<sup>59</sup> See Herron v. West. U. Tel. Co., 90 Iowa, 129, 57 N. W. 696; McPeck v. West. U. Tel. Co., 107 Iowa, 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214; Rittenhouse v. Independent, etc., Tel. Co., 44 N. Y. 263, 4 Am. Rep. 673; West. U. Tel. Co. v. Edsall, 74 Tex. 329, 12 S. W. 41, 15 Am. St. Rep. 835; West. U. Tel. Co. v. Jobe, 6 Tex. Civ. App. 403, 25 S. W. 168, 1036.

ed with the sending of the message, and that these facts were properly and sufficiently communicated to the company; they cannot control the measure of damages, where they are essentially remote or speculative in character.<sup>60</sup> Thus, where the sender loses the opportunity to conduct a profitable speculation, or to secure contingent profits, he cannot recover for these, although the company may have been informed of the nature and character of the message. So also, where the basis of the action is the negligence of the company in failing to deliver promptly the message requesting the addressee to meet the plaintiff at a station, damages are not recoverable for fatigue and exposure incident to the plaintiff's being compelled to walk from the station, nor for impairment of health resulting therefrom;<sup>61</sup> neither could the expenses for the hiring of a conveyance be recovered.<sup>62</sup> It was held, however, that if the operator knew that the sender was a woman, and the place to which the message requested the addressee to meet her was a flag station, the company is put on notice that a failure of the message being delivered will necessitate her walking, and it will be liable therefor, but not for sickness resulting from the fatigue and exposure to which she was subjected.<sup>63</sup>

§ 536. **Cipher or otherwise unintelligible messages.**—From what has been said in the preceding section, the logical conclusion which naturally follows is that, where a telegraph company receives a cipher<sup>64</sup> message, or one otherwise unintelligible,<sup>65</sup> and

<sup>60</sup> See §§ 530, 531.

<sup>61</sup> *Stafford v. West. U. Tel. Co.* (C. C.) 73 Fed. 273; *Yazoo, etc., R. Co. v. Foster (Miss.)* 23 South. 581; *West. U. Tel. Co. v. Smith*, 76 Tex. 253, 13 S. W. 169.

<sup>62</sup> *West. U. Tel. Co. v. Smith*, 76 Tex. 253, 13 S. W. 169.

<sup>63</sup> *West. U. Tel. Co. v. Norton* (Tex. Civ. App.) 62 S. W. 1081. See, also, *West. U. Tel. Co. v. Bryant*, 17 Ind. App. 70, 46 N. E. 358; *West. U. Tel. Co. v. Ragland* (Tex. Civ. App.) 61 S. W. 421; *West. U. Tel. Co. v. Karr*, 5 Tex. Civ. App. 60, 24 S. W. 302.

<sup>64</sup> *West. U. Tel. Co. v. Wilson*, 32 Fla. 527, 14 South. 1, 37 Am. St. Rep. 125, 22 L. R. A. 434, overruling *West. U. Tel. Co. v. Hyer*, 22 Fla. 637, 1 South. 129, 1 Am. St. Rep. 222; *Hart v. West. U. Tel. Co.*, 66 Cal. 579, 6 Pac. 637, 56 Am. Rep. 119; *West. U. Tel. Co. v. Martin*, 9 Ill. App. 587; *West. U. Tel. Co. v. Merritt*, 55 Fla. 462, 46 South. 1024, 127 Am. St. Rep. 169; *Wheelock v. Postal Tel. Cable Co.*, 197 Mass. 119, 83 N. E. 313, 14 Ann. Cas. 188; *MacKay v. West. U. Tel. Co.*, 16 Nev. 222; *Beaupre v. Pacific, etc., Tel. Co.*, 21 Minn. 155; *Abeles v. West. U. Tel. Co.*, 37 Mo. App. 554; *Hughes v. West. U. Tel. Co.*, 79 Mo. App. 133; *Hughes v. West. U. Tel. Co.*, 114 N. C. 70, 19 S. E. 100, 41 Am. St. Rep. 782; *Cannon v. West. U. Tel. Co.*, 100 N. C. 300, 6 S. E. 731, 6 Am. St. Rep. 590; *Hill v. West. U. Tel. Co.*, 42 S. C. 367, 20 S. E. 135, 40 Am. St. Rep. 734; *Fergusson v. Anglo-American Tel. Co.*, 178 Pa. 377, 35 Atl. 979, 56 Am. St. Rep. 770, 35 L. R. A. 554, distinguishing

<sup>65</sup> See note 65 on following page.



the nature and the purpose of which are only known by the sender and the addressee, the company will only be liable for nominal damages, or, at least, the price paid for its transmission, where it is negligently transmitted or delivered. Some courts hold differently with respect to this subject,<sup>66</sup> but the greater weight of authority, both English and American, considers it as first stated. As was said in discussing the general rule on this subject, when

*West. U. Tel. Co. v. Landis*, 21 Wkly. Notes Cas. (Pa.) 38; *Daniel v. West. U. Tel. Co.*, 61 Tex. 452, 48 Am. Rep. 305; *Candee v. West. U. Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452; *West. U. Tel. Co. v. Mellor*, 33 Tex. Civ. App. 264, 76 S. W. 449; *Houston, etc., Tel. Co. v. Davidson*, 15 Tex. Civ. App. 334, 39 S. W. 605; *Harrison v. West. U. Tel. Co.*, 3 Willson, Civ. Cas. Ct. App. § 43; *Primrose v. West. U. Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; *Sanders v. Stuart*, 1 C. P. D. 326, 45 L. J. C. P. 682, 35 L. T. Rep. N. S. 370, 24 Wkly. Rep. 949; *West. U. Tel. Co. v. McKinney*, 2 Willson, Civ. Cas. Ct. App. § 644; *Erb v. Telephone Co.*, 162 Ill. App. 494.

*Action by sender.*—In the following cases it was held that the sender of an unintelligible or cipher message could only recover nominal damages for failure to correctly deliver where the company had no notice of the meaning of the telegram: *Primrose v. West. U. Tel. Co.*, supra; *West. U. Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 66 Am. St. Rep. 361, 36 L. R. A. 711; *Pacific Postal Tel. Cable Co. v. Fleischner*, 66 Fed. 899, 14 C. C. A. 168; *Hart v. West. U. Tel. Co.*, supra; *White v. West. U. Tel. Co. (C. C.)* 14 Fed. 710; *West. U. Tel. Co. v. Coggin*, 68 Fed. 137, 15 C. C. A. 231; *West. U. Tel. Co. v. Martin*, supra; *Shields v. Washington Tel. Co. (La.)* 9 West. Law J. 283; *Shaw v. Postal Tel. Cable Co.*, 79 Miss. 670, 31 South. 222, 89 Am. St. Rep. 666, 56 L. R. A. 486; *Postal Tel. Cable Co. v. Wells*, 82 Miss. 733, 35 South. 190; *Newsome v. West. U. Tel. Co.*, 137 N. C. 513, 50 S. E. 279; *Hart v. Direct U. S. Cable Co.*, 86 N. Y. 633; *Fererro v. West. U. Tel. Co.*, 9 App. D. C. 455, 35 L. R. A. 548; *Postal Tel. Cable Co. v. Lathrop*, 131 Ill. 575, 23 N. E. 583, 19 Am. St. Rep. 55, 7 L. R. A. 474; *West. U. Tel. Co. v. Hall*, 124 U. S. 244, 8 Sup. Ct. 577, 31 L. Ed. 479; *United States Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519; *Wheelock v. Postal Tel. Cable Co.*, supra; *Smith v. West. U. Tel. Co.*, 80 Neb. 395, 114 N. W. 288; *Frazier v. West. U. Tel. Co.*, 45 Or. 414, 78 Pac. 330, 67 L. R. A. 319, 2 Ann. Cas. 396; *West. U. Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844; *West. U. Tel. Co. v. McKinney*, 2 Willson, Civ. Cas. Ct. App. (Tex.) § 644.

<sup>65</sup> *United States Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519; *West. U. Tel. Co. v. Cornwell*, 2 Colo. App. 491, 31 Pac. 393; *Jacobs v. Postal Tel. Cable Co.*, 76 Miss. 278, 24 South. 535; *West. U. Tel. Co. v. Clifton*, 68 Miss. 307, 8 South. 746; *West. U. Tel. Co. v. Pearce*, 82 Miss. 487, 34 South. 152; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *Melson v. West. U. Tel. Co.*, 72 Mo. App. 111; *McColl v. West. U. Tel. Co.*, 44 N. Y. Super. Ct. 487; *West. U. Tel. Co. v. True*, 101 Tex. 236, 106 S. W. 315, reversing (Civ. App.) 103 S. W. 1180; *West. U. Tel. Co. v. Pratt*, 18 Okl. 274, 89 Pac. 237; *Elliott v. West. U. Tel. Co.*, 75 Tex. 18, 12 S. W. 954, 16 Am. St. Rep. 872; *Primrose v. West. U. Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; *West. U. Tel. Co. v. Coggin*, 68 Fed. 137, 15 C. C. A. 231; *Behm v. West. U. Tel. Co.*, Fed. Cas. No. 1,234; *Telephone Co. v. Farrington (Tex. Civ. App.)* 131 S. W. 609; *Telephone v. Barkley*, 62 Tex. Civ. App. 573, 131 S. W. 849; *Stone v. Postal Tel. Cable Co.*, 35 R. I. 498, 87 Atl. 319, 46 L. R. A. (N. S.) 180.

<sup>66</sup> See § 538.

considering special circumstances connected with the contract of sending and which was not known by the contracting parties: "Had the special circumstances been known, the parties might have specially provided for the breach of the contract by special terms as to the damages in that case and of this advantage it would be very unjust to deprive them."<sup>67</sup> The unintelligible messages may and generally do relate to special circumstances not known by these companies, and to hold them liable for damages resulting from negligence in sending, and that which may not have entered into the contemplation of their minds at the time of accepting the message as being the natural and proximate result of such negligence, would be inconsistent with the spirit of the general rule. Some courts have held that this rule is analogous to, and derives its support from, the principle of the law of common carriers which exempts them from responsibility where the owner conceals his goods so that the nature, quantity and price of them are unknown to the carrier.<sup>68</sup> This is doubtless true, in a sense, but we think the fundamental principle of this rule, as well as that of carriers, is founded upon the reasons given in the case which is universally recognized as authority on this subject.<sup>69</sup> The only difficulty in these cases is in ascertaining the fact as to whether the company was informed of the nature and purpose of the message.

§ 537. **Same continued—reason of rule.**—A reason for this rule was given by Chief Justice Dixon, from which we quote: "It cannot be said or assumed that any amount of damages or any pecuniary loss or injury will naturally ensue or be suffered, according to the usual course of things, from the failure to transmit a message, the meaning and import of which are wholly unknown to the operator. The operator who receives, and who represents the company, and may for this purpose be said to be the other party to the contract, cannot be supposed to look upon such a message as one pertaining to transactions of pecuniary value and importance, and in respect to which pecuniary loss or damages will naturally arise in case of his failure or omission to send it. It may be a mere item of news or some other communication of trifling and unimportant character. Ignorant of its real nature and importance, it cannot be said to have been in his contemplation, at the time of making the contract, that any particular damage or injury would be the probable result of a breach of the contract on his part."<sup>70</sup>

<sup>67</sup> *Hadley v. Baxendale*, 9 Exch. 341.

<sup>68</sup> *Candee v. West. U. Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452.

<sup>69</sup> *Hadley v. Baxendale*, 9 Exch. 341.

<sup>70</sup> *Candee v. West. U. Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452.

It is true that these companies must exercise as much care and diligence in the transmission of unintelligible messages as those which show the importance and urgency on their face, although they would know in one and not in the other the result of their dereliction and carelessness. It is one of the duties of these companies to refrain from divulging the contents of messages intrusted to their care; this is provided for by statutes in some states, and the operator who violates such may be subjected to a penalty.<sup>71</sup> Therefore, if the company may be held liable for all damages resulting proximately and naturally from its negligence, when the message shows its importance and purpose on its face, whereby the company is informed of the probable results of its negligence, and if the secrecy of one is as safe as the other, it should be the duty of the sender to inform the company, in some way, of the importance of the message in order to hold it liable for damages to which it would not otherwise be subjected in case the message was unintelligible.

§ 538. **Contrary view.**—There are some very plausible reasons given by some courts for holding a contrary view on this subject. These courts hold that the company is liable for all damages resulting proximately and directly from the company's failure to transmit correctly or deliver promptly all messages delivered to it, whether they be intelligible or unintelligible to the company at the time they are accepted.<sup>72</sup> The ground on which they base their

<sup>71</sup> See § 311 et seq.

<sup>72</sup> *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844; *Daugherty v. American-Union Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435; *Dodd Gro. Co. v. Postal Tel. Cable Co.*, 112 Ga. 685, 37 S. E. 981; *West. U. Tel. Co. v. Fatman*, 73 Ga. 285, 54 Am. Rep. 877; *West. U. Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715; *Alexander v. West. U. Tel. Co.*, 66 Miss. 161, 5 South. 397, 14 Am. St. Rep. 556, 3 L. R. A. 71; *Bailey v. West. U. Tel. Co.*, 227 Pa. 522, 76 Atl. 736, 43 L. R. A. (N. S.) 502, 19 Ann. Cas. 895.

*Action by receiver.*—In some cases it is held that the receiver of a message may recover all damages caused by the negligent transmission or delivery of a cipher telegram where the agent should have known the importance of accuracy and dispatch. *Bailey v. West. U. Tel. Co.*, supra; *West. U. Tel. Co. v. Landis*, 9 Sudler (Pa.) 357, 12 Atl. 467; *West. U. Tel. Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500; *Postal Tel. Cable Co. v. Wells*, 82 Miss. 733, 35 South. 190; *Pinckney Bros. v. West. U. Tel. Co.*, 19 S. C. 71, 45 Am. Rep. 765; *Hill v. West. U. Tel. Co.*, 42 S. C. 367, 20 S. E. 135, 46 Am. St. Rep. 734; *Heath v. Postal Tel. Cable Co.*, 87 S. C. 219, 69 S. E. 283; *Amistion Cordage Co. v. West. U. Tel. Co.*, 161 Ala. 216, 49 South. 770, 30 L. R. A. (N. S.) 1116, 135 Am. St. Rep. 124; *Hughes v. West. U. Tel. Co.*, 114 N. C. 70, 19 S. E. 100, 41 Am. St. Rep. 782. And so if the receiver had the same information from other sources and where he was not damaged. *West. U. Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 66 Am. St. Rep. 361, 36 L. R. A. 711. See *West. U. Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934,



views is that it is the duty of these companies to exercise as much care and diligence in the transmission of these kinds of messages as one whose importance is shown on its face, or where the information of this fact is otherwise given to them. Another reason entertained is that most messages of great importance are written in cipher or otherwise unintelligible language. In other words, a large part of all messages of a commercial or business nature are sent in cipher, known only to the sender and addressee; and this fact suggests to the company that the damages resulting from its negligence will be usually great, and that all these are supposed to have entered into the contemplation of the company's mind at the time the message was accepted, as would most probably be the natural and direct result of its carelessness or negligence. While these reasons appear at first sight as unanswerable, yet we think that they are unsound.

§ 539. **When message discloses its importance.**—Although a message may be couched in unusual or trade language, if it is sufficiently plain to indicate that it relates to business transaction of

40 L. Ed. 1105, where the statute provides that the receiver may receive a penalty for failure to transmit correctly; *Reynolds v. West. U. Tel. Co.*, 81 Mo. App. 223, no cause of action where the message is to be delivered outside of free delivery limit.

*Action by sender.*—In the following cases it was held that the sender was entitled to recover all damages caused by the failure to deliver the message, some basing the action upon the ground that the message on its face furnishes notice of its importance. Others deny that the telegraph company can exempt itself by contract from gross negligence. *American-Union Tel. Co. v. Daugherty*, 89 Ala. 191, 7 South. 660; *West. U. Tel. Co. v. Way*, *supra*; *Dodd Gro. Co. v. Postal Tel. Cable Co.*, *supra*; *Beggs v. Postal Tel. Cable Co.*, 159 Ill. App. 247; *Postal Tel. Cable Co. v. Louisville Cotton Oil Co.*, 136 Ky. 843, 122 S. W. 852, 125 S. W. 266; *Carland v. West. U. Tel. Co.*, 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280; *Postal Tel. Cable Co. v. Robertson*, 36 Misc. Rep. 785, 74 N. Y. Supp. 876; *United States Tel. Co. v. Wenger*, 55 Pa. 262, 93 Am. Dec. 751; *West. U. Tel. Co. v. Nagle*, 11 Tex. Civ. App. 539, 32 S. W. 707; *West. U. Tel. Co. v. Bell*, 24 Tex. Civ. App. 573, 59 S. W. 918; *West. U. Tel. Co. v. Birge-Forbes Co.*, 29 Tex. Civ. App. 526, 69 S. W. 181; *West. U. Tel. Co. v. Reynold Bros.*, *supra*; *West. U. Tel. Co. v. Merriitt*, 55 Fla. 462, 46 South. 1024, 127 Am. St. Rep. 169; *Tyler v. West. U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *Postal Tel. Cable Co. v. Lathrop*, 131 Ill. 575, 23 N. E. 583, 19 Am. St. Rep. 55, 7 L. R. A. 474; *West. U. Tel. Co. v. Harris*, 19 Ill. App. 347; *West. U. Tel. Co. v. Crall*, 38 Kan. 679, 17 Pac. 309, 5 Am. St. Rep. 795; *Rittenhouse v. Independant, etc., Tel.*, 44 N. Y. 263, 4 Am. Rep. 673; *Candee v. West. U. Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452; *Kirby v. West. U. Tel. Co.*, 4 S. D. 105, 55 N. W. 759, 46 Am. St. Rep. 765, 30 L. R. A. 612; *Pepper v. West. U. Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660; *West. U. Tel. Co. v. Edsall*, 74 Tex. 329, 12 S. W. 41, 15 Am. St. Rep. 835; *Wertz v. West. U. Tel. Co.*, 7 Utah, 446, 27 Pac. 172, 13 L. R. A. 510; *Postal Tel. Cable Co. v. Wells*, 82 Miss. 733, 35 South. 190. See *Shingleur v. West. U. Tel. Co.*, 72 Miss. 1030, 18 South. 425, 48 Am. St. Rep. 604, 30 L. R. A. 447.

much importance, and that loss will probably result unless it is promptly transmitted and delivered, recovery will not be limited to nominal damages.<sup>73</sup> Thus it has been held that the following messages contain sufficient information on their face to indicate their importance: <sup>74</sup> "Cover two hundred September, one hundred August." <sup>75</sup> This meant sell two hundred bales of cotton delivered in September and one hundred delivered in August. "Ten cars new two white August shipment, fifty-six half." <sup>76</sup> This was an offer to sell two cars of No. 2 white oats, to be shipped in August, at fifty-six and one half cents per bushel. "Sell one hundred Western Union. Answer price." <sup>77</sup> "Want your cattle in the morning; meet me at pasture." <sup>78</sup> It was held that this was sufficient to authorize the inference that a delay until the day following would result in confusion, and loss. "Ship your hogs at once." The court said: "The obvious reason of this is evident on its face. It clearly imports that to meet a good market for hogs there must be shipment at once, and that by a delay a good market will be lost. It is equivalent to saying, if you ship at once you will obtain gains of the purchase and sale of your hogs. If you delay, these gains will be lost by the market price declining. It is most obvious, therefore, that the parties contemplated this very thing." <sup>79</sup> "Ship cargo named at 90, if you can secure freight at 10." This was sufficient to inform the operator that this was an acceptance of an offer to sell a cargo at the price named, if freight could be procured at ten cents.<sup>80</sup> "If we have any Old Sutherland on hand, sell same before board. Buy five Hudson at board." <sup>81</sup> "Will take two cars sixteens. Ship soon as convenient via West Shore." This was sent after the sender had received on the same day, through the same office a dispatch from Armour & Co., Chicago, containing these words: "Pickled hams, sixteens, nine and a half." In delivering the opinion the court, said: "We think the contents of this message were such as to indicate clearly to defendant that it was important, that a contract for the purchase of two carloads of hams

<sup>73</sup> Postal Tel. Cable Co. v. Lathrop, 33 Ill. App. 400, affirmed in 131 Ill. 575, 23 N. E. 583, 19 Am. St. Rep. 55, 7 L. R. A. 474; West. U. Tel. Co. v. Nagle, 11 Tex. Civ. App. 539, 32 S. W. 707. See other cases in note 72, supra. See, also, §§ 540, 542, and 543, and cases cited thereunder.

<sup>74</sup> See § 540.

<sup>75</sup> West. U. Tel. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480.

<sup>76</sup> West. U. Tel. Co. v. Harris, 19 Ill. App. 347.

<sup>77</sup> Tyler v. West. U. Tel. Co., 60 Ill. 421, 14 Am. Rep. 38.

<sup>78</sup> Hadley v. West. U. Tel. Co., 115 Ind. 191, 15 N. E. 845.

<sup>79</sup> Manville v. West. U. Tel. Co., 37 Iowa, 214, 18 Am. Rep. 8.

<sup>80</sup> True v. International Tel. Co., 60 Me. 9, 11 Am. Rep. 156.

<sup>81</sup> Rittenhouse v. Independent Line of Tel., 44 N. Y. 263, 4 Am. Rep. 673.

was being made by the parties, and that a failure to send the message must result in such loss to the parties as would naturally follow from a failure to complete such contract.”<sup>82</sup> “Buy fifty North Western—fifty Prairie du Chein, limit forty-five.” This contained sufficient information on its face.<sup>83</sup> “Car cribs six sixty, c. a. f., prompt.” This was sent in reply to the following: “Quote cribs loose, and strips packed.” In the meat trade, “cribs,” means clear ribs, and “c. a. f.” means cost and freight.<sup>84</sup> “You had better come and attend to your claim at once.”<sup>85</sup> “Send a bay horse to-day, Mack loads to-night.” Mack was a well-known horse buyer who was in the habit of shipping horses from the vicinity of the place from which the message was sent.<sup>86</sup> The following was held against the great weight of modern authority as being insufficient: “Will take two hundred extra mess, price named.” This was in reply to a message containing the following: “Extra mess, \$28.-75.”<sup>87</sup>

**§ 540. Same continued—need not be informed of all facts.**—It is not necessary that the company be informed of all the facts and circumstances pertaining to the business transaction about which the message is sent, in order for this rule to hold good. It is enough if there are sufficient facts disclosed by the face of the message to indicate its importance, and the probable consequences of its failure in not being received by the addressee as delivered to the company.<sup>88</sup> A message containing these words, “Fifty-five cents,

<sup>82</sup> *Mowry v. West. U. Tel. Co.*, 51 Hun, 126, 4 N. Y. Supp. 666.

<sup>83</sup> *United States Tel. Co. v. Wenger*, 55 Pa. 262, 93 Am. Dec. 751.

<sup>84</sup> *Pepper v. West. U. Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699.

<sup>85</sup> *West. U. Tel. Co. v. Sheffield*, 71 Tex. 570, 10 S. W. 752, 10 Am. St. Rep. 790.

<sup>86</sup> *Thompson v. West. U. Tel. Co.*, 64 Wis. 531, 25 N. W. 789, 54 Am. Rep. 644.

<sup>87</sup> *Beaupre v. Pacific, etc., Tel. Co.*, 21 Minn. 155.

<sup>88</sup> *Evans v. West. U. Tel. Co.*, 102 Iowa, 219, 71 N. W. 219; *Harkness v. West. U. Tel. Co.*, 73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672; *Pepper v. West. U. Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660; *Gulf, etc., R. Co. v. Loonie*, 82 Tex. 323, 18 S. W. 221, 27 Am. St. Rep. 891; *Manville v. West. U. Tel. Co.*, 37 Iowa, 214, 18 Am. Rep. 8; *Garrett v. West. U. Tel. Co.*, 83 Iowa, 257, 49 N. W. 88; *McPeck v. West. U. Tel. Co.*, 107 Iowa, 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214; *Veitch v. West. U. Tel. Co.*, 6 Ala. App. 328, 59 South. 352; *McMillan v. West. U. Tel. Co.*, 60 Fla. 131, 53 South. 329, 29 L. R. A. (N. S.) 891; *West. U. Tel. Co. v. Hines*, 96 Ga. 688, 23 S. E. 845, 51 Am. St. Rep. 159; *Providence-Washington Ins. Co. v. West. U. Tel. Co.*, 247 Ill. 84, 93 N. E. 134, 139 Am. St. Rep. 314, 30 L. R. A. (N. S.) 1170; *West. U. Tel. Co. v. True*, 105 Tex. 344, 148 S. W. 561, 41 L. R. A. (N. S.) 1188; *Hadley v. West. U. Tel. Co.*, 115 Ind. 191, 15 N. E. 845; *West. U. Tel. Co. v. Henley*, 157 Ind. 90, 60 N. E. 682; *Bierhaus v. West. U. Tel. Co.*, 8 Ind. App. 216, 34 N. E. 581; *McNeil v. Postal Tel. Cable Co.*, 154 Iowa, 241, 134



usual terms, quick acceptance," indicates that it relates to a business transaction and to a contemplated trade and puts the company on notice that it is of importance.<sup>89</sup> Some courts have held that a message is sufficiently plain if its language is such as to put the company on inquiry.<sup>90</sup> We hardly think that it is the duty of these

N. W. 611, 38 L. R. A. (N. S.) 727, Ann. Cas. 1914A, 1294; *Manville v. West. U. Tel. Co.*, 37 Iowa, 214, 18 Am. Rep. 8; *Evans v. West. U. Tel. Co.*, 102 Iowa, 219, 71 N. W. 219; *Hendershott v. West. U. Tel. Co.*, 106 Iowa, 529, 76 N. W. 828, 68 Am. St. Rep. 313; *McNeil v. Postal Tel. Cable Co.*, 154 Iowa, 241, 134 N. W. 611, 38 L. R. A. (N. S.) 727, Ann. Cas. 1914A, 727; *Rich Grain Dist. Co. v. West. U. Tel. Co.*, 13 Ky. Law Rep. 256; *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *Squire v. West. U. Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157; *Marriott v. West. U. Tel. Co.*, 84 Neb. 443, 121 N. W. 241, 133 Am. St. Rep. 633; *Pearsall v. West. U. Tel. Co.*, 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662; *Mowry v. West. U. Tel. Co.*, 51 Hun, 126, 4 N. Y. Supp. 666; *United States Tel. Co. v. Wenger*, 55 Pa. 262, 93 Am. Dec. 751; *Wallingford v. West. U. Tel. Co.*, 60 S. C. 201, 38 S. E. 443, 629; *Latham v. West. U. Tel. Co.*, 75 S. C. 129, 55 S. E. 134; *West. U. Tel. Co. v. Sheffield*, 71 Tex. 570, 10 S. W. 752, 10 Am. St. Rep. 790; *West. U. Tel. Co. v. Turner*, 94 Tex. 304, 60 S. W. 432; *Martin v. West. U. Tel. Co.*, 1 Tex. Civ. App. 143, 20 S. W. 860; *West. U. Tel. Co. v. Williford*, 2 Tex. Civ. App. 574, 22 S. W. 244; *Id.* (Civ. App.) 27 S. W. 700; *West. U. Tel. Co. v. Snow*, 31 Tex. Civ. App. 275, 72 S. W. 250; *West. U. Tel. Co. v. Federolf* (Tex. Civ. App.) 145 S. W. 314; *West. U. Tel. Co. v. Williams*, 57 Tex. Civ. App. 267, 122 S. W. 280; *Brooks v. West. U. Tel. Co.*, 26 Utah, 147, 72 Pac. 499; *Beatty v. West. U. Tel. Co.*, 52 W. Va. 410, 44 S. E. 309. See §§ 534, 540, 543, and other cases cited thereunder.

*Notice insufficient.*—It has been held in the following cases that the telegram itself did not give sufficient notice to the company to hold the company liable: *West. U. Tel. Co. v. Cornwell*, 2 Colo. App. 491, 31 Pac. 393; *Ill. Smelting, etc., Co. v. West. U. Tel. Co.*, 146 Ill. App. 163; *West. U. Tel. Co. v. Scott*, 27 Ky. Law Rep. 975, 87 S. W. 289; *United States Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519; *Beaupre v. Pacific, etc., Tel. Co.*, 21 Minn. 155; *Jacobs v. Postal Tel. Cable Co.*, 76 Miss. 278, 24 South. 535; *Melson v. West. U. Tel. Co.*, 72 Mo. App. 111; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *Landsberger v. Magnetic Tel. Co.*, 32 Barb. (N. Y.) 530; *McCull v. West. U. Tel. Co.*, 7 Abb. N. C. (N. Y.) 151; *Clark Mfg. Co. v. West. U. Tel. Co.*, 152 N. C. 157, 67 S. E. 329, 27 L. R. A. (N. S.) 643; *West. U. Tel. Co. v. Sullivan*, 82 Ohio St. 14, 91 N. E. 867, 137 Am. St. Rep. 754; *Frazier v. West. U. Tel. Co.*, 45 Or. 414, 78 Pac. 330, 2 Ann. Cas. 396, 67 L. R. A. 319; *Capers v. West. U. Tel. Co.*, 71 S. C. 29, 50 S. E. 537; *Clio Gin Co. v. West. U. Tel. Co.*, 82 S. C. 405, 64 S. E. 426; *West. U. Tel. Co. v. Thomas*, 7 Tex. Civ. App. 105, 26 S. W. 117; *West. U. Tel. Co. v. Kemp Gro. Co.* (Tex. Civ. App.) 28 S. W. 905; *West. U. Tel. Co. v. Twaddell*, 47 Tex. Civ. App. 51, 103 S. W. 1120; *West. U. Tel. Co. v. Farrington* (Tex. Civ. App.) 131 S. W. 609; *West. U. Tel. Co. v. Barkley*, 62 Tex. Civ. App. 573, 131 S. W. 849; *Stevenson v. Montreal Tel. Co.*, 16 U. C. Q. B. 530; *Elliott v. West. U. Tel. Co.*, 75 Tex. 18, 12 S. W. 954, 16 Am. St. Rep. 872; *Kolliner v. West. U. Tel. Co.*, 126 Minn. 122, 147 N. W. 961, 52 L. R. A. (N. S.) 1180.

<sup>89</sup> *Fererro v. West. U. Tel. Co.*, 9 App. D. C. 455, 35 L. R. A. 548; *West. U. Tel. Co. v. Nagle*, 11 Tex. Civ. App. 539, 32 S. W. 707. But see *Houston, etc., Tel. Co. v. Davidson*, 15 Tex. Civ. App. 334, 39 S. W. 605.

<sup>90</sup> *West. U. Tel. Co. v. Carter* (Tex. Civ. App.) 20 S. W. 834; *Thompson on Elect.* § 365; *West. U. Tel. Co. v. Edsall*, 74 Tex. 329, 12 S. W. 41, 15 Am. St. Rep. 835; *West. U. Tel. Co. v. Nagle*, 11 Tex. Civ. App. 539, 32 S. W. 707.

companies to exert themselves to make any extensive inquiry of the nature and purpose of a message, when the language of such puts them on inquiry. However, if the facts could be ascertained by a little inconvenience on their part, it would be, in our opinion, their duty to make such inquiry. The nature of the business of these companies is to expedite matters in the greatest possible haste; so, to require them to ascertain facts concerning the nature and purposes of messages delivered, would necessarily destroy the effects of such a business.

§ 541. **Question for jury.**—There can be no fixed rule laid down by which a court may be guided in determining whether a message contains such words as will be sufficiently plain to indicate its importance. As was said, some courts hold that the company will not be limited to nominal damages for negligently transmitting or delivering a message, and that, too, whether the company did or did not know the purpose of the message; but the weight of authority is undoubtedly to the contrary. Where there is doubt as to whether the words contained in the message were sufficient to indicate its importance, and whether this is true with respect to the operator, or whether the latter was made more certain of its importance by extrinsic facts, are questions for the jury.<sup>91</sup> The question as to the operator's having transmitted similar messages of whose importance he was informed, or the frequency with which familiar words are used, their familiarity in trade circles, and whether the same have been communicated to the company, are matters to be considered in determining their sufficiency. As said, no rule can be laid down for determining this question, but all facts and circumstances connected with the particular message should be considered.<sup>92</sup> If the message is a summons for a physician, and the operator knows him to be such, it would not be a question for the jury, whether it is sufficiently plain on its face to indicate its importance.<sup>93</sup> When the message announced the illness of some one, where the operator knew that the addressee was related to the person announced as ill,<sup>94</sup> or where the message directed the

<sup>91</sup> Cannon v. West. U. Tel. Co., 100 N. C. 300, 6 S. E. 731, 6 Am. St. Rep. 590; Candee v. West. U. Tel. Co., 34 Wis. 471, 17 Am. Rep. 452; Landsberger v. Magnetic Tel. Co., 32 Barb. (N. Y.) 530; Postal Tel. Cable, etc., Co. v. Lathrop, 131 Ill. 575, 23 N. E. 583, 7 L. R. A. 474, 19 Am. St. Rep. 55. See, also, § 520.

<sup>92</sup> See § 542.

<sup>93</sup> West. U. Tel. Co. v. Church, 3 Neb. (Unof.) 22, 90 N. W. 878, 57 L. R. A. 905.

<sup>94</sup> West. U. Tel. Co. v. Eskridge, 7 Ind. App. 208, 33 N. E. 238; West. U. Tel. Co. v. Pearce, 82 Miss. 487, 34 South. 152; Meadows v. West. U. Tel. Co.,

sender's attorney to attach property of a failing debtor,<sup>95</sup> or advising the plaintiff of the fact that a debtor is about to fail or some similar facts,<sup>96</sup> the message, in either case, will be sufficiently plain to indicate its importance, and the company will not be limited to nominal damages for its failure to transmit or deliver correctly and promptly. All damages which would ordinarily result from the lack of medical attention, or from mental suffering, or for the loss of a debt, may be recovered.

§ 542. **Same continued—extrinsic facts of importance.**—Where the message does not contain words sufficiently plain to indicate its importance, but there are extrinsic facts acquired by the company at the time the contract of sending is made which apprises it of the importance of the message, the company will be liable for a failure to send or deliver the message accurately and promptly, just the same as if it showed this fact on its face.<sup>97</sup> It is claimed by some authority that the extrinsic facts must have been acquired from the sender at the time the contract was made or prior there-

132 N. C. 40, 43 S. E. 512; *West. U. Tel. Co. v. Wilson* (Tex. Civ. App.) 51 S. W. 521; *West. U. Tel. Co. v. Linn*, 87 Tex. 7, 26 S. W. 490, 47 Am. St. Rep. 58.

<sup>95</sup> *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589.

<sup>96</sup> *Pacific Postal Tel. Cable Co. v. Fleischner*, 66 Fed. 899, 14 C. C. A. 166; *Id.* (C. C.) 55 Fed. 738; *Bierhaus v. West. U. Tel. Co.*, 8 Ind. App. 246, 34 N. E. 581; *Martin v. West. U. Tel. Co.*, 1 Tex. Civ. App. 143, 20 S. W. 860.

<sup>97</sup> *McPeck v. West. U. Tel. Co.*, 107 Iowa, 356, 78 N. W. 63, 43 L. R. A. 214, 70 Am. St. Rep. 205; *West. U. Tel. Co. v. Edsall*, 74 Tex. 329, 12 S. W. 41, 15 Am. St. Rep. 835; *West. U. Tel. Co. v. Williford* (Tex. Civ. App.) 27 S. W. 700; *West. U. Tel. Co. v. Jobe*, 6 Tex. Civ. App. 403, 25 S. W. 168, 1036; *Herron v. West. U. Tel. Co.*, 90 Iowa, 129, 57 N. W. 976; *Sprague v. West. U. Tel. Co.*, 6 Daly (N. Y.) 200; *Rittenhouse v. Independent Line of Tel.*, 44 N. Y. 263, 4 Am. Rep. 673; *Fleischner v. Pacific Postal Tel. Cable Co.* (C. C.) 55 Fed. 738; *Postal Tel. Cable Co. v. Nichols*, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A. (N. S.) 870, 14 Ann. Cas. 369; *Stiles v. West. U. Tel. Co.*, 2 Ariz. 308, 15 Pac. 712; *West. U. Tel. Co. v. Fatman*, 73 Ga. 285, 54 Am. Rep. 877; *Garrett v. West. U. Tel. Co.*, 83 Iowa, 257, 49 N. W. 88; *West. U. Tel. Co. v. Lehman*, 105 Md. 442, 66 Atl. 266; *West. U. Tel. Co. v. Lowrey*, 32 Neb. 732, 49 N. W. 707; *Baker v. West. U. Tel. Co.*, 84 S. C. 477, 66 S. E. 182, 137 Am. St. Rep. 848; *West. U. Tel. Co. v. Bowen*, 84 Tex. 476, 19 S. W. 554; *West. U. Tel. Co. v. Haman*, 2 Tex. Civ. App. 100, 20 S. W. 1133; *West. U. Tel. Co. v. Carver*, 15 Tex. Civ. App. 547, 39 S. W. 1021; *West. U. Tel. Co. v. Nagle*, 11 Tex. Civ. App. 539, 32 S. W. 707; *West. U. Tel. Co. v. Birge-Forbes Co.*, 29 Tex. Civ. App. 526, 69 S. W. 181; *Texas, etc., Tel. Co. v. Mackenzie*, 36 Tex. Civ. App. 178, 81 S. W. 581; *West. U. Tel. Co. v. Houston Rice Mill Co.* (Tex. Civ. App.) 93 S. W. 1084; *West. U. Tel. Co. v. Woods* (Tex. Civ. App.) 133 S. W. 440; *Postal Tel. Cable Co. v. Talerico* (Tex. Civ. App.) 136 S. W. 575; *West. U. Tel. Co. v. Williams* (Tex. Civ. App.) 137 S. W. 148; *Thompson v. West. U. Tel. Co.*, 64 Wis. 531, 25 N. W. 789, 54 Am. Rep. 644. But see *Fitch v. West. U. Tel. Co.*, 150 Mo. App. 149, 130 S. W. 44; *West. U. Tel. Co. v. Coggin*, 68 Fed. 137, 15 C. C. A. 231. See §§ 534, 542, and cases cited thereunder; *West. U. Tel. Co. v. Milton*, 53 Fla. 484, 43 South. 495, 11 L. R. A. (N. S.) 561, 125 Am. St. Rep. 1077. See § 543.



to; if they were acquired after the making of the contract, they could not be considered as part of the contract. We are inclined to think it is necessary that they be known at the time of making the contract, else the company could not have contemplated the result of a failure to properly discharge its duty with respect to the message. The rule is that the resulting damages of the company's negligence must have entered into the contemplation of the parties' minds at the time the contract was made. We do not, however, think that the company is precluded from deriving the information from sources other than from the sender, but in determining the question, the court and the jury may ascertain whether the company was informed from other sources. In other words, all the facts and circumstances which have any reference to the acceptance of the particular message, should be considered in determining this question. When notice of the main facts is given, the company is chargeable with notice of every incidental fact that would attend the transaction, and such as could have then been ascertained by the most minute inquiry.<sup>98</sup> If the operator was in the habit of transmitting other messages for similar purposes, of the importance of which he had been informed, or if the sender was carrying on a certain kind of business and was accustomed to send similar messages in regard to such business over the company's lines, the latter is chargeable with notice of its importance, and any circumstances which tend to sustain these facts may be shown.<sup>99</sup> It has been held that the same rule will apply when the message is in cipher as if written in the English language.<sup>100</sup>

<sup>98</sup> West. U. Tel. Co. v. Edsall, 74 Tex. 329, 12 S. W. 41, 15 Am. St. Rep. 835. See § 587.

<sup>99</sup> Postal Tel. Cable Co. v. Lathrop, 131 Ill. 575, 23 N. E. 583, 7 L. R. A. 474, 19 Am. St. Rep. 55; Mackay v. West. U. Tel. Co., 16 Nev. 227; West. U. Tel. Co. v. Williford (Tex. Civ. App.) 27 S. W. 700; Erie Tel., etc., Co. v. Grimes, 82 Tex. 89, 17 S. W. 831; Roach v. Jones, 18 Tex. Civ. App. 231, 44 S. W. 677; West. U. Tel. Co. v. Nagle, 11 Tex. Civ. App. 539, 32 S. W. 707. See § 587.

*Evidence as to notice, admissibility.*—Evidence is admissible to show that the company's agent was informed as to the importance or urgency of the message, Pope v. West. U. Tel. Co., 14 Ill. App. 531; Ward v. West. U. Tel. Co. (Tex. Civ. App.) 51 S. W. 259; Christmon v. Telegraph Co., 159 N. C. 195, 74 S. E. 325; Telephone Co. v. Henderson, 62 Tex. Civ. App. 457, 131 S. W. 1153; Telephone Co. v. Jenkins (Tex. Civ. App.) 152 S. W. 198; West. U. Tel. Co. v. Daniels (Tex. Civ. App.) 152 S. W. 1116; but separate transactions inadmissible, Pope v. West. U. Tel. Co., *supra*; Wiggs v. Southwestern Tel., etc., Co. (Tex. Civ. App.) 110 S. W. 179; Telephone Co. v. White (Tex. Civ. App.) 149 S. W. 790; evidence that the company was otherwise informed or chargeable with such notice, West. U. Tel. Co. v. Merritt, 55 Fla. 462, 46 South. 1024, 127 Am. St. Rep. 169; Smith v. West. U. Tel. Co., 80 Neb. 395, 114 N. W. 288. See Telephone Co. v. Woods (Tex. Civ. App.) 133 S. W. 440.

<sup>100</sup> West. U. Tel. Co. v. Hyer, 22 Fla. 637, 1 South. 129, 1 Am. St. Rep. 222.

§ 543. **Messages relating to business transactions.**—It is not necessary for a telegraph company to be informed of all the details of a business transaction concerning which a message relates in order to hold it liable for more than nominal damages as a result of its negligent transmission or delivery.<sup>101</sup> If the company has information derived either from the fact of the message itself or from any extrinsic evidence of its general purpose and character, it will be liable for all the damages naturally arising in consequence of such negligence.<sup>102</sup> A message is not necessarily a cipher message by the fact that trade terms and abbreviations are used.<sup>103</sup> It may be considered a general rule that the actual loss resulting proximately from the negligence of a telegraph company in failing to transmit correctly or to deliver promptly a message relating to a business transaction may be recovered, if the message contains sufficient information on its face to inform the company that it is an order to buy, sell, or close a pending trade or option, or that it is a definite offer or acceptance of a contract.<sup>104</sup> If, how-

<sup>101</sup> *Postal Tel. Cable Co. v. Lathrop*, 33 Ill. App. 400, affirmed in 131 Ill. 575, 23 N. E. 583, 19 Am. St. Rep. 55, 7 L. R. A. 474; *Texas, etc., Tel. Co. v. Mackenzie*, 36 Tex. Civ. App. 178, 81 S. W. 581; *West. U. Tel. Co. v. Merritt*, 55 Fla. 462, 46 South. 1024, 127 Am. St. Rep. 169; *West. U. Tel. Co. v. Nagle*, 11 Tex. Civ. App. 539, 32 S. W. 707; *Kerns v. Telephone Co.*, 170 Mo. App. 642, 157 S. W. 106; *Levy v. Telephone Co.*, 39 Okl. 416, 135 Pac. 423; *West. U. Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480.

<sup>102</sup> *Pepper v. West. U. Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660; *Postal Tel. Cable Co. v. Lathrop*, 33 Ill. App. 400, affirmed in 131 Ill. 575, 23 N. E. 583, 19 Am. St. Rep. 55, 7 L. R. A. 474; *West. U. Tel. Co. v. Edsall*, 74 Tex. 329, 12 S. W. 41, 15 Am. St. Rep. 835; *Texas, etc., Tel. Co. v. Mackenzie*, 36 Tex. Civ. App. 178, 81 S. W. 581; *West. U. Tel. Co. v. Nagle*, 11 Tex. Civ. App. 539, 32 S. W. 707; *Providence-Washington Ins. Co. v. West. U. Tel. Co.*, 247 Ill. 84, 93 N. E. 134, 30 L. R. A. (N. S.) 1170, 139 Am. St. Rep. 314; *McMillan v. West. U. Tel. Co.*, 60 Fla. 131, 53 South. 329, 29 L. R. A. (N. S.) 891.

<sup>103</sup> *Pepper v. West. U. Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660; *Bailey v. West. U. Tel. Co.*, 227 Pa. 522, 76 Atl. 736, 43 L. R. A. (N. S.) 502, 19 Ann. Cas. 895.

<sup>104</sup> *West. U. Tel. Co. v. Merritt*, 55 Fla. 462, 46 South. 1024, 127 Am. St. Rep. 169; *West. U. Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480, "Cover two hundred September and one hundred August"; *Fererro v. West. U. Tel. Co.*, 9 App. D. C. 455, 35 L. R. A. 548, "Fifty-five cents, usual terms, quick acceptance"; *Postal Tel. Cable Co. v. Lathrop*, 33 Ill. App. 400, affirmed in 131 Ill. 575, 23 N. E. 583, 19 Am. St. Rep. 55, 7 L. R. A. 474; *Garrett v. West. U. Tel. Co.*, 88 Iowa, 257, 49 N. W. 88; *Herron v. West. U. Tel. Co.*, 90 Iowa, 129, 57 N. W. 696; *Squire v. West. U. Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157, "Will take your hogs at your offer"; *West. U. Tel. Co. v. Lehman*, 105 Md. 442, 66 Atl. 266, "Shipped cattle today"; *Smith v. West. U. Tel. Co.*, 80 Neb. 395, 114 N. W. 288; *Mowry v. West. U. Tel. Co.*, 51 Hun, 126, 4 N. Y. Supp. 666, "Will take two cars Sixteens"; *Rittenhouse v. Independent Tel. Line*, 44 N. Y. 263, 4 Am. Rep. 673, "If we have any Old Southern on hand, sell same before board.

ever, the damages claimed in these cases are special or of a remote, uncertain or speculative character, or such as were not in the contemplation of the parties at the making of the contract as would be the result of its breach, they will be denied.<sup>105</sup> It is a general rule that the expenses of an unnecessary or fruitless trip or loss of time may be recovered from a telegraph company whose negligence in the transmission or delivery of a message was responsible for the trip, if sufficient notice was given to authorize recovery of such damages.<sup>106</sup>

§ 544. Rule in "mental anguish cases."—The rule just discussed is not changed by the fact that the nature and purpose of the mes-

Buy 5 Hudson at board"; *Pepper v. West. U. Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660, "Car cribs six-sixty caf., prompt," it appearing that "cribs" and "caf" meant costs and freight. But see *West. U. Tel. Co. v. Bowen*, 84 Tex. 476, 19 S. W. 554, "Will ship machinery at once"; *Postal Tel. Co. v. Levy* (Tex. Civ. App.) 102 S. W. 134, "Counter proposition not unfavorable. Imperative you come on. Answer"; *West. U. Tel. Co. v. Birge-Forbes Co.*, 29 Tex. Civ. App. 526, 69 S. W. 181, "All right. See bluffing each described amply"; *West. U. Tel. Co. v. Carver*, 15 Tex. Civ. App. 547, 39 S. W. 1021; *West. U. Tel. Co. v. Nagle*, 11 Tex. Civ. App. 539, 32 S. W. 707, "Kammerer renews orders"; with remainder message in cipher, *Brooks v. West. U. Tel. Co.*, 26 Utah, 147, 72 Pac. 499. See *Providence-Washington Ins. Co. v. West. U. Tel. Co.*, 247 Ill. 84, 93 N. E. 134, 30 L. R. A. (N. S.) 1170, 139 Am. St. Rep. 314. See, also, note 50, *supra*, for other cases.

<sup>105</sup> *United States Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519, "Sell fifty gold"; *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126; *Beaupre v. Pacific, etc.*, Tel. Co., 21 Minn. 155, "Will take two hundred extra mess, price named"; *Hord v. West. U. Tel. Co.*, 5 Ohio Dec. (Reprint) 555, "Sold 100,000 clear rib, buyer March—Seven—can sell more"; *McColl v. West. U. Tel. Co.*, 44 N. Y. Super. Ct. 487, "Can close Valkyria and Othere twenty-two net Montreal. Ans. immediately"; *Cahn v. West. U. Tel. Co.*, 48 Fed. 810, 1 C. C. A. 107, "Sell 200 Tennessee coal and iron"; *Telephone v. Barkley*, 62 Tex. Civ. App. 573, 131 S. W. 849. See *Fitch v. Telephone Co.*, 150 Mo. App. 149, 130 S. W. 44. See, also, *Stone v. Postal Tel. Cable Co.*, 35 R. I. 498, 87 Atl. 319, 46 L. R. A. (N. S.) 180; *Anniston Cordage Co. v. West. U. Tel. Co.*, 161 Ala. 216, 49 South. 770, 30 L. R. A. (N. S.) 1116, 135 Am. St. Rep. 124; *West. U. Tel. Co. v. Sights*, 34 Okl. 461, 126 Pac. 234, 42 L. R. A. (N. S.) 419, Ann. Cas. 1914C, 204.

<sup>106</sup> *Kolliner v. West. U. Tel. Co.*, 126 Minn. 122, 147 N. W. 961, 52 L. R. A. (N. S.) 1180; *West. U. Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744; *West. U. Tel. Co. v. Henley*, 157 Ind. 90, 60 N. E. 682; *Lee v. West. U. Tel. Co.*, 51 Mo. App. 375; *Sprague v. West. U. Tel. Co.*, 6 Daly (N. Y.) 200, affirmed in 67 N. Y. 590; *Hall v. West. U. Tel. Co.*, 139 N. C. 369, 52 S. E. 50; *Lothian v. West. U. Tel. Co.*, 25 S. D. 319, 126 N. W. 621; *West. U. Tel. Co. v. Shumate*, 2 Tex. Civ. App. 429, 21 S. W. 109; *West. U. Tel. Co. v. Hines*, 22 Tex. Civ. App. 315, 54 S. W. 627. Other cases holding the telegraph company liable do not discuss the question of notice. *Harkness v. West. U. Tel. Co.*, 73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672; *Salinger v. West. U. Tel. Co.*, 147 Iowa, 484, 126 N. W. 362, Id. (Iowa) 111 N. W. 820; *McInturf v. West. U. Tel. Co.*, 81 Kan. 476, 106 Pac. 282; *West. U. Tel. Co. v. Jump*, 8 Ky. Law Rep. 531; *West. U. Tel. Co. v. Cleaver*, 13 Ky. Law Rep. 301; *West. U. Tel. Co. v. McCormick* (Miss.) 27 South. 606; *Duncan v. West. U. Tel. Co.*, 93 Miss. 500, 47 South. 552;



sage relates to some object which, if not properly accomplished, will result in injury to the feelings of some one interested in the message.<sup>107</sup> It is generally held that where a telegraph company fails to correctly and promptly transmit and deliver a message relating to the serious illness, death or burial of some one in whom the sender or addressee is interested, or a beneficiary whose interest in the delivery of the message appears in the message itself or has been sufficiently made known to the company, it will be liable in damages for the mental anguish suffered by either of these parties,<sup>108</sup> if the company had information of the nature and purpose

Bliss v. Baltimore, etc., Tel. Co., 30 Mo. App. 103; Tobin v. West. U. Tel. Co., 146 Pa. 375, 23 Atl. 324, 28 Am. St. Rep. 802; West. U. Tel. Co. v. Murray, 29 Tex. Civ. App. 207, 68 S. W. 549; Kopperl v. West. U. Tel. Co. (Tex. Civ. App.) 85 S. W. 1018; Lane v. Montreal Tel. Co., 7 U. C. C. P. 23; West U. Tel. Co. v. Bates, 93 Ga. 352, 20 S. E. 639; Cumberland Tel., etc., Co. v. Quigley, 129 Ky. 788, 112 S. W. 897, 19 L. R. A. (N. S.) 575. But in the following cases telegraph company was held liable: West. U. Tel. Co. v. Reed, 3 Ala. App. 253, 57 South. 83; Fitch v. West. U. Tel. Co., 150 Mo. App. 149, 130 S. W. 44; Alexander v. West. U. Tel. Co. (C. C.) 126 Fed. 445; West. U. Tel. Co. v. Cain, 14 Ind. App. 115, 42 N. E. 655; Hunter v. West. U. Tel. Co., 135 N. C. 458, 47 S. E. 745; Hilley v. West. U. Tel. Co., 85 Miss. 67, 37 South. 556; Lee v. West. U. Tel. Co., 51 Mo. App. 375; West. U. Tel. Co. v. Patton (Tex. Civ. App.) 55 S. W. 973; West. U. Tel. Co. v. Smith, 76 Tex. 253, 13 S. W. 169. See, Bowyer v. West. U. Tel. Co., 130 Iowa, 324, 106 N. W. 748, 5 L. R. A. (N. S.) 984.

<sup>107</sup> See Kagy v. West. U. Tel. Co., 37 Ind. App. 73, 76 N. E. 792, 117 Am. St. Rep. 278; Postal Tel. Cable Co. v. Beal, 159 Ala. 249, 48 South. 676; West. U. Tel. Co. v. Toms, 99 Ark. 117, 137 S. W. 559; West. U. Tel. Co. v. Benson, 159 Ala. 254, 48 South. 712; West. U. Tel. Co. v. Garlington, 101 Ark. 487, 142 S. W. 854, 49 L. R. A. (N. S.) 300; Hildreth v. West. U. Tel. Co., 56 Fla. 387, 47 South. 820; Suttle v. West. U. Tel. Co., 148 N. C. 480, 62 S. E. 593, 128 Am. St. Rep. 631; Seddon v. West. U. Tel. Co., 146 Iowa, 743, 126 N. W. 969; Cordell v. West. U. Tel. Co., 149 N. C. 402, 63 S. E. 71, 22 L. R. A. (N. S.) 540; Carswell v. West. U. Tel. Co., 154 N. C. 112, 69 S. E. 782, 32 L. R. A. (N. S.) 611; Pierson v. West. U. Tel. Co., 150 N. C. 559, 64 S. E. 577; Fass v. West. U. Tel. Co., 82 S. C. 461, 64 S. E. 235; Talbert v. West. U. Tel. Co., 83 S. C. 68, 64 S. E. 862, rehearing denied in 83 S. C. 77, 64 S. E. 916; Cameron v. West. U. Tel. Co., 90 S. C. 503, 74 S. E. 929; West. U. Tel. Co. v. Gilliland (Tex. Civ. App.) 130 S. W. 212; West. U. Tel. Co. v. Kibble, 53 Tex. Civ. App. 222, 115 S. W. 643; Johnson v. West. U. Tel. Co. (Tex. Civ. App.) 132 S. W. 814; West. U. Tel. Co. v. Harris (Tex. Civ. App.) 132 S. W. 876; Smith v. Postal Tel. Cable Co., 104 Tex. 171, 133 S. W. 1041, 135 S. W. 1147; West. U. Tel. Co. v. Olivarri, 104 Tex. 203, 135 S. W. 1158, confirming judgment in (Civ. App.) 110 S. W. 930; Id., 126 S. W. 688; West. U. Tel. Co. v. Edmonds (Tex. Civ. App.) 146 S. W. 322; Penn v. West. U. Tel. Co., 159 N. C. 306, 75 S. E. 16, 41 L. R. A. (N. S.) 223; West. U. Tel. Co. v. Potts, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. (N. S.) 479; Bolton v. West. U. Tel. Co., 84 S. C. 67, 65 S. E. 937.

<sup>108</sup> Heathcoat v. West. U. Tel. Co., 156 Ala. 339, 47 South. 139; West. U. Tel. Co. v. Jackson, 163 Ala. 9, 50 South. 316; Louisiana, etc., R. Co. v. Reeves, 95 Ark. 214, 128 S. W. 1051; Lavelle v. West. U. Tel. Co., 102 Ark. 607, 145 S. W. 205; Penn v. West. U. Tel. Co., 159 N. C. 306, 75 S. E. 16, 41 L. R. A. (N. S.) 223; West. U. Tel. Co. v. Olivarri, 104 Tex. 203, 135 S. W. 1158, affirming (Civ.

of such message.<sup>109</sup> If the message does not contain words sufficiently plain on its face to apprise the company of such fact, and there is no extrinsic evidence imparted to the latter at the time of accepting the message to sustain such fact, the company will be liable only for nominal damages.<sup>110</sup> But, on the other hand, if the company is informed, either by the face of the message or by extrinsic evidence, that it relates to the dangerous illness, death or the time of the burial of a relative, or where it requests the addressee to come at once or some request of like import, the com-

App.) 110 S. W. 930; *Id.*, 126 S. W. 688; *West. U. Tel. Co. v. Gilliland* (Tex. Civ. App.) 130 S. W. 212; *Curd v. Cumberland Tel., etc., Co.* (Ky.) 119 S. W. 746.

*Persons not party to or not mentioned in telegram.*—As to the right of a person whose name or interest does not appear on the face of the telegram to recover for mental anguish due to its nondelivery, see *West. U. Tel. Co. v. Potts*, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. (N. S.) 479; *West. U. Tel. Co. v. Northcutt*, 158 Ala. 539, 48 South. 553, 132 Am. St. Rep. 38; *Holler v. West. U. Tel. Co.*, 149 N. C. 336, 63 S. E. 92, 19 L. R. A. (N. S.) 475; *Harrelson v. West. U. Tel. Co.*, 90 S. C. 132, 72 S. E. 882; *Maxville v. West. U. Tel. Co.* (Tex. Civ. App.) 140 S. W. 464; *West. U. Tel. Co. v. Herring* (Tex. Civ. App.) 146 S. W. 699.

<sup>109</sup> *Reese v. West. U. Tel. Co.*, 123 Ind. 294, 21 N. E. 163, 7 L. R. A. 583n; *Lyne v. West. U. Tel. Co.*, 123 N. C. 129, 31 S. E. 350; *Cashion v. West. U. Tel. Co.*, 123 N. C. 267, 31 S. E. 493; *Id.*, 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160; *Bennett v. West. U. Tel. Co.*, 128 N. C. 103, 38 S. E. 294; *West. U. Tel. Co. v. May*, 8 Tex. Civ. App. 176, 27 S. W. 760; *West. U. Tel. Co. v. Randles* (Tex. Civ. App.) 34 S. W. 447; *Postal Tel. Cable Co. v. Beal*, 159 Ala. 249, 48 South. 676; *West. U. Tel. Co. v. Rowell*, 153 Ala. 295, 45 South. 73; *Postal Tel. Cable Co. v. Pratt*, 85 S. W. 225, 27 Ky. Law Rep. 430; *West. U. Tel. Co. v. Moxley*, 80 Ark. 554, 98 S. W. 112; *Dayvis v. West. U. Tel. Co.*, 139 N. C. 79, 51 S. E. 898; *Fass v. West. U. Tel. Co.*, 82 S. C. 461, 64 S. E. 235; *Lyles v. West. U. Tel. Co.*, 77 S. C. 174, 57 S. E. 725, 12 L. R. A. (N. S.) 534; *West. U. Tel. Co. v. Olivarri* (Tex. Civ. App.) 110 S. W. 930; *West. U. Tel. Co. v. Bell* (Tex. Civ. App.) 90 S. W. 714; *West. U. Tel. Co. v. West*, 165 Ala. 399, 51 South. 710; *West. U. Tel. Co. v. Russell*, 4 Ala. App. 485, 58 South. 938; *West. U. Tel. Co. v. Toms*, 99 Ark. 117, 137 S. W. 559; *West. U. Tel. Co. v. Gilliland* (Tex. Civ. App.) 130 S. W. 212; *Smith v. Postal Tel. Cable Co.*, 104 Tex. 171, 133 S. W. 1041, 135 S. W. 1147; *West. U. Tel. Co. v. Olivarri*, 104 Tex. 203, 135 S. W. 1158; *Middleton v. Telephone Co.*, 183 Ala. 213, 62 South. 744, 49 L. R. A. (N. S.) 305; *Lyles v. West. U. Tel. Co.*, 84 S. C. 1, 65 S. E. 832, 137 Am. St. Rep. 829. See §§ 547, 587.

<sup>110</sup> *West. U. Tel. Co. v. Todd*, 22 Ind. App. 701, 54 N. E. 446; *West. U. Tel. Co. v. Pearce*, 82 Miss. 487, 34 South. 152; *Sherrill v. West. U. Tel. Co.*, 116 N. C. 655, 21 S. E. 429; *Cashion v. West. U. Tel. Co.*, 123 N. C. 267, 31 S. E. 493; *Darlington v. West. U. Tel. Co.*, 127 N. C. 448, 37 S. E. 479; *Sparkman v. West. U. Tel. Co.*, 130 N. C. 447, 41 S. E. 881; *Kennon v. West. U. Tel. Co.*, 126 N. C. 232, 35 S. E. 468; *Ikard v. West. U. Tel. Co.* (Tex. Civ. App.) 22 S. W. 534; *West. U. Tel. Co. v. Womack*, 9 Tex. Civ. App. 607, 29 S. W. 932; *West. U. Tel. Co. v. Murray*, 29 Tex. Civ. App. 207, 68 S. W. 549; *West. U. Tel. Co. v. May*, 8 Tex. Civ. App. 176, 27 S. W. 760; *West. U. Tel. Co. v. Kerr*, 4 Tex. Civ. App. 280, 23 S. W. 564; *West. U. Tel. Co. v. Smith* (Tex. Civ. App.) 26 S. W. 216; *Davis v. West. U. Tel. Co.*, 46 W. Va. 48, 32 S. E. 1026.

pany will be liable for all mental suffering resulting proximately and directly from the failure to properly transmit or deliver the message.<sup>111</sup>

§ 545. **Same continued—relationship of person affected.**—The above rule is considered further, in this, that the company must not only be informed that the message relates to the serious illness, death or the time set for burial of some one in whom the plaintiff is interested, but it must further be informed that the party about whom the message concerns is a near relative of his.<sup>112</sup> This may either be imparted to the company by the face of the message, where the wording is sufficiently plain to indicate this important

<sup>111</sup> *Green v. West. U. Tel. Co.*, 136 N. C. 489, 49 S. E. 165, 103 Am. St. Rep. 955, 67 L. R. A. 985, 1 Ann. Cas. 349; *West. U. Tel. Co. v. Womack*, 9 Tex. Civ. App. 607, 29 S. W. 932; *West. U. Tel. Co. v. Burgess* (Tex. Civ. App.) 56 S. W. 237; *Lyles v. West. U. Tel. Co.*, 84 S. C. 1, 65 S. E. 832, 137 Am. St. Rep. 829. See § 587. See also, *West. U. Tel. Co. v. Luck*, 91 Tex. 178, 41 S. W. 469, 66 Am. St. Rep. 869, overruling *West. U. Tel. Co. v. Nations*, 82 Tex. 539, 18 S. W. 709, 27 Am. St. Rep. 914; *West. U. Tel. Co. v. Potts*, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. (N. S.) 479; *West. U. Tel. Co. v. Shofner*, 87 Ark. 303, 112 S. W. 751; *Cashion v. West. U. Tel. Co.*, 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160; *Harrison v. West. U. Tel. Co.*, 136 N. C. 381, 48 S. E. 772; *Pierson v. West. U. Tel. Co.*, 150 N. C. 559, 64 S. E. 577; *Davis v. West. U. Tel. Co.*, 107 Ky. 527, 54 S. W. 849, 92 Am. St. Rep. 371; *West. U. Tel. Co. v. Griffin*, 92 Ark. 219, 122 S. W. 489; *West. U. Tel. Co. v. Carter* (Tex. Civ. App.) 20 S. W. 834; *West. U. Tel. Co. v. Toms*, 99 Ark. 117, 137 S. W. 559; *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23; *Harrison v. West. U. Tel. Co.*, 143 N. C. 147, 55 S. E. 435, 10 Ann. Cas. 476; *West. U. Tel. Co. v. Bell*, 42 Tex. Civ. App. 462, 92 S. W. 1036; *West. U. Tel. Co. v. Rosentreter*, 80 Tex. 406, 16 S. W. 25; *Louisiana, etc., R. Co. v. Reeves*, 95 Ark. 214, 128 S. W. 1051; *Reese v. West. U. Tel. Co.*, 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583; *West. U. Tel. Co. v. Eskridge*, 7 Ind. App. 208, 33 N. E. 238; *Graham v. West. U. Tel. Co.*, 93 S. C. 173, 76 S. E. 200; *Gulf, etc., Tel. Co. v. Richardson*, 79 Tex. 649, 15 S. W. 689; *West. U. Tel. Co. v. May*, 8 Tex. Civ. App. 176, 27 S. W. 760; *West. U. Tel. Co. v. Gullledge*, 84 Ark. 501, 106 S. W. 957; *Shaw v. West. U. Tel. Co.*, 151 N. C. 638, 66 S. E. 668; *Gerock v. West. U. Tel. Co.*, 142 N. C. 22, 54 S. E. 782; *Loper v. West. U. Tel. Co.*, 70 Tex. 689, 8 S. W. 600; *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; *West. U. Tel. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843; *Carter v. West. U. Tel. Co.*, 73 S. C. 430, 53 S. E. 539. But see *West. U. Tel. Co. v. Kuykendall*, 99 Tex. 323, 89 S. W. 965.

*Telegram not relating to serious illness or death.*—Damages not recoverable. *West. U. Tel. Co. v. Kibble*, 53 Tex. Civ. App. 222, 115 S. W. 643; *Sparkman v. West. U. Tel. Co.*, 130 N. C. 447, 41 S. E. 881; *West. U. Tel. Co. v. Raines*, 78 Ark. 545, 94 S. W. 700; *Williams v. West. U. Tel. Co.*, 136 N. C. 82, 48 S. E. 559, 1 Ann. Cas. 359; *West. U. Tel. Co. v. Hogue*, 79 Ark. 33, 94 S. W. 924; *West. U. Tel. Co. v. Oastler*, 90 Ark. 268, 119 S. W. 285, 49 L. R. A. (N. S.) 325; *Christmon v. Postal Tel. Cable Co.*, 159 N. C. 195, 74 S. E. 325; *West. U. Tel. Co. v. McFadden*, 32 Tex. Civ. App. 582, 75 S. W. 352; *Sledge v. West. U. Tel. Co.*, 163 Ala. 4, 50 South. 886; *West. U. Tel. Co. v. Westmoreland*, 151 Ala. 319, 44 South. 382.

<sup>112</sup> *Butner v. West. U. Tel. Co.*, 2 Okl. 234, 37 Pac. 1087; *West. U. Tel. Co. v. Benson*, 159 Ala. 254, 48 South. 712; *West. U. Tel. Co. v. Steele* (Tex. Civ.



fact, or it may derive this information from extrinsic evidence alone, or in connection with the facts on the face of the message.<sup>113</sup> It seems that it is not as necessary for the face of the message to be plain and clear, with respect to a message of this character, and one of a business nature when written unintelligibly; but if there is any notice or information of its purpose, it becomes the duty of the company to make further inquiry.<sup>114</sup> While these companies must have some information of the relationship of the parties, yet it is not necessary that the exact relationship of the parties, or that the family pedigree, should be set out in the message, or even given to the company by outside information.<sup>115</sup> The reason for the later view, is the same as that given above in regard to the brevity in which messages should be prepared. The only apparent effect this would have, as said in regard to "repeating" a message, would be "to increase the revenue of these companies."<sup>116</sup> In some states the rule seems to be that the company is charged with knowledge of the relationship of the parties by the mere fact of the nature of the message, where it is one relating to the serious illness, death or

App.) 110 S. W. 546; *West. U. Tel. Co. v. Russell*, 4 Ala. App. 485, 58 South. 938; *West. U. Tel. Co. v. Peagler*, 163 Ala. 38, 50 South. 912.

Many cases hold that the relationship of the parties to a message need not be disclosed to the company, but in most of these cases the relationship did, in fact, exist, and it might be said that the company presumed relationship; *West. U. Tel. Co. v. Bennett*, 3 Ala. App. 275, 57 South. 87; *West. U. Tel. Co. v. Moxley*, 80 Ark. 554, 98 S. W. 112; *Foreman v. West. U. Tel. Co.*, 141 Iowa. 32, 116 N. W. 724, 19 L. R. A. (N. S.) 374; *Davis v. West. U. Tel. Co.*, 107 Ky. 527, 54 S. W. 849, 92 Am. St. Rep. 371; *Lynne v. West. U. Tel. Co.*, 123 N. C. 129, 31 S. E. 350; *Bennett v. West. U. Tel. Co.*, 128 N. C. 103, 38 S. E. 294; *Meadows v. West. U. Tel. Co.*, 132 N. C. 40, 43 S. E. 512; *Bright v. West. U. Tel. Co.*, 132 N. C. 317, 43 S. E. 841; *Hunter v. West. U. Tel. Co.*, 135 N. C. 458, 47 S. E. 745; *Ellison v. West. U. Tel. Co.*, 163 N. C. 5, 79 S. E. 277; *Harrison v. West. U. Tel. Co.*, 163 N. C. 18, 79 S. E. 281; *Potts v. West. U. Tel. Co.*, 82 Tex. 545, 18 S. W. 604; *West. U. Tel. Co. v. Carter*, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826; *West. U. Tel. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896; *West. U. Tel. Co. v. Sweetman*, 19 Tex. Civ. App. 435, 47 S. W. 676; *West. U. Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844; *Seddon v. West. U. Tel. Co.*, 146 Iowa, 743, 126 N. W. 969.

<sup>113</sup> *Davis v. West. U. Tel. Co.*, 107 Ky. 527, 54 S. W. 849, 92 Am. St. Rep. 371; *Bennett v. West. U. Tel. Co.*, 128 N. C. 103, 38 S. E. 294; *Meadows v. West. U. Tel. Co.*, 132 N. C. 40, 43 S. E. 512; *West. U. Tel. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843; *West. U. Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920; *West. U. Tel. Co. v. Peegles*, 75 Tex. 537, 12 S. W. 860; *West. U. Tel. Co. v. Moore*, 76 Tex. 66, 12 S. W. 949, 18 Am. St. Rep. 25; *West. U. Tel. Co. v. Rosentreter*, 80 Tex. 406, 16 S. W. 25; *Potts v. West. U. Tel. Co.*, 82 Tex. 545, 18 S. W. 604; *West. U. Tel. Co. v. Carter* (Tex. Civ. App.) 20 S. W. 834.

<sup>114</sup> *West. U. Tel. Co. v. Moore*, 76 Tex. 66, 12 S. W. 949, 18 Am. St. Rep. 25.

<sup>115</sup> See § 605 et seq.

<sup>116</sup> *West. U. Tel. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279.

time of funeral, or the like.<sup>117</sup> When such communication relates to sickness and death, there accompanies them a common sense suggestion that they are of importance, and that the persons addressed have in them a serious interest.<sup>118</sup> If the relationship is remote, the company should have notice of such fact.<sup>119</sup>

§ 546. **Same continued—reason of rule—nearness of relationship.**—The reason of the rule that the relationship of the parties must be known by the company at the time the message is accepted, in order to recover damages for mental suffering, as the natural and direct result of its failure to discharge its duty, is obvious. No one can recover damages, as was said in the beginning of this chapter, unless his rights have been infringed upon, and then they are only given as a compensation for such infringement.

<sup>117</sup> West. U. Tel. Co. v. Coffin, 88 Tex. 94, 30 S. W. 896; West. U. Tel. Co. v. Luck, 91 Tex. 178, 41 S. W. 469, 66 Am. St. Rep. 869; West. U. Tel. Co. v. Smith (Tex. Civ. App.) 53 S. W. 742; West. U. Tel. Co. v. Adams, 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920; Postal Tel. Cable Co. v. Beal, 159 Ala. 249, 48 South. 676; Foreman v. West. U. Tel. Co., 141 Iowa, 32, 116 N. W. 724, 19 L. R. A. (N. S.) 374; West. U. Tel. Co. v. Moxley, 80 Ark. 554, 98 S. W. 112; Postal Tel. Cable Co. v. Pratt, 85 S. W. 225, 27 Ky. Law Rep. 430; Davis v. West. U. Tel. Co., 107 Ky. 527, 54 S. W. 849, 21 Ky. Law Rep. 1251, 92 Am. St. Rep. 371; Bright v. West. U. Tel. Co., 132 N. C. 317, 43 S. E. 841; Hunter v. West. U. Tel. Co., 135 N. C. 458, 47 S. E. 745; Meadows v. West. U. Tel. Co., 132 N. C. 40, 43 S. E. 512; Bennett v. West. U. Tel. Co., 128 N. C. 103, 38 S. E. 294; Lyne v. West. U. Tel. Co., 123 N. C. 129, 31 S. E. 350; Lyles v. West. U. Tel. Co., 77 S. C. 174, 57 S. E. 725, 12 L. R. A. (N. S.) 534; Potts v. West. U. Tel. Co., 82 Tex. 545, 18 S. W. 604; West. U. Tel. Co. v. Rosentretter, 80 Tex. 406, 16 S. W. 25; Seddon v. Telephone Co., 146 Iowa, 743, 126 N. W. 969.

*Whether action brought by sender or sendee—distinction.*—A distinction has been made according to whether the action is brought by the sender or the receiver of a message. See West. U. Tel. Co. v. Luck, 91 Tex. 178, 41 S. W. 469, 66 Am. St. Rep. 869, overruling West. U. Tel. Co. v. Nations, 82 Tex. 539, 18 S. W. 709, 27 Am. St. Rep. 914. But see Potts v. West. U. Tel. Co., *supra*; contra, Bright v. West. U. Tel. Co., 132 N. C. 317, 43 S. E. 841.

<sup>118</sup> Foreman v. West. U. Tel. Co., 141 Iowa, 32, 116 N. W. 724, 19 L. R. A. (N. S.) 374; West. U. Tel. Co. v. Moxley, 80 Ark. 554, 98 S. W. 112; Meadows v. West. U. Tel. Co., 132 N. C. 40, 43 S. E. 512; Lyles v. West. U. Tel. Co., 77 S. C. 174, 57 S. E. 725, 12 L. R. A. (N. S.) 534; Lyne v. West. U. Tel. Co., 123 N. C. 129, 31 S. E. 350; Potts v. West. U. Tel. Co., 82 Tex. 545, 18 S. W. 604; nor would result to the particular person appearing as plaintiff, West. U. Tel. Co. v. Luck, 91 Tex. 178, 41 S. W. 469, 66 Am. St. Rep. 869, overruling West. U. Tel. Co. v. Nations, 82 Tex. 539, 18 S. W. 709, 27 Am. St. Rep. 914; West. U. Tel. Co. v. Potts, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. (N. S.) 479.

<sup>119</sup> Butler v. West. U. Tel. Co., 77 S. C. 148, 57 S. E. 757; Amos v. West. U. Tel. Co., 79 S. C. 259, 60 S. E. 660, 128 Am. St. Rep. 845; West. U. Tel. Co. v. Wilson, 97 Tex. 22, 75 S. W. 482; West. U. Tel. Co. v. Coffin, 88 Tex. 94, 30 S. W. 896; West. U. Tel. Co. v. Gibson (Tex. Civ. App.) 39 S. W. 198; West. U. Tel. Co. v. Garrett (Tex. Civ. App.) 34 S. W. 649; West. U. Tel. Co. v. McMillan (Tex. Civ. App.) 30 S. W. 298.

It is true that we grieve to hear of the serious illness or death of close friends, but it would be wholly and entirely foreign to sound reason to say that we would suffer the same pangs and untold grief at the death of a friend as we would to hear of the death of a member of one's family or closely of kin. It is only when this relationship exists, or is presumed to exist—which is a presumption all relatives in consanguinity bear—that the mind can become so impaired by suffering as to entitle the person to damages for such.<sup>120</sup> In other words, there must be such an injury to the feelings or sufferings of mind as can be, in a sense, measured by a pecuniary compensation, before the party can recover; and this is never presumed, except where the parties are closely related by blood.<sup>121</sup> Therefore, if the message concerns some one who does not stand in this relation, the company will not be liable for damages caused by mental suffering, although it may be informed of its purpose.<sup>122</sup> However, if the message concerns the dangerous illness, death or time of burial of some one related to plaintiff, and it is affirmatively shown that there was a peculiar tenderness of relation existing between the parties, and the company is informed of this

<sup>120</sup> *Immediate members of family*.—West. U. Tel. Co. v. McMorris, 158 Ala. 563, 48 South. 349, 132 Am. St. Rep. 46; West. U. Tel. Co. v. Benson, 159 Ala. 254, 48 South. 712; West. U. Tel. Co. v. Heathcoat, 149 Ala. 623, 43 South. 117; West. U. Tel. Co. v. De Andrea, 45 Tex. Civ. App. 395, 100 S. W. 977.

*Grandmother and grandchild*.—Doster v. West. U. Tel. Co., 77 S. C. 56, 57 S. E. 671; West. U. Tel. Co. v. Prevatt, 149 Ala. 617, 43 South. 106; West. U. Tel. Co. v. Porterfield (Tex. Civ. App.) 84 S. W. 850.

So there can be no recovery where the relationship is merely by marriage or a remote blood relationship. Lee v. West. U. Tel. Co., 130 Ky. 202, 113 S. W. 55; West. U. Tel. Co. v. Ayers, 131 Ala. 391, 31 South. 78, 90 Am. St. Rep. 92; West. U. Tel. Co. v. Steenbergen, 107 Ky. 469, 54 S. W. 829, 21 Ky. Law Rep. 1289; Denham v. West. U. Tel. Co., 87 S. W. 788, 27 Ky. Law Rep. 999; Davidson v. West. U. Tel. Co., 54 S. W. 830, 21 Ky. Law Rep. 1292; West. U. Tel. Co. v. Wilson, 97 Tex. 22, 75 S. W. 482; West. U. Tel. Co. v. Kanause (Tex. Civ. App.) 143 S. W. 189; or the parties are merely engaged to be married, Randall v. West. U. Tel. Co., 107 S. W. 235, 32 Ky. Law Rep. 859, 15 L. R. A. (N. S.) 277.

<sup>121</sup> West. U. Tel. Co. v. Blair, 51 Tex. Civ. App. 427, 113 S. W. 164; West. U. Tel. Co. v. Thompson, 18 Tex. Civ. App. 609, 45 S. W. 429.

<sup>122</sup> See Butler v. West. U. Tel. Co., 77 S. C. 148, 57 S. E. 757; West. U. Tel. Co. v. Coffin, 88 Tex. 94, 30 S. W. 896; Rich v. West. U. Tel. Co. (Tex. Civ. App.) 110 S. W. 93; West. U. Tel. Co. v. Gibson (Tex. Civ. App.) 39 S. W. 198; West. U. Tel. Co. v. Garrett (Tex. Civ. App.) 34 S. W. 649; West. U. Tel. Co. v. McMillan (Tex. Civ. App.) 30 S. W. 298. But see West. U. Tel. Co. v. Ayers, 131 Ala. 391, 31 South. 78, 90 Am. St. Rep. 92; West. U. Tel. Co. v. Steenbergen, 107 Ky. 469, 54 S. W. 829, 21 Ky. Law Rep. 1289; Lee v. West. U. Tel. Co., 130 Ky. 202, 113 S. W. 55; Randall v. West. U. Tel. Co., 107 S. W. 235, 32 Ky. Law Rep. 859, 15 L. R. A. (N. S.) 277.



fact, it would be liable for mental suffering for negligently transmitting or delivering the message.<sup>123</sup>

§ 547. **Same continued—interest of the party in the transaction.** When the person is not a party to the message, but is greatly interested in the results, the company must be informed of his interest at the acceptance of the message in order to be held liable.<sup>124</sup> He is not a party to the contract, and only such damages can be recovered as result from the company's negligence in transmitting or delivering the message, and such as might have been presumed to have entered into the contemplation of the minds of the *contracting parties* at the time the contract was made. It is the result of the breach supposed to have been contemplated by the contracting parties, and not those entertained by some other, of whose existence the company would not likely be aware. If, however, the company is informed that the message concerns some person who is not a party to the message, it would be liable to him for the resulting damages just as if he were a party to the message; and it matters not in what way it may derive this information.<sup>125</sup> It seems that the damages due a wife or husband for mental suffering are regarded as joint and either may maintain a suit for the recovery of same.<sup>126</sup> Thus it was held that the wife may recover for mental suffering caused by the failure of her relatives to meet her at a station and assist in caring for the body of her dead child, although the message was sent by her husband, and the company was not notified of her interest in the message.

§ 548. **Same continued—deprived of the addressee's consolation.** This brings us to a question with peculiar features, that is, whether or not damages may be recovered for mental suffering caused by one being deprived of the presence and consolation of some close relative, as the direct result of the company's dereliction of duty. In other words, can a person recover damages for mental suffering

<sup>123</sup> West. U. Tel. Co. v. Coffin, 88 Tex. 94, 30 S. W. 896; West. U. Tel. Co. v. McMillan (Tex. Civ. App.) 30 S. W. 298; West. U. Tel. Co. v. Garrett (Tex. Civ. App.) 34 S. W. 649. See Bright v. West. U. Tel. Co., 132 N. C. 317, 43 S. E. 841; Hunter v. West. U. Tel. Co., 135 N. C. 458, 47 S. E. 745.

<sup>124</sup> Morrow v. West. U. Tel. Co., 107 Ky. 517, 54 S. W. 853; Davidson v. West. U. Tel. Co., 54 S. W. 830, 21 Ky. Law Rep. 1292; Southwestern Tel., etc., Co. v. Gotcher, 93 Tex. 114, 53 S. W. 686; West. U. Tel. Co. v. Motley (Tex. Civ. App.) 27 S. W. 51; West. U. Tel. Co. v. Grigsby (Tex. Civ. App.) 29 S. W. 406. Compare Landie v. West. U. Tel. Co., 124 N. C. 528, 32 S. E. 886; West. U. Tel. Co. v. Carter (Tex. Civ. App.) 20 S. W. 834; West. U. Tel. Co. v. Russell (Tex. Civ. App.) 31 S. W. 698. See § 544.

<sup>125</sup> West. U. Tel. Co. v. Evans, 5 Tex. Civ. App. 55, 23 S. W. 998.

<sup>126</sup> Loper v. West. U. Tel. Co., 70 Tex. 689, 8 S. W. 600. See, also, Southwestern U. Tel. Co. v. Dale (Tex. Civ. App.) 27 S. W. 1059.

caused by the absence of some one who was deprived of being present with the former while in deep grief, the loss of whose consolation was the result of the company's negligence? It seems that if the company was informed that the person would suffer, or that the consolation of the addressee was the main purpose of the message, and without which great suffering would be endured, it would be liable for failing to discharge its duty;<sup>127</sup> otherwise it would not be liable.<sup>128</sup> Thus, where the wife, who was at the deathbed of her husband, sent a telegram to her daughter, requesting the latter to come to her, the company would be liable to the daughter for damages caused by the mental suffering, where the message was delayed and she otherwise would have reached her father in time to have seen him before his death. But it would not be liable in damages to the mother for mental suffering caused by the want of the daughter's consolation, unless the company had knowledge that this would be the natural and direct result of its negligence.<sup>129</sup>

**§ 549. Damages which might have been prevented.**—When a person whose legal rights have been impaired as a result of a tele-

<sup>127</sup> West. U. Tel. Co. v. Stratemeier, 6 Ind. App. 125, 32 N. E. 871; West. U. Tel. Co. v. Crocker, 135 Ala. 492, 33 South. 45, 59 L. R. A. 398; Postal Tel., etc., Co. v. Beal, 159 Ala. 249, 48 South. 676; West. U. Tel. Co. v. Benson, 159 Ala. 254, 48 South. 712; Foreman v. West. U. Tel. Co., 141 Iowa, 32, 116 N. W. 724, 19 L. R. A. (N. S.) 374; Cordell v. West. U. Tel. Co., 149 N. C. 402, 63 S. E. 71, 22 L. R. A. (N. S.) 540; Thurman v. West. U. Tel. Co., 127 Ky. 137, 105 S. W. 155, 32 Ky. Law Rep. 26, 14 L. R. A. (N. S.) 499; Bright v. West. U. Tel. Co., 132 N. C. 317, 43 S. E. 841; Potts v. West. U. Tel. Co., 82 Tex. 545, 18 S. W. 604; Bolton v. West. U. Tel. Co., 76 S. C. 529, 57 S. E. 543; West. U. Tel. Co. v. Olivarri (Tex. Civ. App.) 110 S. W. 930; West. U. Tel. Co. v. Steele (Tex. Civ. App.) 110 S. W. 546; West. U. Tel. Co. v. Hankins (Tex. Civ. App.) 110 S. W. 543; West. U. Tel. Co. v. Bell (Tex. Civ. App.) 90 S. W. 714; Telephone Co. v. Snell, 3 Ala. App. 263, 56 South. 854; West. U. Tel. Co. v. Garlington, 101 Ark. 487, 142 S. W. 854, 49 L. R. A. (N. S.) 300; West. U. Tel. Co. v. Bennett, 3 Ala. App. 275, 57 South. 87. See West. U. Tel. Co. v. Saunders, 164 Ala. 234, 51 South. 176, 137 Am. St. Rep. 35.

<sup>128</sup> West. U. Tel. Co. v. Luck, 91 Tex. 178, 41 S. W. 469, 66 Am. St. Rep. 869, overruling West. U. Tel. Co. v. Nations, 82 Tex. 539, 18 S. W. 709, 27 Am. St. Rep. 914. See, also, Weatherford, etc., R. v. Seals (Tex. Civ. App.) 41 S. W. 841; Telephone Co. v. Garlington, 101 Ark. 487, 142 S. W. 854, 49 L. R. A. (N. S.) 300; contra, Foreman v. West. U. Tel. Co., 141 Iowa, 32, 116 N. W. 724, 19 L. R. A. (N. S.) 374; Bright v. West. U. Tel. Co., 132 N. C. 317, 43 S. E. 841. A recovery has been denied in such cases on account of the remoteness of the relationship. West. U. Tel. Co. v. Luck, *supra*. And the negligence of the company must be the proximate cause of the damage. Landry v. West. U. Tel. Co., 102 Tex. 67, 113 S. W. 10, reversing (Civ. App.) 108 S. W. 461; West. U. Tel. Co. v. Northcutt, 158 Ala. 539, 48 South. 553, 132 Am. St. Rep. 38; West. U. Tel. Co. v. McMullin, 98 Ark. 347, 135 S. W. 909; Howard v. Telephone Co., 106 Ark. 559, 153 S. W. 803.

<sup>129</sup> West. U. Tel. Co. v. Luck, 91 Tex. 178, 41 S. W. 469, 66 Am. St. Rep. 869.

graph company's negligence in the transmission or delivery of a message, he should make reasonable efforts on ascertaining such fact to minimize the loss as much as possible.<sup>130</sup> So, if he could have avoided the damages complained of by the exercise of care and diligence, but failed to do so, recovery will be disallowed.<sup>131</sup> It is not meant by this, however, that he must go to great trouble and expense to avoid the loss or injury, but if he has exercised a

<sup>130</sup> *Postal Tel. Cable Co. v. Schaefer*, 110 Ky. 907, 62 S. W. 1119, 23 Ky. Law Rep. 344; *West. U. Tel. Co. v. Reid*, 83 Ga. 401, 10 S. E. 919; *Jones v. West. U. Tel. Co.*, 75 S. C. 208, 55 S. E. 318; *West. U. Tel. Co. v. Jeanes*, 88 Tex. 230, 31 S. W. 186; *Weld v. Postal Tel. Cable Co.*, 199 N. Y. 88, 92 N. E. 415; *Heath v. West. U. Tel. Co.*, 87 S. C. 219, 69 S. E. 283.

<sup>131</sup> *Alabama*.—*Daugherty v. American-Union Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435; *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844.

*Arkansas*.—*West. U. Tel. Co. v. Ivy*, 102 Ark. 246, 143 S. W. 1078; *Brewster v. West. U. Tel. Co.*, 65 Ark. 537, 47 S. W. 560.

*California*.—*Germain Fruit Co. v. West. U. Tel. Co.*, 137 Cal. 598, 70 Pac. 658, 59 L. R. A. 575.

*District of Columbia*.—*Fererro v. West. U. Tel. Co.*, 9 App. D. C. 455, 35 L. R. A. 548.

*Florida*.—*McMillan v. Telephone Co.*, 60 Fla. 131, 53 South. 329, 29 L. R. A. (N. S.) 891.

*Georgia*.—*West. U. Tel. Co. v. Bailey*, 115 Ga. 725, 42 S. E. 89, 61 L. R. A. 933; *West. U. Tel. Co. v. Reid*, 83 Ga. 401, 10 S. E. 919; *Haber, etc., Hat Co. v. Southern Bell, etc., Tel. Co.*, 118 Ga. 874, 45 S. E. 696.

*Illinois*.—*Smith v. West. U. Tel. Co.*, 154 Ill. App. 499; *West. U. Tel. Co. v. North Packing, etc., Co.*, 188 Ill. 366, 58 N. E. 958, 52 L. R. A. 274; *West. U. Tel. Co. v. Hart*, 62 Ill. App. 120.

*Indiana*.—*West. U. Tel. Co. v. Briscoe*, 18 Ind. App. 22, 47 N. E. 473.

*Iowa*.—*Hasbrouck v. West. U. Tel. Co.*, 107 Iowa, 160, 77 N. W. 1034, 70 Am. St. Rep. 181.

*Kentucky*.—*Postal Tel. Cable Co. v. Schaefer*, 110 Ky. 907, 62 S. W. 1119, 23 Ky. Law Rep. 344; *West. U. Tel. Co. v. Matthews*, 113 Ky. 188, 67 S. W. 849, 24 Ky. Law Rep. 3.

*Mississippi*.—*Shingleur v. West. U. Tel. Co.*, 72 Miss. 1030, 18 South. 425, 48 Am. St. Rep. 604, 30 L. R. A. 444.

*Missouri*.—*Reynolds v. West. U. Tel. Co.*, 81 Mo. App. 223; *Miller v. West. U. Tel. Co.*, 157 Mo. App. 580, 138 S. W. 887.

*New York*.—*Rittenhouse v. Independent Tel. Line*, 44 N. Y. 263, 4 Am. Rep. 673; *Leonard v. New York, etc., Elec. Mag. Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446.

*North Carolina*.—*Cranford v. West. U. Tel. Co.*, 138 N. C. 162, 50 S. E. 585; *Hocutt v. West. U. Tel. Co.*, 147 N. C. 186, 60 S. E. 980.

*Ohio*.—*Postal Tel. Cable Co. v. Akron Cereal Co.*, 23 Ohio Cir. Ct. R. 516.

*South Carolina*.—*Key v. West. U. Tel. Co.*, 76 S. C. 301, 56 S. E. 962; *Cason v. West. U. Tel. Co.*, 77 S. C. 157, 57 S. E. 722; *Jones v. West. U. Tel. Co.*, 75 S. C. 208, 55 S. E. 318; *Mitchiner v. West. U. Tel. Co.*, 75 S. C. 182, 55 S. E. 222; *Willis v. West. U. Tel. Co.*, 69 S. C. 531, 48 S. E. 538, 104 Am. St. Rep. 828, 2 Ann. Cas. 52.

*Tennessee*.—*Marr v. West. U. Tel. Co.*, 85 Tenn. 529, 3 S. W. 496.

*Texas*.—*Womack v. West. U. Tel. Co.*, 58 Tex. 176, 44 Am. Rep. 614; *West. U. Tel. Co. v. Jeanes*, 88 Tex. 230, 31 S. W. 186; *Mitchell v. West. U. Tel.*



reasonable amount thereof, and such as a prudent man would do under similar circumstances, he will have discharged his duty.<sup>132</sup> He does not have to resort to a suit in court to protect his rights thus impaired or about to be impaired; only reasonable trouble and expense is required.<sup>133</sup>

§ 550. **Same—damages which could not have been prevented—contributory negligence.**—It sometimes becomes difficult in determining when damages are the proximate result of the company's negligence; but it is a settled question that if the loss would have occurred or the damages could not have been prevented, even though the company had discharged its duty, a recovery is not allowed.<sup>134</sup> So if, under the circumstances the happening or preventing of the loss or injury depended upon a speculative or contingent future event,<sup>135</sup> or on the voluntary, and not the involuntary, action or inaction of another party to the message,<sup>136</sup> or of the plaintiff

Co., 23 Tex. Civ. App. 445, 56 S. W. 439; *West. U. Tel. Co. v. Hearne*, 7 Tex. Civ. App. 67, 26 S. W. 478. See, also, *West. U. Tel. Co. v. Salter* (Civ. App.) 95 S. W. 549.

*Virginia.*—*Washington, etc., Tel. Co. v. Hobson*, 15 Grat. 122.

*United States.*—*West. U. Tel. Co. v. Baker*, 140 Fed. 315, 72 C. C. A. 87.

<sup>132</sup> *West. U. Tel. Co. v. Witt*, 110 S. W. 889, 33 Ky. Law Rep. 685.

<sup>133</sup> *Reed v. West. U. Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492; *Hasbrouck v. West. U. Tel. Co.*, 107 Iowa, 160, 77 N. W. 1034, 70 Am. St. Rep. 181.

<sup>134</sup> *Cherokee Tanning Extract Co. v. West. U. Tel. Co.*, 143 N. C. 376, 55 S. E. 777, 118 Am. St. Rep. 806; *Bashinsky v. West. U. Tel. Co.*, 1 Ga. App. 761, 58 S. E. 91; *Clio Gin Co. v. West. U. Tel. Co.*, 82 S. C. 405, 64 S. E. 426; *Bird v. West. U. Tel. Co.*, 76 S. C. 345, 56 S. E. 973; *Beatty Lbr. Co. v. West. U. Tel. Co.*, 52 W. Va. 410, 44 S. E. 309; *Cronheim v. Postal Tel. Cable Co.*, 10 Ga. App. 716, 74 S. E. 78; *Clark Mfg. Co. v. West. U. Tel. Co.*, 152 N. C. 157, 67 S. E. 329, 27 L. R. A. (N. S.) 643; *Newsome v. West. U. Tel. Co.*, 153 N. C. 153, 69 S. E. 10. See *West. U. Tel. Co. v. Sights*, 34 Okl. 461, 126 Pac. 234, 42 L. R. A. (N. S.) 419, Ann. Cas. 1914C, 204, evidence that contract would have been accepted.

<sup>135</sup> *West. U. Tel. Co. v. Crall*, 39 Kan. 580, 18 Pac. 719; *Chapman v. West. U. Tel. Co.*, 90 Ky. 265, 13 S. W. 880, 12 Ky. Law Rep. 265; *Rice Grain Dist. Co. v. West. U. Tel. Co.*, 13 Ky. Law Rep. 256; *Barnesville First Natl. Bank v. West. U. Tel. Co.*, 30 Ohio St. 555, 27 Am. Rep. 485; *Martin v. Sunset Tel., etc., Co.*, 18 Wash. 260, 51 Pac. 376; *Cronheim v. Postal Tel. Cable Co.*, 10 Ga. App. 716, 74 S. E. 78; *West. U. Tel. Co. v. Ivy*, 177 Fed. 63, 100 C. C. A. 481. See, also, § 575.

<sup>136</sup> *Kiley v. West. U. Tel. Co.*, 39 Hun (N. Y.) 158, affirmed in 109 N. Y. 231, 16 N. E. 75; *Newsome v. West. U. Tel. Co.*, 137 N. C. 513, 50 S. E. 279; *Taliferro v. West. U. Tel. Co.*, 54 S. W. 825, 21 Ky. Law Rep. 1290; *Capers v. West. U. Tel. Co.*, 71 S. C. 29, 50 S. E. 537; *West. U. Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479; *Cronheim v. Postal Tel. Cable Co.*, 10 Ga. App. 716, 74 S. E. 78; *Clark Mfg. Co. v. West. U. Tel. Co.*, 152 N. C. 157, 69 S. E. 329, 27 L. R. A. (N. S.) 643.

himself,<sup>137</sup> or of a third person,<sup>138</sup> recovery cannot be had.<sup>139</sup> So also, if the damages complained of have been incurred by the plaintiff's contributory negligence, they cannot be recovered.<sup>140</sup> Thus, if a message is incorrectly transmitted so as to be unintelligible and the plaintiff attempts to interpret and act upon such message,<sup>141</sup> or acts thereon without attempting to verify its correctness when he has reasons to believe that an error has been made,<sup>142</sup> or makes no effort to correct the mistake after ascertaining such fact which has been obtained sufficiently long before the loss is sustained,<sup>143</sup> he cannot recover. However, these are ordinarily questions for the jury.<sup>144</sup>

<sup>137</sup> *Frazer v. West. U. Tel. Co.*, 84 Ala. 487, 4 South. 831; *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126; *Haber, etc., Hat Co. v. Southern Bell Tel., etc., Co.*, 118 Ga. 874, 45 S. E. 696; *Baldwin v. United States Telegraph Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *McColl v. West. U. Tel. Co.*, 44 N. Y. Super. Ct. 487; *Alexander v. West. U. Tel. Co. (C. C.)* 126 Fed. 445; *West. U. Tel. Co. v. Ivy*, 177 Fed. 63, 100 C. C. A. 481; *Cronheim v. Postal Tel. Cable Co.*, 10 Ga. App. 716, 74 S. E. 78.

<sup>138</sup> *Postal Tel. Cable Co. v. Barwise*, 11 Colo. App. 328, 53 Pac. 252; *Kenyon v. West. U. Tel. Co.*, 100 Cal. 454, 35 Pac. 75; *Walser v. West. U. Tel. Co.*, 114 N. C. 440, 19 S. E. 366.

<sup>139</sup> *Cronheim v. Postal Tel. Cable Co.*, 10 Ga. App. 716, 74 S. E. 78; *Walser v. West. U. Tel. Co.*, 114 N. C. 440, 19 S. E. 366; *West. U. Tel. Co. v. Connelly*, 2 Willson, Civ. Cas. Ct. App. (Tex.) § 113.

<sup>140</sup> *Manly Mfg. Co. v. West. U. Tel. Co.*, 105 Ga. 235, 31 S. E. 156; *West. U. Tel. Co. v. Gullledge*, 84 Ark. 501, 106 S. W. 957; *West. U. Tel. Co. v. Wright*, 18 Ill. App. 337; *Bowyer v. West. U. Tel. Co.*, 130 Iowa, 324, 106 N. W. 748, 5 L. R. A. (N. S.) 984; *Hart v. Direct U. S. Cable Co.*, 86 N. Y. 633; *Nusbaum v. West. U. Tel. Co.*, 17 Phila. (Pa.) 340; *Hocutt v. West. U. Tel. Co.*, 147 N. C. 186, 60 S. E. 980; *West. U. Tel. Co. v. Harper*, 15 Tex. Civ. App. 37, 39 S. W. 599; *Barnes v. Postal Tel. Cable Co.*, 156 N. C. 150, 72 S. E. 78.

<sup>141</sup> *Hart v. Direct U. S. Cable Co.*, 86 N. Y. 633; *Manly Mfg. Co. v. West. U. Tel. Co.*, 105 Ga. 235, 31 S. E. 156; *Nusbaum v. West. U. Tel. Co.*, 17 Phila. (Pa.) 340.

<sup>142</sup> *West. U. Tel. Co. v. Wright*, 18 Ill. App. 337.

<sup>143</sup> *West. U. Tel. Co. v. Harper*, 15 Tex. Civ. App. 37, 39 S. W. 599.

<sup>144</sup> *Manly Mfg. Co. v. West. U. Tel. Co.*, 105 Ga. 235, 31 S. E. 156; *West. U. Tel. Co. v. Powell*, 54 Tex. Civ. App. 466, 118 S. W. 226; *Jackson v. Telephone Co.*, 174 Mo. App. 70, 156 S. W. 801.

## CHAPTER XXI

MEASURE OF DAMAGES—CONTINUED—LOSS OF EXPECTED PROFITS  
ON SALES BY ERROR OR NEGLIGENCE IN TRANSMISSION

- § 551. Loss of profits—in general.
- 552. Sales prevented—plaintiff vendor—in general—legal sales.
- 553. Same continued—measure of damages.
- 554. Loss must be actual and substantial.
- 555. Orders for goods not delivered—in general.
- 556. Same continued—measure of damages.
- 557. Orders for goods erroneously transmitted—purchaser's duty.
- 558. Same continued—goods shipped to wrong place.
- 559. Same continued—stock, bonds, etc.
- 560. Messages directing agent to sell or purchase.
- 561. Same continued—order to close option to purchase.
- 562. Loss of an exchange.
- 563. Negligence of company inducing shipment.
- 564. Deterioration.
- 565. Announcement of prices or state of market.
- 566. Contemplating shipping—delay in message—loss.

§ 551. **Loss of profits—in general.**—It is our purpose to discuss in this chapter the loss of expected profits in transactions or sales, caused by the negligence of telegraph companies in transmitting or delivering messages, and the means by which the amount of damage or loss sustained thereby may be ascertained. The negligence of telegraph companies may be the proximate cause of preventing contracts of sale from being consummated, or it may prevent a contract from being made at all whereby great substantial losses may be suffered; in either case, the company would be liable for all direct and proximate losses in the way of actual and substantial gains and profits which would be the natural result of same. The company is the agency or means by which the contracting parties are brought together, and its negligent act in transmitting or delivering the message containing an acceptance of a contract, would have the same effect as if it were a direct breach of the contract. A leading American authority, with respect to the measure of damages for a breach of a contract, holds: "The party injured by a breach of a contract is entitled to recover all his damages, including gains prevented, as well as losses sustained, provided they are certain and such as might naturally be expected to follow from the breach. It is only uncertain and contingent profits, therefore, which the law excludes; not such as are the immediate and necessary result of the breach of the contract, which may be fairly sup-



posed to have entered into the contemplation of the parties when they made it, and are capable of being definitely ascertained by reference to the established market rates.”<sup>1</sup> This rule may be considered as the basis of the measure of damages which may have been incurred by reason of the company’s negligence.<sup>2</sup>

**§ 552. Sales prevented—plaintiff vendor—in general—legal sales.**—It is often the case that parties who are at a distant place consummate certain sales by means of telegraph companies, and the subject-matter of the sale may be either at or near the place of the purchaser, and there to be delivered; or it may be where the vendor is and to be delivered to the former at some other place. Much depends in the sale on the accuracy and promptness of the company, since one small error on its part might be of serious injury to one of the contracting parties. It is always their duty to send the message in its exact language and as prepared by the sender, and deliver it as speedily as possible.<sup>3</sup> More especially is this the case where the message concerns sales or commercial trans-

<sup>1</sup> *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718.

<sup>2</sup> *McNeil v. Postal Tel. Cable Co.*, 154 Iowa. 241, 134 N. W. 611, Ann. Cas. 1914A, 1294, 38 L. R. A. (N. S.) 727, profit which could have been made by sale of cement; *Purdom Naval Stores Co. v. West. U. Tel. Co.* (C. C.) 153 Fed. 327, chance to purchase business; *Postal Tel. Cable Co. v. Nichols*, 159 Fed. 643, 89 C. C. A. 585, 14 Ann. Cas. 369, 16 L. R. A. (N. S.) 870, bid on building contract; *West. U. Tel. Co. v. Love Banks Co.*, 73 Ark. 205, 83 S. W. 949, 3 Ann. Cas. 712, loss of sale; *Hoyt v. West. U. Tel. Co.*, 85 Ark. 473, 108 S. W. 1056, reaffirmed in 89 Ark. 118, 115 S. W. 941, sale of horse; *Hadley v. West. U. Tel. Co.*, 115 Ind. 191, 15 N. E. 845, cattle decreasing in weight; *Manville v. West. U. Tel. Co.*, 37 Iowa, 214, 18 Am. Rep. 8, delayed sale of goods; *Herron v. West. U. Tel. Co.*, 90 Iowa, 129, 57 N. W. 696, sale of horse; *Hise v. West. U. Tel. Co.*, 137 Iowa, 329, 113 N. W. 819, commission; *West. U. Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 18 Ky. Law Rep. 995, 66 Am. St. Rep. 361, 36 L. R. A. 711, later sale; *West. U. Tel. Co. v. Scott*, 87 S. W. 289, 27 Ky. Law Rep. 975, shutting down plant; *Squire v. West. U. Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157, to buy in order to cover contracts previously made to sell; *Postal Tel. Co. v. Rhett* (Miss.) 33 South. 412, rehearing denied in 35 South. 829, re-sale; *West. U. Tel. Co. v. McLaurin*, 70 Miss. 26, 13 South. 36, fee by attorney; *Harper v. West. U. Tel. Co.*, 92 Mo. App. 304, reaffirmed in 111 Mo. App. 269, 86 S. W. 904, commission on sale; *West. U. Tel. Co. v. Lowrey*, 32 Neb. 732, 49 N. W. 707, loss of favorable market; *Kerns v. West. U. Tel. Co.*, 170 Mo. App. 642, 157 S. W. 106, delayed sale; *West. U. Tel. Co. v. Nye & Schneider Grain Co.*, 70 Neb. 251, 97 N. W. 305, 63 L. R. A. 803, loss of higher price; *Wallingford v. West. U. Tel. Co.*, 53 S. C. 410, 31 S. E. 275, rehearing denied in 60 S. C. 201, 38 S. E. 443, 629, delayed sale; *West. U. Tel. Co. v. Snow*, 31 Tex. Civ. App. 275, 72 S. W. 250, loss of purchase; *Texas, etc. v. Tel. Co. v. Mackenzie*, 36 Tex. Civ. App. 178, 81 S. W. 581, building contract; *West. U. Tel. Co. v. Auslet*, 53 Tex. Civ. App. 264, 115 S. W. 625, failure to hold theatrical performance; *West. U. Tel. Co. v. Hirsch* (Tex. Civ. App.) 84 S. W. 394, option to purchase; *Thompson v. West. U. Tel. Co.*, 64 Wis. 531, 25 N. W. 789, 54 Am. Rep. 646, sale of horse.

<sup>3</sup> See chapter XII.

actions, which fact is often more or less made known to them by the character of the message.<sup>4</sup> It is not meant, however, that the rule applies to sales or commercial transactions of all kinds; it only applies to legal sales or transactions. As said in a former part of this work, telegraph companies were not incorporated to perpetrate crimes, or to carry on illegal transactions; their purposes are lawful, and only such can they be under any duty to perform. The object of the law is to prevent evildoers from carrying on their nefarious acts and misdoings; to be sure, the law would not create any being or institution whose object would be in direct conflict, and inconsistent with the principles of the law itself. So it follows that these companies would be under no obligation to discharge any act which was in itself illegal or immoral. No sale or transaction which showed on its face the illegality or immorality of the affair, or which was otherwise made known to the company, shall be considered within the scope of this chapter, but only such as are legal and moral in effect.<sup>5</sup>

**§ 553. Same continued—measure of damages.**—The measure of damages which may be recovered from a telegraph company for

<sup>4</sup> See § 543.

<sup>5</sup> *Augusta Nat. Bank v. Cunningham*, 75 Ga. 366; *Smith v. West. U. Tel. Co.*, 84 Ky. 664, 2 S. W. 483, 8 Ky. Law Rep. 672; *Cothran v. West. U. Tel. Co.*, 83 Ga. 25, 9 S. E. 836, disapproving *West. U. Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480; *Morris v. West. U. Tel. Co.*, 94 Me. 423, 47 Atl. 926; *West. U. Tel. Co. v. Littlejohn*, 72 Miss. 1025, 18 South. 418; *Carland v. West. U. Tel. Co.*, 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280; *Gist v. West. U. Tel. Co.*, 45 S. C. 344, 23 S. E. 143, 55 Am. St. Rep. 763; *West. U. Tel. Co. v. Harper*, 15 Tex. Civ. App. 37, 39 S. W. 599; *Melchert v. American Union Tel. Co. (C. C.)* 11 Fed. 193; *Weld v. Postal Tel. Cable Co.*, 199 N. Y. 88, 92 N. E. 415; *Schnitzer v. West. U. Tel. Co.*, 84 N. J. Law, 63, 85 Atl. 1021.

Presumed parties contemplated legal transaction. *Hocker v. West. U. Tel. Co.*, 45 Fla. 363, 34 South. 901, futures not necessarily illegal; *West. U. Tel. Co. v. Chamblee*, 122 Ala. 428, 25 South. 232, 82 Am. St. Rep. 89, future delivery presumed an actual purchase; *West. U. Tel. Co. v. Hill* (Tex. Civ. App.) 65 S. W. 1123.

*Sunday contracts.*—See *Willingham v. West. U. Tel. Co.*, 91 Ga. 449, 18 S. E. 298; *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844; *West. U. Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; *Rogers v. West. U. Tel. Co.*, 78 Ind. 169, 41 Am. Rep. 558; *West. U. Tel. Co. v. Henley*, 23 Ind. App. 14, 54 N. E. 775; *Thompson v. West. U. Tel. Co.*, 32 Mo. App. 191; *Bassett v. West. U. Tel. Co.*, 48 Mo. App. 556, distinguishing *Thompson v. West. U. Tel. Co.*, supra; *Arkansas, etc., R. Co. v. Lee*, 79 Ark. 448, 96 S. W. 148; *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23; *West. U. Tel. Co. v. Eskridge*, 7 Ind. App. 208, 33 N. E. 238; *West. U. Tel. Co. v. Griffin*, 1 Ind. App. 46, 27 N. E. 113; *West. U. Tel. Co. v. McLaurin*, 70 Miss. 26, 13 South. 36; *Burnett v. West. U. Tel. Co.*, 39 Mo. App. 599; *Gulf, etc., R. Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269; *Jones v. Roach*, 21 Tex. Civ. App. 301, 51 S. W. 549; *Brown v. West. U. Tel. Co.*, 6 Utah, 219, 21 Pac. 988. See *Taylor v. West. U. Tel. Co.*, 95 Iowa, 740, 64 N. W. 660.

negligently transmitting or delivering a message, whereby a sale has been prevented, is the difference between the price of the subject-matter of sale at the time it would have been sold, had it not been for such negligence, and the price the plaintiff is thereafter enabled to obtain therefor, after exercising reasonable diligence to make such latter sale,<sup>6</sup> together with expenses necessarily incurred in consequence of the delay or failure.<sup>7</sup> In other words, if the plaintiff could have gotten a certain price for the thing to be sold at the time the message was delivered to the company, but was, after the negligence of the company in transmitting or delivering the message, only able to sell at a less price, and that by reasonable diligence, the measure of damages would be the difference between the two prices, together with the necessary expenses incurred in making the latter sale.<sup>8</sup> The object of the law in such cases is to compensate the injured party as near as possible for the loss incurred. Thus, in a case where the words contained in the message were, "Ship your hogs at once," the message was delayed

<sup>6</sup> West. U. Tel. Co. v. Milton, 53 Fla. 484, 43 South. 495, 11 L. R. A. (N. S.) 560, 125 Am. St. Rep. 1077; West. U. Tel. Co. v. Love Banks Co., 73 Ark. 205, 83 S. W. 949, 3 Ann. Cas. 712; West. U. Tel. Co. v. James, 90 Ga. 254, 16 S. E. 83; Herron v. West. U. Tel. Co., 90 Iowa, 129, 57 N. W. 696; West U. Tel. Co. v. Reid, 83 Ga. 401, 10 S. E. 919; Blackburn v. Kentucky Central R. Co., 15 Ky. Law Rep. 303; Smith v. West. U. Tel. Co., 80 Neb. 395, 114 N. W. 288; Thorp v. West. U. Tel. Co., 118 Mo. App. 398, 94 S. W. 554; West. U. Tel. Co. v. Nye & Schneider Grain Co., 70 Neb. 251, 97 N. W. 305, 63 L. R. A. 803; Houston, etc., R. Co. v. Davidson, 15 Tex. Civ. App. 334, 39 S. W. 605; Wallingford v. West. U. Tel. Co., 53 S. C. 410, 31 S. E. 275; West. U. Tel. Co. v. Haman, 2 Tex. Civ. App. 100, 20 S. W. 1133; Beatty Lumber Co. v. West. U. Tel. Co., 52 W. Va. 410, 44 S. E. 309; Thompson v. West. U. Tel. Co., 64 Wis. 531, 25 N. W. 789, 54 Am. Rep. 644; West. U. Tel. Co. v. Hall, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479. Where by the terms of the contract of sale delivery is to be made at another time and place, the measure of damages is the difference between the contract price and the market value of the property at the time and place of delivery. See Beatty Lumber Co. v. West. U. Tel. Co., supra; Evans v. West. U. Tel. Co., 102 Iowa, 219, 71 N. W. 219, measure of damages is the difference between the contract price and the value of goods at the point of shipment less cost of transportation to place of delivery. See, also, West. U. Tel. Co. v. Federolf (Tex. Civ. App.) 145 S. W. 314, value at time and place of delivery, with interest, less transportation. See Maddux v. West. U. Tel. Co., 92 Kan. 619, 141 Pac. 585.

<sup>7</sup> West. U. Tel. Co. v. Collins, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515, note; West. U. Tel. Co. v. Shumate, 2 Tex. Civ. App. 429, 21 S. W. 109; Lane v. Montreal Tel. Co., 7 U. C. C. P. 23.

<sup>8</sup> West. U. Tel. Co. v. James, 90 Ga. 254, 16 S. E. 83; Hoyt v. West. U. Tel. Co., 85 Ark. 473, 108 S. W. 1056; Herron v. West. U. Tel. Co., 90 Iowa, 129, 57 N. W. 696; Wallingford v. West. U. Tel. Co., 53 S. C. 410, 31 S. E. 275; Blackburn v. Kentucky Central R. Co., 15 Ky. Law Rep. 303; Brooks v. West. U. Tel. Co., 26 Utah, 147, 72 Pac. 499.



four days, and in consequence thereof the plaintiff had to keep his hogs four days longer than he would have done, thus incurring expenses for feeding, etc., and having to sell at a decreased price. It was held that he might recover the difference, at the place of delivery, between the market value of the hogs on the day when they would have been delivered had the message been delivered promptly and the market value on the day when the plaintiff was able to deliver them after the receipt of the message, together with the extra expense to which he was subjected.<sup>9</sup> If there was any extra expense incurred in drayage, storage or transportation, or if he was out transportation or message fares or charges in consummating the last sale, this may be recovered. In other words, to brief the rule in one sentence, the plaintiff may recover the profits he would have reaped from the bargain had it been perfected. So, where the message concerns the sale and shipment of a carload of mules, and on account of the delay in the delivery of a message to the owner of the mules they were shipped on a subsequent day and sold at a reduction, he was allowed to recover the profit he would have made had the message not been delayed.<sup>10</sup> It is not necessary that the profit should have been made out of the person first offering to buy, but if, on account of the company's negligence, the plaintiff was prevented from realizing it out of some other offering to buy at the same time for the same price, he may recover. Thus, if the plaintiff had been offered the same price for a certain number of bales of cotton by another cotton buyer, at the same time the message was delivered to the company offering the acceptance of the sale to a former bidder, but is prevented from consummating the last on the account of the negligent delay of the message, he may recover on account of the second sale.<sup>11</sup> If the expense in any instance incurred in the second sale could have been avoided, it cannot be recovered,<sup>12</sup> as only necessary expenses can be recovered.

**§ 554. Loss must be actual and substantial.**—We are again reminded of the recognized rule in the noted English case,<sup>13</sup> when we come to consider the nature of the loss sustained in cases about which we are discussing in this chapter. That is that a loss sustained in a sale by reason of the negligence of a telegraph company in transmitting a message, respecting such sale, must be actual and substantial in order to be recovered. Not only is this fact sufficient,

<sup>9</sup> *Manville v. West. U. Tel. Co.*, 37 Iowa, 214, 18 Am. Rep. 8.

<sup>10</sup> *West. U. Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 66 Am. St. Rep. 361, 36 L. R. A. 711.

<sup>11</sup> *Postal Tel. Co. v. Rhett (Miss.)* 33 South. 412; *Id.*, 35 South. 829.

<sup>12</sup> See note 3.

<sup>13</sup> *Hadley v. Baxendale*, 9 Exch. 341.

but a loss must be proven by competent evidence, because, while it may be presumed in certain cases that a telegraph company has been guilty of negligence, a loss will never be presumed by the mere fact of negligence on the part of the company.<sup>14</sup> Thus, if the quantity of the goods to be sold is uncertain,<sup>15</sup> or depends upon other contingencies, there can be no recovery of profits;<sup>16</sup> or, if there is no evidence that the goods could or would have been shipped to him, if the message had been promptly sent and delivered, there can be no recovery.<sup>17</sup> The profits, in order to be recovered, must not be such as are classed with those which are purely speculative or conjectural;<sup>18</sup> and more especially is this true when they relate to gambling transactions, since in no breach of a contract can any damages be recovered which are speculative or such as depend on the happening of some event which may never come to pass. They must be such as most reasonably would have been realized had the message been promptly transmitted and delivered, and not such as depended upon the hazards or chances of business.<sup>19</sup> Thus, if the

<sup>14</sup> *Pennington v. West. U. Tel. Co.*, 67 Iowa, 631, 24 N. W. 45, 25 N. W. 838, 56 Am. Rep. 367; *Mickelwait v. West. U. Tel. Co.*, 113 Iowa, 177, 84 N. W. 1038. Compare *Alexander v. West. U. Tel. Co.*, 67 Miss. 386, 7 South. 280.

<sup>15</sup> Must have ascertained market value, such as *grain*, *West. U. Tel. Co. v. Nye & Schneider Grain Co.*, 70 Neb. 251, 97 N. W. 305, 63 L. R. A. 803; *Smith v. West. U. Tel. Co.*, 80 Neb. 395, 114 N. W. 288; *cotton*, *West. U. Tel. Co. v. Milton*, 53 Fla. 484, 43 South. 495, 11 L. R. A. (N. S.) 560, 125 Am. St. Rep. 1077; *West. U. Tel. Co. v. Love Banks Co.*, 73 Ark. 205, 83 S. W. 949, 3 Ann. Cas. 712; *Houston, etc., R. Co. v. Davidson*, 15 Tex. Civ. App. 334, 39 S. W. 605; *lumber*, *Beatty Lumber Co. v. West. U. Tel. Co.*, 52 W. Va. 410, 44 S. E. 309; or *wool*, *West. U. Tel. Co. v. Haman*, 2 Tex. Civ. App. 100, 20 S. W. 1133.

<sup>16</sup> *Kingborne v. Montreal Tel. Co.*, 18 U. C. Q. B. 60. See *Bass v. Postal Tel. Cable Co.*, 127 Ga. 423, 56 S. E. 465, 12 L. R. A. (N. S.) 489; *West. U. Tel. Co. v. Lewis*, 203 Fed. 832, 122 C. C. A. 150, 49 L. R. A. (N. S.) 927.

*Telegram ordering cancellation of insurance policy.*—Damages is the amount which the insurer is compelled to pay for the loss, and not merely the difference between the reasonable value of carrying the risk for the additional time and the amount of unearned premium on a policy. *Providence, etc., Ins. Co. v. West. U. Tel. Co.*, 247 Ill. 84, 93 N. E. 134, 30 L. R. A. (N. S.) 1170, 139 Am. St. Rep. 314.

<sup>17</sup> *Meggett v. West. U. Tel. Co.*, 69 Miss. 198, 13 South. 815; *Cahn v. West. U. Tel. Co. (C. C.)* 46 Fed. 40.

<sup>18</sup> *West. U. Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479, attempted purchase of oil; *Cahn v. West. U. Tel. Co.*, 48 Fed. 810, 1 C. C. A. 107, attempted sale of stock to be bought and delivered at later date; *Cannon v. West. U. Tel. Co.*, 100 N. C. 300, 6 S. E. 731, 6 Am. St. Rep. 590, attempted purchase of cotton futures.

<sup>19</sup> *West. U. Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479; *Cahn v. West. U. Tel. Co. (C. C.)* 46 Fed. 40, affirmed 48 Fed. 810, 1 C. C. A. 107; *Beaupré v. Pac., etc., Tel. Co.*, 21 Minn. 155; *Reynolds v. West. U. Tel. Co.*, 81 Mo. App. 223; *Kiley v. West. U. Tel. Co.*, 39 Hun (N. Y.) 158; *Cannon v. West. U. Tel. Co.*, 100 N. C. 300, 6 S. E. 731, 6 Am. St. Rep. 590; *Reliance Lumber Co. v. West. U. Tel. Co.*, 58 Tex. 395, 44 Am. Rep. 620; *Hall v. West.*

profits to be realized depend on another sale which may or may not be made,<sup>20</sup> or on the vendee's acceptance, or on another's judgment, or when the profits are conjectural or speculative, they cannot be recovered.<sup>21</sup>

§ 555. **Orders for goods not delivered—in general.**—Not only can there be a recovery of all losses sustained in a sale by reason of the negligence of the company in failing to properly transmit a message pertaining thereto, but all gains in the purchase of goods, which may have been prevented for the same reason, may be equally recoverable.<sup>22</sup> As was said, many sales are consummated by means of telegraphic communication, and there cannot, of course, be a sale without a purchase. While in a sale of goods both parties, as a general rule, are equally benefited, one parts with his goods without injuring his trade and receives in lieu thereof their money's worth, while the purchasing party could hardly carry on his business without the particular goods. So they are both about equally benefited, so long as the price of the commodities do not change; and it is this fact—the fluctuating prices—which causes the one to gain and the other to lose. In other words, if the owner of the goods is prevented, by any cause, from selling on one day,

U. Tel. Co., 59 Fla. 275, 51 South. 819, 27 L. R. A. (N. S.) 639; *McNeil v. Postal Tel. Cable Co.*, 154 Iowa, 241, 134 N. W. 611, Ann. Cas. 1914A, 1294, 38 L. R. A. (N. S.) 727; *West. U. Tel. Co. v. Sights*, 34 Okl. 461, 126 Pac. 234, 42 L. R. A. (N. S.) 419, Ann. Cas. 1914C, 204; *West. U. Tel. Co. v. Allen*, 30 Okl. 229, 119 Pac. 981, 38 L. R. A. (N. S.) 348; *West. U. Tel. Co. v. Lewis*, 203 Fed. 832, 122 C. C. A. 150, 49 L. R. A. (N. S.) 927; *Hall v. West. U. Tel. Co.*, 59 Fla. 275, 51 South. 819, 27 L. R. A. (N. S.) 639.

<sup>20</sup> *West. U. Tel. Co. v. Lewis*, 203 Fed. 832, 122 C. C. A. 150, 49 L. R. A. (N. S.) 927.

<sup>21</sup> *Brewster v. West. U. Tel. Co.*, 65 Ark. 537, 47 S. W. 560; *Postal Tel. Cable Co. v. Barwise*, 11 Colo. App. 328, 53 Pac. 252; *Clay v. West. U. Tel. Co.*, 81 Ga. 285, 6 S. E. 813, 12 Am. St. Rep. 316; *West. U. Tel. Co. v. Watson*, 94 Ga. 202, 21 S. E. 457, 47 Am. St. Rep. 151; *Bennett v. West. U. Tel. Co.*, 129 Iowa, 607, 106 N. W. 13; *Postal Tel. Cable Co. v. Crook*, 106 Miss. 175, 63 South. 350; *Bird v. West. U. Tel. Co.*, 76 S. C. 345, 56 S. E. 973, distinguishing *Wallingford v. West. U. Tel. Co.*, 53 S. C. 410, 31 S. E. 275; *Id.*, 60 S. C. 212, 38 S. E. 443, 629; *Fisher v. West. U. Tel. Co.*, 119 Wis. 146, 96 N. W. 545; *Bass v. Postal Tel. Cable Co.*, 127 Ga. 423, 56 S. E. 465, 12 L. R. A. (N. S.) 489.

Damages could not be recovered against the company in the following cases, because the latter had no notice of the contents of the message: *Beaupre v. Pacific, etc., Tel. Co.*, 21 Minn. 155; *West. U. Tel. Co. v. Clifton*, 68 Miss. 307, 8 South. 746; *McColl v. West. U. Tel. Co.*, 7 Abb. N. C. (N. Y.) 151; *Clark Mfg. Co. v. West. U. Tel. Co.*, 152 N. C. 157, 67 S. E. 329, 27 L. R. A. (N. S.) 643; *Stone v. Postal Tel. Cable Co.*, 35 R. I. 498, 87 Atl. 319, 46 L. R. A. (N. S.) 180; *Clio Gin Co. v. West. U. Tel. Co.*, 82 S. C. 405, 64 S. E. 426; *West. U. Tel. Co. v. True*, 101 Tex. 236, 106 S. W. 315; *West. U. Tel. Co. v. Woods* (Tex. Civ. App.) 133 S. W. 440.

<sup>22</sup> *Alexander v. West. U. Tel. Co.*, 67 Miss. 386, 7 South. 280; *West. U. Tel. v. Robertson* (Tex. Civ. App.) 133 S. W. 454.



and the price of the goods goes up the next, when he does sell, there is a gain on his part, but a loss on the part of the purchaser. So, if there is an order made by means of a telegram but the same is, through the company's negligence, not sent or is delayed in delivery an unusually long time, during which the price of goods goes up, the purchaser would most certainly be damaged. In other words, he would have gained in the purchase of the goods had it not been for the negligence of the company; but the question in this instance is, By what method or means can the amount of damages be ascertained?

§ 556. **Same continued—measure of damages.**—The measure of damages in cases where the purchaser of goods or property fails to obtain them at the price he otherwise would have done had the message been properly and promptly delivered to the vendor is similar to that in ascertaining the amount to be recovered in those cases where a loss has been sustained by the failure of a sale being consummated, except it is, in form, reversed. To be more explicit, the measure of damages to be recovered for a loss sustained by the failure of the company to promptly transmit and deliver a message, which contains an order for goods, is the difference between the price of the goods at the time and place the message should have been delivered and the market price or the price which was paid for the same goods, at the same place, by another order, presented within a reasonable time after it has been learned, through due diligence, that the first was not delivered.<sup>23</sup> The same rule will apply if the order was delayed in the delivery an unreasonable time.<sup>24</sup> That is, the measure of damages would be the difference between the price of goods at the time the order should have been delivered by reasonable diligence on the part of the company, and the price

<sup>23</sup> *Squire v. West. U. Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157; *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *Alexander v. West. U. Tel. Co.*, 66 Miss. 161, 5 South. 397, 14 Am. St. Rep. 556, 3 L. R. A. 71; *Purdum Naval Stores Co. v. West. U. Tel. Co. (C. C.)* 153 Fed. 327; *West. U. Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479; *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844; *West. U. Tel. Co. v. Graham*, 1 Colo. 230, 9 Am. Rep. 136; *West. U. Tel. Co. v. Harris*, 19 Ill. App. 347; *Dodd Gro. Co. v. Postal Tel. Cable Co.*, 112 Ga. 685, 37 S. E. 981; *Turner v. Hawkeye, etc., Tel. Co.*, 41 Iowa, 458, 20 Am. Rep. 605; *Mowry v. West. U. Tel. Co.*, 51 Hun, 126, 4 N. Y. Supp. 666; *United States Tel. Co. v. Wenger*, 55 Pa. 262, 93 Am. Dec. 751; *Gulf, etc., R. Co. v. Loonie*, 82 Tex. 323, 18 S. W. 221, 27 Am. St. Rep. 891; *Carver v. West. U. Tel. Co. (Tex. Civ. App.)* 31 S. W. 432. See, also, *West. U. Tel. Co. v. Pells*, 2 Willson, Civ. Cas. Ct. App. § 41; *West. U. Tel. Co. v. Hirsch (Tex. Civ. App.)* 84 S. W. 394.

<sup>24</sup> *West. U. Tel. Co. v. Carver*, 15 Tex. Civ. App. 547, 39 S. W. 1021; *Pearshall v. West. U. Tel. Co.*, 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662, affirming 44 Hun (N. Y.) 532.

of the same goods at the time the order was delivered.<sup>25</sup> It must be understood, however, that if the delay was the result of some uncontrollable power, such as atmospheric hindrances<sup>26</sup> or the act of the public enemy,<sup>27</sup> and not that of the company's negligence, it would not be liable for these losses. It is, nevertheless, the presumption that the negligence of the company was the cause of the loss,<sup>28</sup> and the burden rests upon the latter to overcome this presumption.<sup>29</sup> It has been attempted to be shown that not only should the difference in these two prices be recovered, but, in addition to this, the profits which would have been more than probably realized in a resale of the goods should also be recovered. It is generally held, however, that this loss is entirely too remote and speculative;<sup>30</sup> but if there has been a resale of the goods effected or agreed upon, whereby a profit would have been realized, then this also can be recovered, as this is not depending upon any unreasonable conditions.<sup>31</sup> In connection with this statement, it has been held that, if the order contained both an order to buy and sell, the losses which would have been sustained on the purchase order must be deducted from the profits he would have made on the sale order, in determining the measure of damages. So the latter rule applies where the party on whom the order is made does both the buying and selling by the authority given in the message,<sup>32</sup> and not where the sender, as in the first rule stated above, accomplishes the resale. To re-

<sup>25</sup> *Swan v. West. U. Tel. Co.*, 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153; *Gulf, etc., R. Co. v. Loonie*, 82 Tex. 323, 18 S. W. 221, 27 Am. St. Rep. 891; *West. U. Tel. Co. v. Woods* (Tex. Civ. App.) 133 S. W. 440; *Postal Tel. Cable Co. v. Talerico* (Tex. Civ. App.) 136 S. W. 575.

<sup>26</sup> See chapter XII.

<sup>27</sup> See chapter XV.

<sup>28</sup> See chapter XIII. See, also, § 509.

<sup>29</sup> See § 320 et seq. See, also, § 509 et seq.

<sup>30</sup> *West. U. Tel. Co. v. Fellner*, 58 Ark. 29, 22 S. W. 917, 41 Am. St. Rep. 81; *West. U. Tel. Co. v. Graham*, 1 Colo. 230, 9 Am. Rep. 136; *Squire v. West. U. Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157; *Hibbard v. West. U. Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 775; *West. U. Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479.

<sup>31</sup> *West. U. Tel. Co. v. Brown*, 84 Tex. 54, 19 S. W. 336; *Walden v. West. U. Tel. Co.*, 105 Ga. 275, 31 S. E. 172; *West. U. Tel. Co. v. Landis* (Pa.) 12 Atl. 467; *Postal Tel. Co. v. Rhett* (Miss.) 33 South. 412; *Id.*, 35 South. 829; *West. U. Tel. Co. v. J. A. Kemp Grocer Co.* (Tex. Civ. App.) 28 S. W. 905; *West. U. Tel. Co. v. Thomas*, 7 Tex. Civ. App. 105, 26 S. W. 117.

<sup>32</sup> See *West. U. Tel. Co. v. North Packing, etc., Co.*, 89 Ill. App. 301, affirmed in 188 Ill. 366, 58 N. E. 958, 52 L. R. A. 274; *Dodd Gro. Co. v. Postal Tel. Cable Co.*, 112 Ga. 685, 37 S. E. 981; *Pearsall v. West. U. Tel. Co.*, 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662; *Rittenhouse v. Independent Tel. Line*, 44 N. Y. 263, 4 Am. Rep. 673; *United States Tel. Co. v. Wenger*, 55 Pa. 262, 93 Am. Dec. 751; *West. U. Tel. Co. v. Carver*, 15 Tex. Civ. App. 547, 39 S. W. 1021; *West. U. Tel. Co. v. Woods* (Tex. Civ. App.) 133 S. W. 440.

cover in any instance, the plaintiff must prove that the addressee of the delayed or unsent message, containing the order, would have filled it, since if there was a doubt of this fact which had not been overcome by evidence, he could only recover nominal damages.<sup>33</sup> All necessary expenses incurred in the transaction can be recovered in these cases the same as where a sale was prevented from being made by the negligence of the company.

§ 557. **Orders for goods erroneously transmitted—purchaser's duty.**—Very often orders for goods, sent by means of telegrams, are erroneously transmitted, and when received by the addressee show items which call for a greater or less quantity than ordered, or misstate the terms, conditions or other details of the transaction, thereby causing injury or loss to the plaintiff.<sup>34</sup> In consequence of which, the actual, direct, and proximate damages may be recovered;<sup>35</sup> and, in the determination of the amount to be so recovered, the nature and circumstances of each particular case must be considered.<sup>36</sup> There must be, however, an actual loss or injury

<sup>33</sup> *Meggett v. West. U. Tel. Co.*, 69 Miss. 198, 13 South. 815; *West. U. Tel. Co. v. Burns* (Tex. Civ. App.) 70 S. W. 784.

The same rule applies where there is no positive direction to the agent to purchase, or where the agent does not purchase after receipt of message. *Hibbard v. West. U. Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 775; *West. U. Tel. Co. v. Fellner*, 58 Ark. 29, 22 S. W. 917, 41 Am. St. Rep. 81; *West. U. Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479. See, also, *Brewster v. West. U. Tel. Co.*, 65 Ark. 537, 47 S. W. 560.

<sup>34</sup> *West. U. Tel. Co. v. Milton*, 53 Fla. 484, 43 South. 495, 125 Am. St. Rep. 1077, 11 L. R. A. (N. S.) 560; *Hasbrouck v. West. U. Tel. Co.*, 107 Iowa, 160, 77 N. W. 1034, 70 Am. St. Rep. 181; *Tyler v. West. U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *West. U. Tel. Co. v. Chamblee*, 122 Ala. 428, 25 South. 232, 82 Am. St. Rep. 89; *Fisher v. West. U. Tel. Co.*, 119 Ky. 885, 84 S. W. 1179, 27 Ky. Law Rep. 340; *Elsev v. Postal Tel. Co.*, 15 Daly, 58, 3 N. Y. Supp. 117; *Reed v. West. U. Tel. Co.*, 135 Mo. 661, 31 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492; *Hays v. West. U. Tel. Co.*, 70 S. C. 16, 48 S. E. 608, 106 Am. St. Rep. 731, 67 L. R. A. 481, 3 Ann. Cas. 424; *Washington, etc., Tel. Co. v. Hobson*, 15 Grat. (Va.) 122.

<sup>35</sup> *West. U. Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; *Reed v. West. U. Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492; *West. U. Tel. Co. v. Milton*, 53 Fla. 484, 43 South. 495, 125 Am. St. Rep. 1077, 11 L. R. A. (N. S.) 560; *Postal Tel. Co. v. Schaefer*, 110 Ky. 907, 62 S. W. 1119, 23 Ky. Law Rep. 344; *Rittenhouse v. Ind. Line*, 44 N. Y. 263, 4 Am. Rep. 673, affirming 1 Daly (N. Y.) 474; *Hays v. West. U. Tel. Co.*, 70 S. C. 16, 48 S. E. 608, 106 Am. St. Rep. 731, 67 L. R. A. 481, 3 Ann. Cas. 424; *West. U. Tel. Co. v. Spivey*, 98 Tex. 308, 83 S. W. 364; *Bowie v. West. U. Tel. Co.*, 78 S. C. 424, 59 S. E. 65; *Mills v. West. U. Tel. Co.*, 88 S. C. 498, 70 S. E. 1040, Ann. Cas. 1912C, 1273.

<sup>36</sup> *Bowie v. West. U. Tel. Co.*, 78 S. C. 424, 59 S. E. 65. See *Henry v. West. U. Tel. Co.*, 73 Wash. 260, 131 Pac. 812, 46 L. R. A. (N. S.) 412; *Pegram v. West. U. Tel. Co.*, 100 N. C. 28, 6 S. E. 770, 6 Am. St. Rep. 557; *Mills v. West. U. Tel. Co.*, 88 S. C. 498, 70 S. E. 1040, Ann. Cas. 1912C, 1273; *West. U.*



suffered<sup>37</sup> by the party complaining before actual damages can be recovered.<sup>38</sup> The plaintiff should not carry out the transaction, if he is not under obligations to do so, and has discovered the error in time,<sup>39</sup> but in any instance he should make the damages as light as possible.<sup>40</sup> Very often the transaction is carried out before the error is discovered,<sup>41</sup> or the circumstances are such that it must be carried out in order to avoid further loss.<sup>42</sup> Under such circumstances, the first rule stated would not apply. Where a different quantity of goods or articles are sold than that intended,<sup>43</sup> or for a less price than that offered, and the same being the result of the company's negligence, the loss actually sustained thereby may be recovered.<sup>44</sup> So also the same rule applies where by reason of the said error the name of the addressee is changed, resulting in the message not being delivered,<sup>45</sup> or in its being delivered to the wrong person.<sup>46</sup>

**§ 558. Same continued—goods shipped to wrong place.**—Errors of message, in not correctly transmitting the amount as ordered, is not necessarily the only manner in which loss may occur, but a loss may be sustained by the message misstating the place to which such goods are to be shipped. The measure of damages, in such cases, is the difference between the price of the goods which

Tel. Co. v. Milton, 53 Fla. 484, 43 South. 495, 125 Am. St. Rep. 1077, 11 L. R. A. (N. S.) 560; Turner v. Hawkeye Tel. Co., 41 Iowa, 458, 20 Am. Rep. 605.

<sup>37</sup> See §§ 525, 526.

<sup>38</sup> Mickelwait v. West. U. Tel. Co., 113 Iowa, 177, 84 N. W. 1038; Hughes v. West. U. Tel. Co., 114 N. C. 70, 19 S. E. 100, 41 Am. St. Rep. 782; James v. West. U. Tel. Co., 86 Ark. 339, 111 S. W. 276.

<sup>39</sup> Shingleur v. West. U. Tel. Co., 72 Miss. 1030, 18 South. 425, 48 Am. St. Rep. 604, 30 L. R. A. 444; Postal Tel. Cable Co. v. Schaefer, 110 Ky. 907, 62 S. W. 1119, 23 Ky. Law Rep. 344; Joynes v. Postal Tel. Cab. Co., 37 Pa. Super. Ct. 63; McKee v. West. U. Tel. Co., 158 Ky. 143, 164 S. W. 348, 51 L. R. A. (N. S.) 439.

<sup>40</sup> Postal Tel. Cab. Co. v. Schaefer, 110 Ky. 907, 62 S. W. 1119, 23 Ky. Law Rep. 344; West. U. Tel. Co. v. Truitt, 5 Ga. App. 809, 63 S. E. 934. But see West. U. Tel. Co. v. Crawford, 110 Ala. 460, 20 South. 111.

<sup>41</sup> See Fisher v. West. U. Tel. Co., 119 Ky. 885, 84 S. W. 1179, 27 Ky. Law Rep. 340; Hasbrouck v. West. U. Tel. Co., 107 Iowa, 160, 77 N. W. 1034, 70 Am. St. Rep. 181; Reed v. West. U. Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492.

<sup>42</sup> West. U. Tel. Co. v. Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109.

<sup>43</sup> Tyler v. West. U. Tel. Co., 60 Ill. 421, 14 Am. Rep. 38.

<sup>44</sup> Fisher v. West. U. Tel. Co., 119 Ky. 885, 84 S. W. 1179, 27 Ky. Law Rep. 340; West. U. Tel. Co. v. Crawford, 110 Ala. 460, 20 South. 111; Reed v. West. U. Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492; West. U. Tel. Co. v. Landis, 9 Sadler (Pa.) 357, 12 Atl. 467.

<sup>45</sup> Postal Tel. Cab. Co. v. Sunset Constr. Co., 102 Tex. 148, 114 S. W. 98, reversing (Civ. App.) 109 S. W. 265.

<sup>46</sup> Elsey v. Postal Tel. Co., 15 Daly, 53, 3 N. Y. Supp. 117.

could have been obtained at the place to which they would have been shipped, had it not been for the error made in the telegram, and the market value or best obtainable price at the place to which they were actually sent.<sup>47</sup> He should also be allowed to recover any necessary extra expenses incurred in the way of accomplishing a sale at the latter place. And if the transportation charges to this place were greater than those to the place they were ordered to be sent, the difference between the two should be recovered; but if, on the other hand, they were less, then this difference should be deducted from the total amount sustained in the loss. It will be seen by this that the purpose of the law, where the company only negligently discharged its duty, is to only compensate the injured party for his loss; where the act was maliciously done to injure his trade or business, the rule is different.

§ 559. **Same continued—stock, bonds, etc.**—We have been, heretofore, discussing the means of ascertaining the amount of recoverable damages sustained in losses caused by telegraph companies erroneously transmitting orders for goods. Where the order is not for commodities, but for stocks, bonds and other like securities, the measure of damages is different, yet the principle on which they are founded is the same. The cause of this is that the nature of the property and the uses to which it may be put are different. If an order for stocks, bonds or other like securities has been erroneously transmitted, the measure of damages is the loss, if any, sustained by the purchaser in consequence of the error in transmission.<sup>48</sup> In other words, if the order is changed so as to call for a kind of stock other than that ordered, the injured party may recover the difference in the price of stock it was desired to purchase, at the time the order was made, and the price to which it had advanced at the time the error was made, also the amount of the loss on the other stock.<sup>49</sup> Where there is a profit which would have been larger had the message been correctly transmitted, the decrease in the profits realized may be recovered. Thus,

<sup>47</sup> *West. U. Tel. Co. v. Reid*, 83 Ga. 401, 10 S. E. 919; *West. U. Tel. Co. v. Stevens* (Tex.) 16 S. W. 1095. See *West. U. Tel. Co. v. Collins*, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515; *West. U. Tel. Co. v. Woods*, 56 Kan. 737, 44 Pac. 989; *Leonard v. N. Y., etc., Elec. Mag. Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *West. U. Tel. Co. v. Linney* (Tex. Civ. App.) 28 S. W. 234.

<sup>48</sup> *West. U. Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; *Strong v. West. U. Tel. Co.*, 18 Idaho, 389, 109 Pac. 910, 31 L. R. A. (N. S.) 409, Ann. Cas. 1912A, 55.

<sup>49</sup> *Rittenhouse v. Independent Line of Tel.*, 44 N. Y. 263, 4 Am. Rep. 673; *Strong v. West. U. Tel. Co.*, 18 Idaho, 389, 109 Pac. 910, 30 L. R. A. (N. S.) 409, Ann. Cas. 1912A, 55.

where an order for 1,000 shares of certain stock was changed in the transmission so as to read 100 shares, and before the error was discovered the stock had advanced, it was held that the plaintiff could recover the amount of the advance in the price of 900 shares up to the time he became aware of the error, but not for advances occurring thereafter.<sup>50</sup>

§ 560. **Messages directing agent to sell or purchase.**—Where a person directs or orders his agent, by means of a telegram, to sell certain property, but on account of an inexcusable delay in the delivery of the message the person loses by a decline in the price of the property, the measure of damages is the difference between the price at which the same was sold and that which he would have received had it not been for the delay.<sup>51</sup> In such cases, however, the injured party must exercise reasonable diligence to make the loss as light as possible, which may be done by the sending of another order for the sale as soon as possible after he learns of the delay.<sup>52</sup> One difficulty which arises under cases of this kind is whether the property ordered to be sold was ever in the actual or constructive possession of the sender or the injured party. Many transactions for the sale or purchase of property are carried on under what is known as “future” sales or purchases; and where the contract of sale made by telegram is for the sale or purchase of “futures,” loss sustained by a message in respect to same, being either negligently transmitted or delayed in delivery, cannot be recovered because the law decrees such contracts illegal.<sup>53</sup> Before a legal sale can be made there must be in one party to the contract ownership of some respect of the thing to be sold, and to complete same the party must be able to deliver the same. There cannot be a sale of something of which the intended seller has no salable interest, and of course, if he cannot deliver that which he did not either sell or have to sell, there cannot be a sale. Thus, where it appears that the plaintiff’s agent had neither money nor stock in his hands belonging to the former, no sale or purchase was made, although the agent testified that he would have loaned plaintiff the money if the message had been received in time, and although the agent of the company was familiar with the nature of

<sup>50</sup> *Marr v. West, U. Tel. Co.*, 85 Tenn. 529, 3 S. W. 496.

<sup>51</sup> *Daugherty v. American U. Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435; *Hocker v. West, U. Tel. Co.*, 45 Fla. 363, 34 South. 901; *Hadley v. West, U. Tel. Co.*, 115 Ind. 191, 15 N. E. 845; *West, U. Tel. Co. v. Littlejohn*, 72 Miss. 1025, 18 South. 418; *West, U. Tel. Co. v. Stevens (Tex.)* 16 S. W. 1095.

<sup>52</sup> *Daugherty v. American U. Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435.

<sup>53</sup> See § 429.



such transactions, the damages sustained by a decline in the price of the stock during the delay of the message are too remote and speculative.<sup>54</sup> If possession is once had by the party selling stock, it matters not how rapidly and often made, if delivery is contemplated, is not dealing in "futures," within the prohibition of the statutes.<sup>55</sup>

**§ 561. Same continued—order to close option to purchase.**—Where a person has an option to purchase certain property, and a message, which is delivered to a company, containing an order to his agent to close such option, is delayed through the negligence of the company until after the expiration of the time within which the purchase was to have been made, the measure of damages, where there is a loss, is the difference between the price fixed by the option and the market price at the same place on that day.<sup>56</sup> If, however, the market is less than that fixed in the option, and this is greater than the amount forfeited by the failure in not closing the option, there can be no recovery, as there is no loss. In order to hold the company liable, in either instance, the message must have been delivered to the company within a reasonable time before the closing of the option, to have given ample time for its delivery to the agent, and to have accomplished its purpose.

**§ 562. Loss of an exchange.**—Where a party makes a proposition to exchange some particular property for other, and such offer or proposition is attempted to be made by means of a telegram, which is turned over to a telegraph company for transmission and delivery, but the company has negligently failed to discharge its duty in the transaction, and as a result of which the party has suffered a loss, the same may be recovered; and the measure of damages therein is the difference between the value of the property he offered to exchange and the value of the property he would have received therefor.<sup>57</sup>

**§ 563. Negligence of company inducing shipment.**—Where a telegraph company has negligently performed its duty, and as a result of which goods are shipped to one market and there sold for a certain price, when, if such negligence had not occurred, or if the company had performed its duty in transmitting correctly the

<sup>54</sup> *Cahn v. West. U. Tel. Co.*, 48 Fed. 810, 1 C. C. A. 107, affirming (C. C.) 46 Fed. 40.

<sup>55</sup> *West. U. Tel. Co. v. Littlejohn*, 72 Miss. 1025, 18 South. 418.

<sup>56</sup> *Brewster v. West. U. Tel. Co.*, 65 Ark. 537, 47 S. W. 560; *West. U. Tel. Co. v. Bell*, 24 Tex. Civ. App. 572, 59 S. W. 918.

<sup>57</sup> *West. U. Tel. Co. v. Wilhelm*, 48 Neb. 910, 67 N. W. 870. See, also, *Lucas v. West. U. Tel. Co.*, 131 Iowa, 669, 109 N. W. 191, 6 L. R. A. (N. S.) 1016.

message in reference to such transaction, the goods would have been shipped to another and better market, a recovery may be had for the difference between the markets, plus or minus, as the case may be, the difference in expense of transportation and handling.<sup>58</sup> So also, if the goods would not have been shipped at all but for such negligence, the measure of damages therefor would be the difference between the price realized by the sale at such place, plus the cost of handling and freight.<sup>59</sup>

§ 564. **Deterioration.**—The question could hardly occur where real property was under consideration, but personal property and such as may be perishable may be caused to deteriorate in value as a result of the negligence of a telegraph company in failing to transmit correctly or promptly a message relating thereto. Where such an instance happens, the amount of such deterioration may be recovered.<sup>60</sup> Thus, where there is a delay in the shipments of such property,<sup>61</sup> or where important information is not communicated to the owner thereof, whereby threatened danger could have been averted, as a result of the company's negligence,<sup>62</sup> such damages may be recovered.

§ 565. **Announcement of prices or state of market.**—It is the general rule, as stated elsewhere, that where the owner of certain property makes an offer, in response to the announcement of the market price by means of a telegram, to sell at a certain price, and the message has been changed in its transmission so as to make the price less than that offered, the sender is bound to the receiver, who purchases the property, for the price as shown in the message received. The owner of the property may, however, where he relies on the announcement of the price or the state of market, as received from his agent, hold the company liable for the loss he has sustained by reason of the misquoted prices.<sup>63</sup> In other words,

<sup>58</sup> West. U. Tel. Co. v. Collins, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515; Marriott v. West. U. Tel. Co., 84 Neb. 443, 121 N. W. 241, 133 Am. St. Rep. 633; West. U. Tel. Co. v. Reid, 83 Ga. 401, 10 S. E. 919.

<sup>59</sup> Leonard v. N. Y., etc., Elec. Mag. Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446; West. U. Tel. Co. v. Woods, 56 Kan. 737, 44 Pac. 989; West. U. Tel. Co. v. Stevens (Tex.) 16 S. W. 1095; West. U. Tel. Co. v. Limney (Tex. Civ. App.) 28 S. W. 234.

<sup>60</sup> Mitchell v. West. U. Tel. Co., 12 Tex. Civ. App. 262, 33 S. W. 1016.

<sup>61</sup> West. U. Tel. Co. v. Corso, 121 Ky. 322, 89 S. W. 212, 28 Ky. Law Rep. 290, 11 Ann. Cas. 1065; West. U. Tel. Co. v. Simpson, 10 Kan. App. 473, 62 Pac. 901.

<sup>62</sup> Mitchell v. West. U. Tel. Co., 12 Tex. Civ. App. 262, 33 S. W. 1016.

<sup>63</sup> Eureka Cot. Mills v. West. U. Tel. Co., 88 S. C. 498, 70 S. E. 1040, Ann. Cas. 1912C, 1273; Henry v. West. U. Tel. Co., 73 Wash. 260, 131 Pac. 812, 46 L. R. A. (N. S.) 412; West. U. Tel. Co. v. Spivey, 98 Tex. 308, 83 S. W. 364; Jackson v. West. U. Tel. Co., 174 Mo. App. 70, 156 S. W. 801. See

if he receives a message from his agent stating the price at which the property can be sold, but the price as delivered to the company is really less than that quoted in the received message, and he sells on the strength of the latter price, believing it to be the state of the market, he may recover for the loss; and the measure of damages is the difference between the price the property actually sold for and that which he thought he was getting for it, or, as stated in another way, the amount of his actual loss caused by the decrease in the price he obtained.<sup>64</sup> It is held in these cases that the announcement must have been made in contemplation of a trade, and by some one acting with authority to make such an-

West. U. Tel. Co. v. Waxelbaum, 113 Ga. 1017, 39 S. E. 443, 56 L. R. A. 741; Stewart v. Postal Tel. Cab. Co., 131 Ga. 31, 61 S. E. 1045, 127 Am. St. Rep. 205, 18 L. R. A. (N. S.) 692; De Rutte v. N. Y., etc., Elec. Mag. Tel. Co., 1 Daly (N. Y.) 547; Wolf v. West. U. Tel. Co., 24 Pa. Super. Ct. 129; West. U. Tel. Co. v. McCants (Miss.) 46 South. 535; West. U. Tel. Co. v. Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; Turner v. Hawkeye Tel. Co., 41 Iowa. 458, 20 Am. Rep. 605; West. U. Tel. Co. v. Bradford, 52 Tex. Civ. App. 392, 114 S. W. 686; Hays v. West. U. Tel. Co., 70 S. C. 16, 48 S. E. 608, 106 Am. St. Rep. 731, 67 L. R. A. 481, 3 Ann. Cas. 424.

Where price is changed to a larger amount, the measure of damages is the difference between the price as stated in the original message and the price paid by plaintiff: West. U. Tel. Co. v. Dubois, *supra*; Hays v. West. U. Tel. Co., *supra*. It has been held, however, that he could not recover this amount: West. U. Tel. Co. v. Spivey, 98 Tex. 308, 83 S. W. 364; West. U. Tel. Co. v. Bell, 24 Tex. Civ. App. 572, 59 S. W. 918.

<sup>64</sup> West. U. Tel. Co. v. Crawford, 110 Ala. 460, 20 South. 111; West. U. Tel. Co. v. Flint River Lumber Co., 114 Ga. 576, 40 S. E. 815, 88 Am. St. Rep. 36; Postal Tel. Cable Co. v. Schaefer, 62 S. W. 1119, 23 Ky. Law Rep. 344; Reed v. West. U. Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492; West. U. Tel. Co. v. Richman (Pa.) 8 Atl. 171; Pepper v. West. U. Tel. Co., 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699; Hays v. West. U. Tel. Co., 70 S. C. 16, 48 S. E. 608, 67 L. R. A. 481, 106 Am. St. Rep. 731, 3 Ann. Cas. 424; Eureka Cotton Mills v. West. U. Tel. Co., 88 S. C. 498, 70 S. E. 1040, Ann. Cas. 1912C, 1273; Bowie v. West. U. Tel. Co., 78 S. C. 424, 59 S. E. 65; Sims v. West. U. Tel. Co., 89 S. C. 237, 71 S. E. 783; McCarty v. West. U. Tel. Co., 116 Mo. App. 441, 91 S. W. 976; West. U. Tel. Co. v. Hart, 62 Ill. App. 120; West. U. Tel. Co. v. Lyon, 93 Miss. 590, 47 South. 344; Anniston Cordage Co. v. West. U. Tel. Co., 161 Ala. 219, 49 South. 770, 135 Am. St. Rep. 124, 30 L. R. A. (N. S.) 1116; Stewart v. Postal Tel. Cable Co., 131 Ga. 31, 61 S. E. 1045, 127 Am. St. Rep. 205, 18 L. R. A. (N. S.) 692, overruling Brooke v. West. U. Tel. Co., 119 Ga. 694, 46 S. E. 826; Henry v. West. U. Tel. Co., 73 Wash. 260, 131 Pac. 812, 46 L. R. A. (N. S.) 412.

*Liability to sender.*—The foregoing cases have reference to the liability to the receiver of a message. In some jurisdictions it is held that a person selecting the telegraph is bound by any errors in the transmission. Younker v. West. U. Tel. Co., 146 Iowa, 499, 125 N. W. 577; West. U. Tel. Co. v. Fischer, 133 Ky. 768, 119 S. W. 189; West. U. Tel. Co. v. Milton, 53 Fla. 484, 43 South. 495, 125 Am. St. Rep. 1077, 11 L. R. A. (N. S.) 560; West. U. Tel. Co. v. Robertson, 59 Tex. Civ. App. 426, 126 S. W. 629; Pegram v. West. U. Tel. Co., 100 N. C. 28, 6 S. E. 770, 6 Am. St. Rep. 557; Bass v. Postal Tel. Cable Co., 127



nouncement.<sup>65</sup> If the party to whom the announcement is made should be the purchaser, the measure of damages would be the increase in the price he was obliged to pay in consequence of the error.<sup>66</sup>

§ 566. **Contemplating shipping—delay in message—loss.**—There are so very many cases arising from the negligence of telegraph companies in delaying the delivery of a message that it is difficult to enumerate them all and to give the measure of damages in each case. He who contemplates bringing suit should ascertain from the cases already cited the measure of damages to be recovered in his particular case, since the principle in all is the same, but only differently applied. Thus, if a party who contemplates making a shipment of live stock to a certain place on the announcement of the price at that place, but in consequence of a delay in the delivery or nondelivery of the price he ships to another less advantageous point, the measure of damages would be similar to all those cases heretofore discussed. In these particular cases it has been held that the measure of damages would be the difference in price at the place he actually shipped and that to which he would have shipped had the message been delivered in time, together with the difference, if any, between the transportation to the two places.<sup>67</sup> If, on the other hand, the message is one advising the owner of the stock not to ship, and, through the delay in the message, he does ship, thereby encountering an unfavorable market, the measure of damages is the difference between the price of the stock at the place from which they were shipped and the price at the place to which they were shipped, together with expenses in transportation and that accruing in the sale.<sup>68</sup> In all cases where the owner suffers a loss by the negligence of these companies, he must exercise reasonable diligence to reduce his loss as much as possible.<sup>69</sup> Thus, in the last rule given above,

Ga. 423, 56 S. E. 465, 12 L. R. A. (N. S.) 489; *Thorp v. West. U. Tel. Co.*, 118 Mo. App. 398, 94 S. W. 554.

<sup>65</sup> *Frazer v. West. U. Tel. Co.*, 84 Ala. 487, 4 South. 831.

<sup>66</sup> *West. U. Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; *Stewart v. Postal Tel. Cable Co.*, 131 Ga. 31, 61 S. E. 1045, 18 L. R. A. (N. S.) 692, 127 Am. St. Rep. 205; *Henry v. West. U. Tel. Co.*, 73 Wash. 260, 131 Pac. 812, 46 L. R. A. (N. S.) 412.

<sup>67</sup> *West. U. Tel. Co. v. Collins*, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515; *West. U. Tel. Co. v. Stevens (Tex.)* 16 S. W. 1095; *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 458, 20 Am. Rep. 605. See, also, § 563.

<sup>68</sup> *West. U. Tel. Co. v. Linney (Tex. Civ. App.)* 28 S. W. 234; *West. U. Tel. Co. v. Woods*, 56 Kan. 737, 44 Pac. 989. See, also, *West. U. Tel. Co. v. Reid*, 83 Ga. 401, 10 S. E. 919. See, also, § 563.

<sup>69</sup> See § 557.

if the owner of the stock cannot sell at the place he has shipped, it is his duty, if practicable, to ship to the nearest good market in order to reduce his loss.<sup>70</sup> He need only exercise reasonable diligence and effort, and is not under obligation to seriously inconvenience himself or cause injury to his other business to make such reduction. If the message has never been delivered, and the addressee, under the circumstances, believes that there is no change in the market and buys accordingly at the last rates communicated to him, he may recover the difference between the excessive price he pays for the property and the price he would have paid had the message been delivered in time.<sup>71</sup> But if he should get the same information the delayed message would have given from other sources and before he buys, he cannot recover anything.<sup>72</sup>

<sup>70</sup> *West. U. Tel. Co. v. Woods*, 56 Kan. 737, 44 Pac. 989. Compare *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446.

<sup>71</sup> *Garrett v. West. U. Tel. Co.*, 92 Iowa, 449, 58 N. W. 1064, 60 N. W. 644.

<sup>72</sup> *Reynolds v. West. U. Tel. Co.*, 81 Mo. App. 223.

## CHAPTER XXII

## MEASURE OF DAMAGES—CONTINUED—LOSS OF EMPLOYMENT, ETC.

- § 567. In general.
568. Loss of situation or employment.
569. Same continued—actual damages.
570. Same continued—circumstances tending to reduce loss.
571. Loss of professional fees.
572. Same continued—losses of otherwise professional nature.
573. Same continued—such as not recoverable.
574. Losses which might have been prevented.
575. Same continued—must show same would have been prevented.
576. Failing debtors—messages from creditors regarding same.
577. Failure to transmit money.
578. Messages summoning physicians or veterinaries.
579. Messages requesting addressee to meet sender.

§ 567. In general.—The failure on the part of a telegraph company to properly discharge its duty towards the public, subjects it to as many and almost the same kind of actions as may be maintained against individuals for their wrongful acts. In fact, they are nothing more than persons in law, so considered by all the courts, and, with certain peculiar exceptions, their duties and liabilities toward the public are the same. One of the inalienable rights of every citizen is to own property and to make and enter into contracts in respect thereto. Any interference by another, except by due process of law, whereby he is prevented from exercising his authority over such, will subject the wrongdoer to damages. These companies may also own all property necessary for them to carry on and perform those objects for which they were incorporated. They may make and perform contracts, both with other corporations, and with individuals with respect to such property, so far as it may be necessary to accomplish their corporate objects, and any interference in these contractual rights may be remedied by proper actions. We propose to discuss in this chapter the interference with contracts made or in contemplation of being made by individuals, or such as may have been prevented from being made by the negligence of telegraph companies. And first we shall speak of the loss of a situation or employment, which is the result of the company's negligence in delaying a message.

§ 568. Loss of situation or employment.—When a telegraph company, through its negligence, delays a message resulting in a loss of a situation or employment, it is not such an interference



with the making of a contract as is meant when some third person intentionally interferes with the contracting parties in the making of a contract, and for which an action in tort may be maintained. In the latter cases the gist of the action is the wrongful or malicious intent on the part of the wrongdoer; in the former it is not the intent which the company may have that makes out the case, but it is a failure to discharge its duties toward the public and the contracting parties. It is true that this negligence of the company may become so gross as to place them under the same class of cases—that is, a malicious interference. We shall not speak here of the wrongful or malicious intent which may have been entertained by the company when such negligence is perpetrated, but only of its negligence in the delay of the message and the results thereof. When a contract of employment or for a situation has been lost by the delay of a message, the injured party is surely entitled to damages.<sup>1</sup>

§ 569. **Same continued—actual damages.**—In cases where the plaintiff loses an employment in consequence of the company's negligent delay in delivering a message, the amount of damages to be recovered should be such as he has actually sustained.<sup>2</sup> It is not an easy matter to always ascertain what are the actual damages, but the general rule is the amount the employer would have been legally obliged to pay the employé under the contract less what the latter made or could in the exercise of reasonable diligence have made in similar employment during the corresponding time is recoverable.<sup>3</sup> In viewing this subject, the circumstances involved

<sup>1</sup> But see § 573. See, also, *Postal Tel. Cable Co. v. Nichols*, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A. (N. S.) 870, 14 Ann. Cas. 369, loss of bid for public work.

<sup>2</sup> *Baldwin v. West. U. Tel. Co.*, 93 Ga. 692, 21 S. E. 212, 44 Am. St. Rep. 194; *West. U. Tel. Co. v. Valentine*, 18 Ill. App. 57; *Mondon v. West. U. Tel. Co.*, 96 Ga. 499, 23 S. E. 553; *West. U. Tel. Co. v. McKibben*, 114 Ind. 511, 14 N. E. 894; *Merrill v. West. U. Tel. Co.*, 78 Me. 97, 2 Atl. 847; *West. U. Tel. Co. v. Fenton*, 52 Ind. 1; *West. U. Tel. Co. v. Longwill*, 5 N. M. 308, 21 Pac. 339; *West. U. Tel. Co. v. Partlow*, 30 Tex. Civ. App. 599, 71 S. W. 584; *Barker v. West. U. Tel. Co.*, 134 Wis. 147, 114 N. W. 439, 126 Am. St. Rep. 1017, 14 L. R. A. (N. S.) 533; *West. U. Tel. Co. v. Biggerstaff*, 177 Ind. 168, 97 N. E. 531; *Stumm v. West. U. Tel. Co.*, 140 Wis. 528, 122 N. W. 1032; *Postal Tel. Cable Co. v. Nichols*, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A. (N. S.) 870, 14 Ann. Cas. 369; *Fulkerson v. West. U. Tel. Co.*, 110 Ark. 144, 161 S. W. 168, Abn. Cas. 1915D, 221.

<sup>3</sup> *McGregor v. West. U. Tel. Co.*, 85 Mo. App. 308; *West. U. Tel. Co. v. Valentine*, 18 Ill. App. 57; *West. U. Tel. Co. v. Partlow*, 30 Tex. Civ. App. 599, 71 S. W. 584; *Stumm v. West. U. Tel. Co.*, 140 Wis. 528, 122 N. W. 1032. See *Postal Tel. Cable Co. v. Nichols*, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A. (N. S.) 870, 14 Ann. Cas. 369.

must be considered; the character of the employment; the ability of the plaintiff to perform such work; and the duration of the time he is to be engaged are matters to be considered.<sup>4</sup> And he should prove the damages he has actually sustained by the delay. Thus, if his employment is for a certain specified time, during which he is to obtain a certain salary, the loss of this is the amount to be recovered;<sup>5</sup> unless there are circumstances which would reduce this amount. In other words, if he is employed for one month at a salary of \$100, and his board for that time, but is prevented from making this through the negligence of the company, he may recover this amount. It is not only of a situation or an employment where he may have a right to recover; but if he has been prevented from accepting a contract to build a certain structure, or any other similar purpose, he may recover the actual loss sustained thereby.<sup>6</sup> In these latter cases, it is more difficult to ascertain the exact damage sustained. It is the general rule that the amount to be recovered is the net profit he would have made by performing the con-

<sup>4</sup> West. U. Tel. Co. v. Hines, 96 Ga. 688, 23 S. E. 845, 51 Am. St. Rep. 159; West. U. Tel. Co. v. Fenton, 52 Ind. 1; Kemp v. West. U. Tel. Co., 28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363; Wolfskehl v. West. U. Tel. Co., 46 Hun, (N. Y.) 542. See, also, Baldwin v. West. U. Tel. Co., 93 Ga. 692, 21 S. E. 212, 44 Am. St. Rep. 194. Compare Jacobs v. Postal Tel. Co., 76 Miss. 278, 24 South. 535. See, also, Fulkerson v. West. U. Tel. Co., 110 Ark. 144, 161 S. W. 168, Ann. Cas. 1915D, 221.

<sup>5</sup> Mondon v. West. U. Tel. Co., 96 Ga. 499, 23 S. E. 853; Merrill v. West. U. Tel. Co., 78 Me. 97, 2 Atl. 847, if the contract is only for a certain amount per day for no stipulated period, and is defeasible at the will of either party, only nominal damages can be recovered. But see West. U. Tel. Co. v. McKibben, 114 Ind. 511, 14 N. E. 894.

*Employment from month to month.*—Where employment is from month to month, the limit of recovery is one month's salary. Baldwin v. West. U. Tel. Co., 93 Ga. 692, 21 S. E. 212, 44 Am. St. Rep. 194; Mondon v. West. U. Tel. Co., supra.

*Employment at will.*—Where the employment may be terminated at the will of the employer, it cannot be presumed that the employment would continue for any given length of time so as to entitle to the recovery for employé's loss during that period. Fulkerson v. West. U. Tel. Co., 110 Ark. 144, 161 S. W. 168, Ann. Cas. 1915D, 221; Merrill v. West. U. Tel. Co., supra.

<sup>6</sup> West. U. Tel. Co. v. Robinson (Tex. Civ. App.) 29 S. W. 71; West. U. Tel. Co. v. Bowen, 84 Tex. 476, 19 S. W. 554. In this case plaintiffs were threshers and their agent at X. wired them, "Have 30,000 bushels for you, if you can come at once." Plaintiffs answered, "Will ship machinery at once." This latter message was not delivered, and the parties for whom the threshing was to be done, not knowing that the offer was accepted, employed other contractors. It was held that the company was liable, although there was no delay in getting the machinery to V.; that, complainant being able to show the amount of grain to be threshed and the rate of toll per bushel contracted for, the damages claimed could not be considered contingent, uncertain, or speculative.

tract had be not been interfered with by the acts of the company.<sup>7</sup> It must be understood that the gist of the action, in such cases, is not the interference with the contract made between the sender and the addressee of the message by the company's negligence, but it is the company's failure to carry out its contract made with one of these parties in respect to such contract; that is, to act as agent in bringing the minds of these two parties together with reference to the contract to be made by them as it contracts to do in accepting compensation for the delivery of the message.

**§ 570. Same continued—circumstances tending to reduce loss.** It is the general rule, where a person is prevented from performing or carrying out a contract, and where he has not been guilty of any fault on his part, that he should exercise reasonable diligence to minimize the loss as much as possible; this may be done by performing other similar contracts. Thus, where he has lost a situation or employment, it is the duty of the plaintiff to seek other employment, by means of which the loss would naturally be reduced.<sup>8</sup> But if he has a certain occupation or avocation, he need not seek employment in other lines of business.<sup>9</sup> In other words, if he is a contractor, he need not endeavor to reduce the loss sustained by the acts of the company by engaging to farm or clerk, or any business outside that of a contractor. It is not necessary, in any particular, that he should exercise every endeavor to obtain other similar employment, but it is only his duty to exert reasonable diligence. If he has obtained other employment, the measure of damages for the loss sustained by a failure to perform the first is the difference between what he would have made had the message been delivered in time and the amount received in the latter employment. If, on the other hand, he has been unable to get other employment, he should recover all the loss actually sustained by a

<sup>7</sup> Texas, etc., *Tel. Co. v. Mackenzie*, 36 Tex. Civ. App. 178, 81 S. W. 581, holding that, where a building contract is lost by the nondelivery of a message containing plaintiff's bid for the work, the measure of damages is the difference between the amount of the bid and what it would have cost plaintiff to erect the building according to the plans and specifications upon which the bid was based.

<sup>8</sup> *Moody v. Leverich*, 14 Abb. Prac. N. S. (N. Y.) 145; *Worth v. Edmonds*, 52 Barb. (N. Y.) 42; *Gillis v. Space*, 63 Barb. (N. Y.) 182.

<sup>9</sup> *Perry v. Dickerson*, 7 Abb. N. C. (N. Y.) 471; *Strauss v. Meertief*, 64 Ala. 308, 38 Am. Rep. 8; *Taylor v. Bradley*, 4 Abb. Dec. (N. Y.) 377, 100 Am. Dec. 415; *Id.*, 39 N. Y. 141; *Tufts v. Plymouth Gold M. Co.*, 14 Allen (Mass.) 413; *Costigan v. Mohawk & H. R. R. Co.*, 2 Denio (N. Y.) 609, 43 Am. Dec. 758; *West. U. Tel. Co. v. Bowman*, 141 Ala. 175, 37 South. 493. The burden is on the company to show that the plaintiff could obtain other employment. It is a question for the jury as to whether a contract had been made. *Id.*



failure to perform caused by the delay of the message. That is, all that would have been made from the time the contract was made and the time it would have expired; and he should not be allowed to recover such claim as might likely accrue after the filing of the suit.<sup>10</sup>

§ 571. **Loss of professional fees.**—The same rule which has just been discussed applies to cases where a professional fee has been lost by a negligent delay in a message. Thus where a message summoning a physician to visit a member of the family who is sick, or where it is a request for an attorney to attend a case, and the message is negligently delayed whereby the fees for such services are lost, the actual damages sustained thereby should be recovered. It is very often the case that professional men have been deprived of fees they otherwise would have obtained had it not been for the company's negligence; and the measure of damages, in such cases, is the amount of fees they would have received, less the amount of fees made while not fulfilling such engagement, and also the extra expenses which necessarily would have been incurred had the services been rendered.<sup>11</sup> Thus, in a case where a message was delayed summoning a physician to make a visit, it was shown that he would have made \$500 had the message been delivered in time and the visit made. The court held that this amount was recoverable, less other fees made during the time he would have been gone. We think that railroad and other similar expenses incurred in making the trip should also be deducted from the amount of fees which would have been made.<sup>12</sup> In any of these cases, the company must have had some information of the character and purpose of the message, in order to have been liable. In these, as in all other cases heretofore discussed, all the damages may be recovered which entered into the contemplation of the parties' minds, at the time the contract of sending was made, as would be the natural and probable results of a breach of such contract; and, unless the company should have had some information of the purpose of the message, such contemplation could not have been entertained by it.<sup>13</sup>

<sup>10</sup> *Uline v. New York Cent., etc., R. Co.*, 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661; *West. U. Tel. Co. v. McKibben*, 114 Ind. 511, 14 N. E. 894.

<sup>11</sup> *West. U. Tel. Co. v. McLaurin*, 70 Miss. 26, 13 South. 36, attorney's fee; *Fairley v. West. U. Tel. Co.*, 73 Miss. 6, 18 South. 796, loss of fee to physician. See, also, *Mood v. West. U. Tel. Co.*, 40 S. C. 524, 19 S. E. 67; *West. U. Tel. Co. v. Longwill*, 5 N. M. 308, 21 Pac. 339; *Barker v. West. U. Tel. Co.*, 134 Wis. 147, 114 N. W. 439, 14 L. R. A. (N. S.) 533, 126 Am. St. Rep. 1017, physician.

<sup>12</sup> *West. U. Tel. Co. v. Longwill*, 5 N. M. 308, 21 Pac. 339.

<sup>13</sup> *West. U. Tel. Co. v. Clifton*, 68 Miss. 307, 8 South. 746. In this case a

§ 572. **Same continued—losses of otherwise professional nature.** While people carrying on a business of a special and particular nature do not, strictly speaking, fall in the class of professional men, yet, their business being somewhat similar, the above rule may, however, be applied to them. Thus, where a person is acting in the capacity of a detective, and is trying to capture a criminal for whose capture there is a reward, he may recover of the company an amount of damages equal to the reward offered, when he has been prevented from making such capture by the company's negligence in delaying a message containing facts of his whereabouts.<sup>14</sup> Where a real estate agent has failed to make his commission in a sale of real estate by reason of the message being negligently delayed, the commission may be recovered.<sup>15</sup> It was held in one case that the fact of the nondelivery of a message in time to enable the party to whom it was sent to meet a train and comply with the directions of the sender does not cause the former party to suffer any damage, but simply to lose a mere opportunity or possibility to make some money, and the company therefore is not liable to him in damages for such nondelivery.<sup>16</sup> This opinion is contrary to the general rule under such cases. In this case the telegram was a request to an undertaker to meet the remains of

party at W. telegraphed to his attorney to meet him there to arrange an assignment. The attorney replied that he would come at once, but this latter message was not delivered, and the party secured a local attorney, and plaintiff lost the expected fee. The only information the company had of the circumstances was from the message which read: "Sent Eckford on first train. Am here. Answer"—and a reply to the effect that E. would come at once. It was held that only nominal damages could be recovered. See *Melson v. West. U. Tel. Co.*, 72 Mo. App. 111. Extrinsic evidence is admissible to show that the company had notice of the importance: *McPeck v. West. U. Tel. Co.*, 107 Iowa, 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214.

<sup>14</sup> *McPeck v. West. U. Tel. Co.*, 107 Iowa, 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214.

<sup>15</sup> *West. U. Tel. Co. v. Fatman*, 73 Ga. 285, 54 Am. Rep. 877; *Hise v. West. U. Tel. Co.*, 137 Iowa, 329, 113 N. W. 819; *West. U. Tel. Co. v. Cook*, 54 Neb. 109, 74 N. W. 395; *Harper v. West. U. Tel. Co.*, 92 Mo. App. 304; *Id.*, 111 Mo. App. 269, 86 S. W. 904; *Levy v. West. U. Tel. Co.*, 39 Okl. 416, 135 Pac. 423.

*Subsequent sale, effect of.*—The commission may be recovered, although at the time of the trial it appears that the plaintiff subsequently negotiated a sale of the same property to another party and earned a larger commission. *Hise v. West. U. Tel. Co.*, *supra*. See *West. U. Tel. Co. v. Allen*, 30 Okl. 229, 119 Pac. 981, 38 L. R. A. (N. S.) 348. But see *Postal Tel. Cable Co. v. Barwise*, 11 Colo. App. 328, 53 Pac. 252, merely asking a quotation of best prices and stating those quoted by a rival concern does not convey such notice as to make the loss of commissions within the contemplation of the parties: *West. U. Tel. Co. v. Twaddell*, 47 Tex. Civ. App. 51, 103 S. W. 1120, message reading, "You can make big money next month—come at once," does not advise the company.

<sup>16</sup> *Clay v. West. U. Tel. Co.*, 81 Ga. 285, 6 S. E. 813, 12 Am. St. Rep. 316.

a certain person at the depot and convey same to another place. As said by the court, in this case: "It is contended that if he had received the telegram, he would have made a considerable amount of money as profits from services rendered. He might have made it, or he might have not." In other words, it was claimed that the sender of the message might have "declined the services" on arrival with the remains, and for this reason the damages were too remote.<sup>17</sup> With all due respect to this learned court, we do not agree with it in this holding. The fact of the sender's not accepting the services of the addressee does not enter into the contemplation of the interested parties to the contract at the time it was made; that is, it does not enter into the contemplation of the addressee's mind, for whose benefit the contract was made, that there would be an acceptance or nonacceptance of his services; neither was this entertained by the sender. That which does enter into his contemplation—and presumed to have been entertained at the same time by the company—is the loss of charges for such services, in case there is a delay; and this may be recovered.

§ 573. **Same continued—such as not recoverable.**—There may be a number of instances, however, when the damages claimed may be too remote or speculative, or, rather, such as would give them the same effect.<sup>18</sup> Thus, if the employment is conjectural or contingent, so that the delivery of the message might or might not have secured the employment or services for the plaintiff, he cannot recover.<sup>19</sup> So it has been held that the failure to secure a position as deputy assessor is not a ground for the recovery of more than nominal damages, where it appears that the deputy holds only at the pleasure of the officer appointing him.<sup>20</sup> If the plaintiff could not have rendered his assistance by reason of being employed in other services, he cannot recover on the first, although the message was negligently delayed; <sup>21</sup> or, if the services could not have been rendered on account of other circumstances, had it been delivered in due time, he cannot recover.<sup>22</sup> Thus, if his services are required some distance from his home, which necessitates him to go by railroad, and no train leaves for that place so that he can

<sup>17</sup> *Id.*

<sup>18</sup> See cases in note 15, *supra*.

<sup>19</sup> *Walser v. West. U. Tel. Co.*, 114 N. C. 440, 19 S. E. 366; *Wilson v. West. U. Tel. Co.*, 124 Ga. 131, 52 S. E. 153; *Johnson v. West. U. Tel. Co.*, 79 Miss. 58, 29 South. 787, 89 Am. St. Rep. 584; *West. U. Tel. Co. v. Connelly*, 2 Willson, Civ. Cas. Ct. App. § 113.

<sup>20</sup> *Kenyon v. West. U. Tel. Co.*, 100 Cal. 454, 35 Pac. 75, plaintiff might have been discharged either with or without cause on the day he was appointed.

<sup>21</sup> *Freeman v. West. U. Tel. Co.*, 93 Ga. 230, 18 S. E. 647.

<sup>22</sup> *Id.*



reach this place in time for his services to be rendered, he cannot recover, if the message was delayed, when the same would have been the result had it not been delayed.

§ 574. **Losses which might have been prevented.**—The statutes in many states have classed telegraph companies under the head of common carriers, and yet, irrespective of this fact, their duties and obligations toward the public are somewhat similar to the former.<sup>23</sup> It is only the nature of their employment that makes them different. One engages itself to transmit news, and the other to transport property. The one has under its control property which is invisible, while the other is intrusted with visible and tangible property. For this reason it is more difficult for one to safely accomplish its duties than the other. It is for this that one is considered under the common law as being an insurer, while the other is acting in a quasi-insuring capacity, but with respect to their negligence they are equally liable. A common carrier engages to transport property in its tangible state from one place to another, and on a failure, through its negligence, so to do, it will be liable for all the natural and proximate results which could have been prevented. In other words, if a loss in the transportation of goods has been sustained, which could have been prevented by the injured party had the carrier properly discharged its duty, it will be liable. The same rule will apply to telegraph companies. For instance, if a loss has been sustained by reason of a message being negligently sent or delivered, and the same could have been prevented by the plaintiff, or injured party, had the company properly discharged its duty with respect to such message, it will be liable for all the natural and direct consequences arising from such failure of duty.<sup>24</sup> Thus, where the company's negligence prevents plaintiff from stopping a sale of his property under foreclosure, he is not bound, in order to recover damages, to show that he has been ejected from the property; the loss of his title is enough. But he must be able to show that, had the message been duly delivered, he would have been able to command the money necessary to stop the sale.<sup>25</sup>

§ 575. **Same continued—must show same would have been prevented.**—In order to recover under the above rule, it must be

<sup>23</sup> See chapter 11.

<sup>24</sup> *Bodkin v. West. U. Tel. Co.* (C. C.) 31 Fed. 134; *West. U. Tel. Co. v. McCormick* (Miss.) 27 South. 606; *Wolfskehl v. West. U. Tel. Co.*, 46 Hun (N. Y.) 542; *Wallingford v. West. U. Tel. Co.*, 60 S. C. 201, 38 S. E. 443, 629; *West. U. Tel. Co. v. Shumate*, 2 Tex. Civ. App. 429, 21 S. W. 109. See, also, § 549.

<sup>25</sup> *West. U. Tel. Co. v. Hearne*, 7 Tex. Civ. App. 67, 26 S. W. 478.

shown, in every case, that there has been a loss sustained by the company's negligence, and that the same could and would have been prevented.<sup>26</sup> Thus, where the action is for a failure to deliver a message summoning a physician to visit plaintiff's wife, damages cannot be recovered for the loss of her services, unless it is shown that a prompt delivery of the message and the arrival of the physician would have saved her life.<sup>27</sup> In such cases, it is a question for the jury to say as to whether or not the patient, to whom he was summoned, was injured by the delay, and whether the result would have been different had the dispatch been delivered.<sup>28</sup> A case somewhat similar to this is, where the father was unable, by a negligent delay of a message, to prevent the marriage of his minor child. In this case he was allowed to recover the amount of the child's services from the time of the marriage until it should have reached its majority.<sup>29</sup> The gist of the action, in these cases, is the loss of services, and it must be shown that there was a loss in this respect, and that the same not only could but would have been prevented, had the company not been guilty of negligence. So, if the plaintiff is deprived of the services of the person for whom he sues, no recovery can be had so long as that state of affairs exists. Where there is a loss of any nature, sustained by the negligent act of the company, the injured person may recover for same if he can show that it would have been prevented in the absence of such negligence. For instance, where a message from a sister to a brother reading: "Mother started to-night," was changed in its transmission so as to read, "Mother died to-night." It was held that the brother could recover for all the expense he was put to in preparing for the funeral, including flowers bought for said occasion.<sup>30</sup>

§ 576. **Failing debtors—messages from creditors regarding same.** Cases similar to those discussed in the preceding section have been instituted where messages have been sent by creditors to their agents in regard to failing debtors, but for the reason that they were negligently delayed by the company, they failed to accomplish their desired purposes. In these the creditors were allowed to recover the

<sup>26</sup> West. U. Tel. Co. v. Cornwell, 2 Colo. App. 491, 31 Pac. 393; West. U. Tel. Co. v. Norton (Tex. Civ. App.) 62 S. W. 1081; West. U. Tel. Co. v. Patton (Tex. Civ. App.) 55 S. W. 973; Cutts v. West. U. Tel. Co., 71 Wis. 46, 36 N. W. 627; Giddens v. West. U. Tel. Co., 111 Ga. 824, 35 S. E. 638. See, also, § 550.

<sup>27</sup> Slaughter v. West. U. Tel. Co. (Tex. Civ. App.) 112 S. W. 688; West. U. Tel. Co. v. Haley, 143 Ala. 586, 39 South. 386.

<sup>28</sup> Brown v. West. U. Tel. Co., 6 Utah, 219, 21 Pac. 988.

<sup>29</sup> West. U. Tel. Co. v. Procter, 6 Tex. Civ. App. 300, 25 S. W. 811.

<sup>30</sup> West. U. Tel. Co. v. Hines, 22 Tex. Civ. App. 315, 54 S. W. 627.

loss which could and would have been prevented but for the company's negligence.<sup>31</sup> Thus, where a creditor telegraphed his attorney of the failing circumstances of his debtor, with the instruction to attach his property, but on account of the delay in the delivery of the message to the attorney he failed to attach until four days after the time the message should have been delivered, and, in the meantime, the debtor's property was fully covered by other attachments, the company will be liable for the loss of the debt.<sup>32</sup> If the message was delivered on time, but was altered in its transmission so as to show that the claim was less than it really was, the difference in the actual debt and that as shown in the message may be recovered, if this amount has been lost by other creditors having attached all of his other property.<sup>33</sup> In either case, it must be shown that the loss was the result of the company's negligence, and but for this the loss could and would have been prevented.<sup>34</sup> For instance, an attorney, who was representing the plaintiff in a certiorari proceeding, sent a message containing notice of hearing. On account of the message not being delivered in time, the proceedings were dismissed for want of notice, and the attorney thereupon paid his client the amount involved in the suit and instituted suit to recover damages of the company. It was held that he could not recover in the absence of proof that he would have succeeded.<sup>35</sup>

<sup>31</sup> *Pacific Tel. Cable Co. v. Fleischner*, 66 Fed. 899, 14 C. C. A. 166; *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589; *Bierhaus v. West. U. Tel. Co.*, 8 Ind. App. 246, 34 N. E. 581; *Bryant v. American Tel. Co.*, 1 Daly (N. Y.) 575; *West. U. Tel. Co. v. Sheffield*, 71 Tex. 570, 10 S. W. 752, 10 Am. St. Rep. 790; *West. U. Tel. Co. v. Wofford* (Tex. Civ. App.) 42 S. W. 119; *West. U. Tel. Co. v. Beals*, 56 Neb. 415, 76 N. W. 903, 71 Am. St. Rep. 682; *Fleischner v. Pacific Postal Tel. Cable Co.* (C. C.) 55 Fed. 738; *Baird v. West. U. Tel. Co.*, 79 S. C. 310, 60 S. E. 695; *Hartstein v. West. U. Tel. Co.*, 89 Wis. 531, 62 N. W. 412.

<sup>32</sup> *Hartstein v. West. U. Tel. Co.*, 89 Wis. 531, 62 N. W. 412. In this case it was held that the loss of the debt was too remote where there was no proof that the plaintiff would have left immediately on receipt of the telegram and the debtor would have secured the claim. *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589; *Fleischner v. Pacific Postal Tel. Cable Co.* (C. C.) 55 Fed. 738.

<sup>33</sup> *Bryant v. American Tel. Co.*, 1 Daly (N. Y.) 575; *West. U. Tel. Co. v. Beals*, 56 Neb. 415, 76 N. W. 903, 71 Am. St. Rep. 682. In this case the message as delivered to the company read, "Attach property of A. for seven hundred and ninety dollars," and as received read, "Attach property of A. for even hundred and ninety dollars."

<sup>34</sup> *Hartstein v. West. U. Tel. Co.*, 89 Wis. 531, 62 N. W. 412; *West. U. Tel. Co. v. Bailey*, 115 Ga. 725, 42 S. E. 89, 61 L. R. A. 933; *Martin v. Sunset Tel. Co.*, 18 Wash. 260, 51 Pac. 376; *West. U. Tel. Co. v. Gideumb* (Tex. Civ. App.) 28 S. W. 699.

<sup>35</sup> *Evidence held sufficient* to show that plaintiff's debt would have been secured if the message had been promptly delivered. See *Hartstein v. West. U. Tel. Co.*, 89 Wis. 531, 62 N. W. 412.



in the proceeding had it not been for the negligence of the company.<sup>36</sup> In another case, where the company's agent, in order to save himself and others, willfully withholds a message to a branch bank announcing the failure of its principal until some time after the bank has opened, the company is liable for all the money paid out by the bank between the time when the message should have been delivered and the time when it was actually delivered.<sup>37</sup>

§ 577. **Failure to transmit money.**—It has become a very common thing for money to be transmitted by telegraph companies; or, rather, means are furnished by which the same results are accomplished. When such undertakings have been assumed, it is as much the duty to make speedy transmission of the money, or accomplish the same results, as it is to transmit messages pertaining to other business. So, where they are employed to transmit money, and there is a failure to do so, or there is an unreasonable delay in delivery, the company will be liable to the party to whom the money was sent for the actual damages sustained thereby. The measure of damages in such cases is the interest on the money from the time it should have been delivered to the time it was actually delivered, together with the cost of the message.<sup>38</sup> Any loss other than this would be too remote.<sup>39</sup> Thus, where the plaintiff sues for being put out of his house,<sup>40</sup> or for injury to his reputation,<sup>41</sup> or for loss of credit<sup>42</sup> on account of the delay of the company in transmitting money sent to him it was held that the dam-

*Notice to company.*—A message to plaintiff from his agent reading: "You had better come and attend to your claim at once," is sufficient to charge the company with notice of its purpose and the necessity of prompt delivery so as to make damages due to the loss of the debt by reason of the other creditors obtaining attachments reasonably within the contemplation of the parties. *West. U. Tel. Co. v. Sheffield*, 71 Tex. 570, 10 S. W. 752, 10 Am. St. Rep. 790.

<sup>36</sup> *West. U. Tel. Co. v. Bailey*, 115 Ga. 725, 42 S. E. 89, 61 L. R. A. 933.

<sup>37</sup> *Stiles v. West. U. Tel. Co.*, 2 Ariz. 308, 15 Pac. 712; *Baird v. West. U. Tel. Co.*, 79 S. C. 310, 60 S. E. 695, holding that, where plaintiff was instructed to draw on a bank for the amount of a debt, and the message was not delivered, and subsequently the funds of the debtor were paid out on other claims, it was held that plaintiff might recover for the loss of the debt.

<sup>38</sup> *Smith v. West. U. Tel. Co.*, 150 Pa. 561, 24 Atl. 1049; *Robinson v. West. U. Tel. Co.*, 68 S. W. 656, 24 Ky. Law Rep. 452, 57 L. R. A. 611; *De Voegler v. West. U. Tel. Co.*, 10 Tex. Civ. App. 229, 30 S. W. 1107; *Stansell v. West. U. Tel. Co. (C. C.)* 107 Fed. 668; *Ricketts v. West. U. Tel. Co.*, 10 Tex. Civ. App. 226, 30 S. W. 1105. See, also, *Gooch v. West. U. Tel. Co.*, 90 S. W. 587, 28 Ky. Law Rep. 828; *Cason v. West. U. Tel. Co.*, 77 S. C. 157, 57 S. E. 722.

<sup>39</sup> *Stansell v. West. U. Tel. Co. (C. C.)* 107 Fed. 668.

<sup>40</sup> *Id.*

<sup>41</sup> *Stansell v. West. U. Tel. Co. (C. C.)* 107 Fed. 668; *Capers v. West. U. Tel. Co.*, 71 S. C. 29, 50 S. E. 537.

<sup>42</sup> *Smith v. West. U. Tel. Co.*, 150 Pa. 561, 24 Atl. 1049.

ages were too remote. In order to stop the running of interest, the company must tender to the injured person the money sent, and not merely a check for same.<sup>43</sup> The company may, however, have notice of facts and circumstances such as to render it liable for special damages.<sup>44</sup>

§ 578. Messages summoning physicians or veterinaries.—Where an effort is made by means of a telegram to summon a physician to attend a sick person, but such telegram is delayed as a result of the company's negligence, a recovery may be had for any increased physical or mental suffering incident thereto,<sup>45</sup> provided the company had information at the time that such suffering would be the natural and proximate result of such delay.<sup>46</sup> But the mere fact of the telegram being addressed to a physician would not be sufficient notice to inform the company of such consequences,<sup>47</sup> unless it directed him to come at once,<sup>48</sup> or shows in some other way that the patient is suffering physically<sup>49</sup> or mentally and that such damages will be the result.<sup>50</sup> In the cases arising on this question, and those supporting the text, it was apparently conceded, if not affirmatively shown, that the physician would have gone to see the sick person, or was under some obligation to do so.<sup>51</sup>

<sup>43</sup> *Robinson v. West. U. Tel. Co.*, 68 S. W. 656, 24 Ky. Law Rep. 452, 57 L. R. A. 611.

<sup>44</sup> *West. U. Tel. Co. v. Wells*, 50 Fla. 474, 39 South. 838, 111 Am. St. Rep. 129, 2 L. R. A. (N. S.) 1072, 7 Ann. Cas. 531.

<sup>45</sup> *West. U. Tel. Co. v. Church*, 3 Neb. (Unof.) 22, 90 N. W. 878, 57 L. R. A. 905; *West. U. Tel. Co. v. McCall*, 9 Kan. App. 886, 58 Pac. 797; *Carter v. West. U. Tel. Co.*, 141 N. C. 374, 54 S. E. 274; *West. U. Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728; *West. U. Tel. Co. v. Lavender (Tex. Civ. App.)* 40 S. W. 1035; *Brown v. West. U. Tel. Co.*, 6 Utah, 219, 21 Pac. 988; *West. U. Tel. Co. v. Morris*, 83 Fed. 992, 28 C. C. A. 56; *Glawson v. West. U. Tel. Co.*, 9 Ga. App. 450, 71 S. E. 747; *Cumberland Tel. & Tel. Co. v. Carter*, 1 Tenn. Civ. App. 750; *Alexander v. West. U. Tel. Co.*, 158 N. C. 473, 74 S. E. 449, 42 L. R. A. (N. S.) 407. But see, contra, *Seifert v. West. U. Tel. Co.*, 129 Ga. 181, 58 S. E. 699, 121 Am. St. Rep. 211, 11 L. R. A. (N. S.) 1149.

<sup>46</sup> *Williams v. West. U. Tel. Co.*, 136 N. C. 82, 48 S. E. 559, 1 Ann. Cas. 359.

<sup>47</sup> *Id.*

<sup>48</sup> *West. U. Tel. Co. v. Lavender (Tex. Civ. App.)* 40 S. W. 1035; *West. U. Tel. Co. v. Church*, 3 Neb. (Unof.) 22, 90 N. W. 878, 57 L. R. A. 905; *Carswell v. West. U. Tel. Co.*, 154 N. C. 112, 69 S. E. 782, 32 L. R. A. (N. S.) 611.

<sup>49</sup> *Brown v. West. U. Tel. Co.*, 6 Utah, 219, 21 Pac. 988.

<sup>50</sup> *West. U. Tel. Co. v. Church*, 3 Neb. (Unof.) 22, 90 N. W. 878, 57 L. R. A. 905; *Carter v. West. U. Tel. Co.*, 141 N. C. 374, 54 S. E. 274; *West. U. Tel. Co. v. McCall*, 9 Kan. App. 886, 58 Pac. 797; *Brown v. West. U. Tel. Co.*, 6 Utah, 209, 21 Pac. 988; *Glawson v. West. U. Tel. Co.*, 9 Ga. App. 450, 71 S. E. 747.

<sup>51</sup> *Slaughter v. West. U. Tel. Co. (Tex. Civ. App.)* 112 S. W. 688; *West. U. Tel. Co. v. Haley*, 143 Ala. 586, 39 South. 386; *Southern Bell Tel. Co. v. Reynolds*, 139 Ga. 385, 77 S. E. 388.

So, if it should be shown that he could or would not have gone or could not have arrived in time, damages could not be recovered. Under the same principle as that herein stated, damages for the loss of an animal may be recovered where the same has been incurred by the failure of the company in not delivering a message summoning a veterinary.<sup>52</sup> The delay in delivering the message or the nondelivery of same must be the proximate cause of the loss,<sup>53</sup> which need not be proved with absolute certainty,<sup>54</sup> but with evidence which will fairly establish the fact without speculation or conjecture.<sup>55</sup>

§ 579. **Messages requesting addressee to meet sender.**—Where the sender of a message requests the addressee thereof to meet him at a railroad station, with or without a conveyance, but the telegraph company negligently fails to deliver the message or to deliver it in time, no damages can be recovered as a usual rule, unless it may be for the expense in hiring a public conveyance to take him to the place he expected to go.<sup>56</sup> The action in such cases is usually brought to recover damages for mental anguish arising in consequence of the disappointment or inconvenience thereby suffered, but such disappointment or inconvenience is not such "anguish" as is contemplated in mental anguish cases.<sup>57</sup> The company would have no reason, in such instances, to presume that a person who is thereby disappointed would become sick,<sup>58</sup> nerv-

<sup>52</sup> *Hendershot v. West. U. Tel. Co.*, 106 Iowa, 529, 76 N. W. 828, 68 Am. St. Rep. 313. See, also, *Central Union Tel. Co. v. Swoveland*, 14 Ind. App. 341, 42 N. E. 1035.

<sup>53</sup> See *Central Union Tel. Co. v. Swoveland*, 14 Ind. App. 341, 42 N. E. 1035.

<sup>54</sup> *Hendershot v. West. U. Tel. Co.*, 106 Iowa, 529, 76 N. W. 828, 68 Am. St. Rep. 313.

<sup>55</sup> *Central Union Tel. Co. v. Swoveland*, 14 Ind. App. 341, 42 N. E. 1035; *Duncan v. West. U. Tel. Co.*, 87 Wis. 173, 58 N. W. 75.

<sup>56</sup> *West. U. Tel. Co. v. Hogue*, 79 Ark. 33, 94 S. W. 924; *West. U. Tel. Co. v. Westmoreland*, 151 Ala. 319, 44 South. 382; *West. U. Tel. Co. v. Henley*, 23 Ind. App. 14, 54 N. E. 775; *Yazoo, etc., R. Co. v. Foster* (Miss.) 23 South. 581; *West. U. Tel. Co. v. Bryant*, 17 Ind. App. 70, 46 N. E. 358; *Todd v. West. U. Tel. Co.*, 77 S. C. 522, 58 S. E. 433; *Williams v. West. U. Tel. Co.*, 136 N. C. 82, 48 S. E. 559, 1 Ann. Cas. 359; *Kirby v. West. U. Tel. Co.*, 77 S. C. 404, 58 S. E. 10, 122 Am. St. Rep. 580; *West. U. Tel. Co. v. Smith*, 76 Tex. 253, 13 S. W. 169; *Jones v. West. U. Tel. Co.*, 75 S. C. 208, 55 S. E. 318; *West. U. Tel. Co. v. Campbell*, 36 Tex. Civ. App. 276, 81 S. W. 580; *West. U. Tel. Co. v. Ragland* (Tex. Civ. App.) 61 S. W. 421; *Stafford v. West. U. Tel. Co.* (C. C.) 73 Fed. 273.

<sup>57</sup> See chapter XXIII.

<sup>58</sup> *West. U. Tel. Co. v. Campbell*, 36 Tex. Civ. App. 276, 82 S. W. 580; *West. U. Tel. Co. v. Smith*, 76 Tex. 253, 13 S. W. 169; *West. U. Tel. Co. v. Ragland* (Tex. Civ. App.) 61 S. W. 421. But see *Dempsey v. West. U. Tel. Co.*, 77 S. C. 399, 58 S. E. 9.



ous,<sup>59</sup> or otherwise subjected to any physical suffering<sup>60</sup> as a result of such negligence. However, if the company should have any notice that such person would be subjected to any special damages as a result of its negligence, the rule would be otherwise.<sup>61</sup>

<sup>59</sup> West. U. Tel. Co. v. Henley, 23 Ind. App. 14, 54 N. E. 775.

<sup>60</sup> Kirby v. West. U. Tel. Co., 77 S. C. 404, 58 S. E. 10, 122 Am. St. Rep. 580; West. U. Tel. Co. v. Bryant, 17 Ind. App. 70, 46 N. E. 358. But see West. U. Tel. Co. v. Karr, 5 Tex. Civ. App. 60, 24 S. W. 302. See Hildreth v. West. U. Tel. Co., 56 Fla. 387, 47 South. 820.

<sup>61</sup> West. U. Tel. Co. v. Powell, 54 Tex. Civ. App. 466, 118 S. W. 226; Dempsey v. West. U. Tel. Co., 77 S. C. 399, 58 S. E. 9; West. U. Tel. Co. v. Crawford, 29 Okl. 143, 116 Pac. 925, 35 L. R. A. (N. S.) 930; Trigg v. West. U. Tel. Co., 4 Ga. App. 416, 61 S. E. 855; West. U. Tel. Co. v. Bryant, 17 Ind. App. 70, 46 N. E. 358; West. U. Tel. Co. v. Farrington (Tex. Civ. App.) 131 S. W. 609; Kirby v. West. U. Tel. Co., 77 S. C. 404, 58 S. E. 10, 122 Am. St. Rep. 580; Hildreth v. West. U. Tel. Co., 56 Fla. 387, 47 South. 820. See West. U. Tel. Co. v. Collins, 156 Ala. 333, 47 South. 61.

## CHAPTER XXIII

## DAMAGES CONTINUED—FOR MENTAL ANGUISH

- § 580. In general.
581. Same continued—subject divided.
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583. Action in contract or tort—rule the same.
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589. Instances in which damages are allowed.
590. Limitation of rule—prolongation of mental anguish.
591. Same continued—suffering must be real.
592. Same continued—must be the result of the cause of complaint.
593. Same continued—suffering must be of the plaintiff.
594. Same continued—anguish from independent causes.
595. Unwarranted apprehension.
596. Failure to meet plaintiff.
597. Summoning a physician.
598. Same continued—must have prevented the injury.
599. Same continued—postponement of funeral services.
600. Same continued—failure to transmit money—no cause.
601. Evidence of mental suffering.
602. Same continued—aggravation of suffering.
603. Same continued—sickness as a result—admissible.
604. Same continued—matters of defense—want of affection.
605. Relationship material.
606. Nature of damages.
607. Actions do not survive—limitation.
608. Burden of proof—presumption.
609. Damages for mental suffering—doctrine denied.
610. When may be basis of action—malicious or willful wrong.
611. Reasons for not allowing such damages.
612. Same continued—other reasons—nominal damages—incidental to other injury.
613. Same continued—mental suffering following physical pain.
614. Conflict of law—with respect to mental damages.
615. Under statutes—constitutionality of.

§ 580. In general.—There is no subject which has been so thoroughly discussed, and upon which there has been so many inequitable decisions rendered, as in cases against telegraph companies brought to recover damages for mental injuries, in consequence of their negligence in transmitting or delivering messages. There are innumerable instances in which these companies should suffer the

results of their negligent acts; however, there are many cases brought against them in which they are unmercifully and unjustly dealt with. Among these are most often to be found suits brought to recover damages for mental anguish. While corporations of all kinds are very grasping, and are becoming too much of a monopoly, yet there is no doubt that they have been very instrumental in the upbuilding and in the progress of our country. Where works of enterprise were too great or too hazardous for one man to undertake, the same have been most happily carried out and performed by a number of individuals, incorporated into one body and operating under the powers of corporations. Because of the fact that they are bodies politic, and generally representatives of wealth, the majority of the people seem prejudiced against them; and whenever there is an opportunity given it seems difficult to do them the same justice as is done to individuals. It may seem, that these remarks are unnecessary; but, as is said above, these companies are often unjustly dealt with, not by the courts or those people learned in the law, but by those who sit upon the juries in deciding cases, and there is no time, it seems, when such favorable opportunities present themselves as in those cases which we propose to discuss in this chapter.

§ 581. **Same continued—subject divided.**—On account of the importance and the peculiar nature of the subject of mental injuries, and the manner in which these are ascertained and compensated for, the closest study and reasoning are required. Therefore, because of its importance, we shall discuss in this chapter mental suffering and anguish as it stands alone, disconnected from other injuries; how it was considered under the common law; the changes made by later decisions and statutes. Then we shall discuss it when connected with other injuries.

§ 582. **Damages for mental anguish and suffering.**—Until a comparatively recent date, it was held, both by the English and American courts, that damages could not be recovered for mental anguish and suffering alone, unaccompanied by pecuniary damages or physical injury, although it may have been the proximate result of negligence on the part of the wrongdoer.<sup>1</sup> This subject

<sup>1</sup> West. U. Tel. Co. v. Ferguson, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846; Chapman v. West. U. Tel. Co., 88 Ga. 763, 15 S. E. 901, 30 Am. St. Rep. 183, 17 L. R. A. 430; Francis v. West. U. Tel. Co., 58 Minn. 259, 59 N. W. 1078, 49 Am. St. Rep. 507, 25 L. R. A. 406; Connelly v. West. U. Tel. Co., 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919, 56 L. R. A. 663; West. U. Tel. Co. v. Rogers, 68 Miss. 748, 9 South. 823, 24 Am. St. Rep. 300, 13 L. R. A. 859; West. U. Tel. Co. v. Sklar, 126 Fed. 295, 61 C. C. A. 281.



was early considered by the English authorities, and it was there unanimously held that the injuries were not sufficient to sustain a suit.<sup>2</sup> "Mental pain and anxiety," as said in an early opinion on this subject, "the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though where material damage occurs, and is connected with it, it is impossible that a jury, in estimating it, should altogether overlook the feelings of the party interested."<sup>3</sup> It might be considered in some cases as an aggravation of damages. For instance, in assault and battery and seduction cases, damages could only be recovered for the loss of services, but it was held that the mental suffering could be considered as an aggravation of damages to be recovered. These early English decisions have been, and are, with few exceptions, followed by all the courts of our country. There was but one class of cases—later followed by another—where damages could be recovered for mental suffering unaccompanied by other injuries, and that was for a breach of contract of marriage. In these latter cases, the jury was allowed to take into consideration "the injury to the plaintiff's feelings, affections and wounded pride, and the pain and mortification resulting from the breach of contract," and award damages therefor.<sup>4</sup> In cases of willful wrong—especially those affecting the liberty, character, reputation, personal security or domestic relations of the injured party—injuries to the feelings were sufficient grounds to maintain an action thereon.<sup>5</sup>

**§ 583. Action in contract or tort—rule the same.**—Where the action is to recover damages for mental suffering in consequence of a telegraph company not properly transmitting or delivering a message, it is immaterial whether the action be brought for the breach of the contract for sending or for the failure to perform the duty devolving on it under the contract. In other words, the rule that such damages cannot be recovered for mental anguish and suffering alone is the same whatever be the form of the action. The nature and substance of the default and the consequent injury are

<sup>2</sup> *Allsop v. Allsop*, 5 Hurl. & N. 554.

<sup>3</sup> *Allsop v. Allsop*, 5 Hurl. & N. 554. See, also, *Lynch v. Knight*, 9 H. L. Cas. 592.

<sup>4</sup> See extensive note to *Weaver v. Bachert*, 44 Am. Dec. 178. See, also, *Milington v. Loring*, L. R. 6 Q. B. Div. 190, 50 L. J. Q. B. 214, 43 L. T. 659, 29 Wkly. Rep. 257; *King v. Kersey*, 2 Ind. 402; *Haymond v. Saucer*, 84 Ind. 3; *Hill v. Maupin*, 3 Mo. 323; *Roper v. Clay*, 18 Mo. 383, 59 Am. Dec. 314; *Giese v. Schultz*, 53 Wis. 462, 10 N. W. 598; *Grant v. Willey*, 101 Mass. 356; *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547; *Renihan v. Wright*, 125 Ind. 536, 25 N. E. 822, 21 Am. St. Rep. 249, 9 L. R. A. 514.

<sup>5</sup> *West. U. Tel. Co. v. Rogers*, 68 Miss. 748, 9 South. 823, 24 Am. St. Rep. 300, 13 L. R. A. 859n.

the same in either form.<sup>6</sup> If, however, the action is to recover damages for mental suffering where it accompanies other injuries to the person, the rule is different. There is more latitude allowed in the recovery of damages brought in tort, since in this form of action damages for mental suffering are generally a subject of consideration for the jury.<sup>7</sup>

§ 584. **Rule departed from.**—The first instance in which this long-recognized rule of the common law was departed from was by the supreme court of Texas in the *So Relle* Case.<sup>8</sup> In this case it was held that the addressee of a telegraph message might recover from the company, as compensation, damages for mental suffering caused by its failure to deliver promptly a message which announced the death of his mother, by reason of which default he failed to attend her funeral. In support of the ruling in this case, the court cited three cases. One was an action for assault and battery;<sup>9</sup> another was a case in which a serious and permanent personal injury had been sustained;<sup>10</sup> and the last case cited was where the wrongful act charged was the seduction of the plaintiff's daughter.<sup>11</sup> In all of these, as a matter of course, and in accordance with generally admitted rules, damages for mental suffering were allowed.<sup>12</sup> This court relied mainly, however, on the following passage from the text of *Shearman & Redfield on Negligence*: "In case of a delay or total failure of delivery of a message

<sup>6</sup> *West. U. Tel. Co. v. Rogers*, 68 Miss. 748, 9 South. 823, 24 Am. St. Rep. 300, 13 L. R. A. 859; *Young v. West. U. Tel. Co.*, 107 N. C. 383, 11 S. E. 1044, 22 Am. St. Rep. 883, 9 L. R. A. 669; *West. U. Tel. Co. v. Potts*, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 997, 19 L. R. A. (N. S.) 479; *Harrison v. West. U. Tel. Co.*, 143 N. C. 147, 55 S. E. 435, 10 Ann. Cas. 476. But see *West. U. Tel. Co. v. Brown*, 6 Ala. App. 339, 59 South. 329; *West. U. Tel. Co. v. Hill*, 163 Ala. 18, 50 South. 248, 19 Ann. Cas. 1058, 23 L. R. A. (N. S.) 648; *West. U. Tel. Co. v. Adams*, 154 Ala. 657, 46 South. 228; *McGehee v. West. U. Tel. Co.*, 169 Ala. 109, 53 South. 205, Ann. Cas. 1912B, 512; *West. U. Tel. Co. v. Haley*, 143 Ala. 586, 39 South. 386; *West. U. Tel. Co. v. Fuel*, 165 Ala. 391, 51 South. 571; *West. U. Tel. Co. v. Krichbaum*, 132 Ala. 535, 31 South. 607; *West. U. Tel. Co. v. Waters*, 139 Ala. 652, 36 South. 773; *West. U. Tel. Co. v. Rowell*, 153 Ala. 295, 45 South. 73; *Manker v. West. U. Tel. Co.*, 137 Ala. 292, 34 South. 839; *West. U. Tel. Co. v. Manker*, 145 Ala. 418, 41 South. 850.

<sup>7</sup> *Cowan v. West. U. Tel. Co.*, 122 Iowa, 379, 98 N. W. 281, 101 Am. St. Rep. 268, 64 L. R. A. 545.

<sup>8</sup> *So Relle v. West. U. Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805. See, also, *West. U. Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846; *Chapman v. West. U. Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 30 Am. St. Rep. 183, 17 L. R. A. 430; *Connelly v. West. U. Tel. Co.*, 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919, 56 L. R. A. 663.

<sup>9</sup> *Hays v. Houston, etc., R. Co.*, 46 Tex. 279.

<sup>10</sup> *Houston, etc., R. Co. v. Randall*, 50 Tex. 261.

<sup>11</sup> *Phillips v. Hoyle*, 4 Gray (Mass.) 568.

<sup>12</sup> See note 3.

relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages on account of the want of strict commercial value in such messages. Delay in the announcement of a death, an arrival, the straying and recovery of a child, and the like, may often be productive of an injury to the feelings which cannot be estimated in money, but for which a jury should be at liberty to award fair damages."<sup>13</sup>

§ 585. Same continued—**So Relle Case overruled and reinstated.** In a later case, the court of Texas went counter to the view taken in the So Relle Case, and held that if the plaintiff is not entitled to recover even nominal damages, as for a breach of a contract and has sustained no injury to his reputation, property or person, he can have no recovery for mental suffering alone.<sup>14</sup> In another case it was held that damages for mental distress could be recovered where nominal damages were proved, in cases where there was such gross negligence or willfulness as to justify exemplary damages.<sup>15</sup> But both of these cases have since been overruled;<sup>16</sup> so that the So Relle Case has been reinstated as the law of Texas, and has been followed by a number of decisions of the same court.<sup>17</sup> And the

<sup>13</sup> Shearman & R. Neg. (4th Ed.) § 756. See, also, *West. U. Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846; *Chapman v. West. U. Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 30 Am. St. Rep. 183, 17 L. R. A. 430.

<sup>14</sup> *Gulf, C. & Santa Fé R. Co. v. Levy*, 59 Tex. 563, 46 Am. Rep. 278.

<sup>15</sup> *Gulf, C. & Santa Fé R. Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269.

<sup>16</sup> *Stuart v. West. U. Tel. Co.*, 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623.

<sup>17</sup> *West. U. Tel. Co. v. Erwin (Tex.)* 19 S. W. 1002; *West. U. Tel. Co. v. Linn*, 87 Tex. 7, 26 S. W. 490, 47 Am. St. Rep. 58; *West. U. Tel. Co. v. Beringer*, 84 Tex. 38, 19 S. W. 336; *West. U. Tel. Co. v. Rosentreter*, 80 Tex. 406, 16 S. W. 25; *West. U. Tel. Co. v. Nations*, 82 Tex. 539, 18 S. W. 709, 27 Am. St. Rep. 914; *West. U. Tel. Co. v. Simpson*, 73 Tex. 422, 11 S. W. 385; *West. U. Tel. Co. v. Brown*, 71 Tex. 723, 10 S. W. 323, 2 L. R. A. 766; *West. U. Tel. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843; *West. U. Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728; *Stuart v. West. U. Tel. Co.*, 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623; *Loper v. West. U. Tel. Co.*, 70 Tex. 689, 8 S. W. 600; *West. U. Tel. Co. v. Seffel*, 31 Tex. Civ. App. 134, 71 S. W. 616; *West. U. Tel. Co. v. Warren (Tex. Civ. App.)* 36 S. W. 314; *Roach v. Jones*, 18 Tex. Civ. App. 231, 44 S. W. 677; *West. U. Tel. Co. v. Smith (Tex. Civ. App.)* 33 S. W. 742; *West. U. Tel. Co. v. Kinsley*, 8 Tex. Civ. App. 527, 28 S. W. 831; *West. U. Tel. Co. v. O'Keefe (Tex. Civ. App.)* 29 S. W. 1137; *West. U. Tel. Co. v. May*, 8 Tex. Civ. App. 176, 27 S. W. 760; *West. U. Tel. Co. v. Neel (Tex. Civ. App.)* 25 S. W. 661; *West. U. Tel. Co. v. Jobe*, 6 Tex. Civ. App. 403, 25 S. W. 168, 1036; *West. U. Tel. Co. v. Carter*, 2 Tex. Civ. App. 624, 21 S. W. 688; *West. U. Tel. Co. v. Gilliland (Tex. Civ. App.)* 130 S. W. 212; *Southwestern Tel. Co. v. Pearson (Tex. Civ. App.)* 137 S. W. 733; *West. U. Tel. Co. v. Moran*, 52 Tex. Civ. App. 117, 113 S. W. 625; *West. U. Tel. Co. v. Barrett*, 55 Tex. Civ. App. 323, 118 S. W. 1089; *West. U. Tel. Co. v. Cobb (Tex. Civ. App.)* 118 S. W. 717; *West. U. Tel. Co. v. McDavid (Tex. Civ. App.)* 121 S. W. 893; *West. U. Tel. Co. v. Bennett*, 58 Tex. Civ. App. 60, 124



courts of a few of the other states to a greater or less extent.<sup>18</sup> The decisions in the Texas courts are not themselves harmonious and have not escaped the severe criticism of text-writers and other

S. W. 151; West. U. Tel. Co. v. Rabon, 60 Tex. Civ. App. 88, 127 S. W. 580; West. U. Tel. Co. v. Mack, 60 Tex. Civ. App. 644, 128 S. W. 921.

<sup>18</sup> *Alabama*.—West. U. Tel. Co. v. Crocker, 135 Ala. 492, 33 South. 45, 59 L. R. A. 398; West. U. Tel. Co. v. McNair, 120 Ala. 99, 23 South. 801; West. U. Tel. Co. v. Crumpton, 138 Ala. 632, 36 South. 517; West. U. Tel. Co. v. Adair, 115 Ala. 441, 22 South. 73; West. U. Tel. Co. v. Wilson, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23; West. U. Tel. Co. v. Cunningham, 99 Ala. 314, 14 South. 579; West. U. Tel. Co. v. Henderson, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; West. U. Tel. Co. v. Jackson, 163 Ala. 9, 50 South. 316; West. U. Tel. Co. v. Saunders, 164 Ala. 234, 51 South. 176, 137 Am. St. Rep. 35; West. U. Tel. Co. v. McMorris, 158 Ala. 563, 48 South. 349, 132 Am. St. Rep. 46; West. U. Tel. Co. v. Fuel, 165 Ala. 391, 51 South. 571; West. U. Tel. Co. v. Cleveland, 169 Ala. 131, 53 South. 80, Ann. Cas. 1912B, 534; Lay v. Postal Tel. Cable Co., 171 Ala. 172, 54 South. 529; West. U. Tel. Co. v. Snell, 3 Ala. App. 263, 56 South. 854; West. U. Tel. Co. v. North, 177 Ala. 319, 58 South. 299.

*Arkansas*.—West. U. Tel. Co. v. Rhine, 90 Ark. 57, 117 S. W. 1069; West. U. Tel. Co. v. Sockwell, 91 Ark. 475, 121 S. W. 1046. See the Act of 1903, Kirby's Dig. § 7947.

*Iowa*.—Maley v. West. U. Tel. Co., 151 Iowa, 228, 130 N. W. 1086, 49 L. R. A. (N. S.) 327; Cowan v. West. U. Tel. Co., 122 Iowa, 379, 98 N. W. 281, 101 Am. St. Rep. 268, 64 L. R. A. 545; Hurlburt v. West. U. Tel. Co., 123 Iowa, 295, 98 N. W. 794; Mentzer v. West. U. Tel. Co., 93 Iowa, 752, 62 N. W. 1, 57 Am. St. Rep. 294, 28 L. R. A. 72.

*Kansas*.—West. U. Tel. Co. v. Bodkin, 79 Kan. 793, 101 Pac. 652.

*Kentucky*.—Cumberland Tel., etc., Co. v. Quigley, 129 Ky. 788, 112 S. W. 897, 19 L. R. A. (N. S.) 575; West. U. Tel. Co. v. Teague, 134 Ky. 601, 121 S. W. 484; West. U. Tel. Co. v. Price, 137 Ky. 758, 126 S. W. 1100, 29 L. R. A. (N. S.) 836; West. U. Tel. Co. v. Mathews, 107 Ky. 663, 55 S. W. 427, 21 Ky. Law Rep. 1405; West. U. Tel. Co. v. Johnson, 107 Ky. 631, 55 S. W. 427, 21 Ky. Law Rep. 1391; West. U. Tel. Co. v. McIlvoy, 107 Ky. 633, 55 S. W. 428, 21 Ky. Law Rep. 1393; West. U. Tel. Co. v. Crider, 107 Ky. 600, 54 S. W. 963, 21 Ky. Law Rep. 1336; West. U. Tel. Co. v. Steenbergen, 107 Ky. 469, 54 S. W. 829, 21 Ky. Law Rep. 1289; West. U. Tel. Co. v. Fisher, 107 Ky. 513, 54 S. W. 830, 21 Ky. Law Rep. 1293; West. U. Tel. Co. v. Van Cleave, 107 Ky. 464, 54 S. W. 827, 22 Ky. Law Rep. 53, 92 Am. St. Rep. 366; Chapman v. West. U. Tel. Co., 90 Ky. 265, 13 S. W. 880, 12 Ky. Law Rep. 265; Taliferro v. West. U. Tel. Co., 54 S. W. 825, 21 Ky. Law Rep. 1290.

*Nevada*.—See Barnes v. West. U. Tel. Co., 27 Nev. 438, 76 Pac. 931, 103 Am. St. Rep. 776, 65 L. R. A. 666, 1 Ann. Cas. 346.

*North Carolina*.—Raiford v. West. U. Tel. Co., 160 N. C. 489, 76 S. E. 532; Bailey v. West. U. Tel. Co., 150 N. C. 316, 63 S. E. 1044; Battle v. West. U. Tel. Co., 151 N. C. 629, 66 S. E. 661; Cates v. West. U. Tel. Co., 151 N. C. 497, 66 S. E. 592, 24 L. R. A. (N. S.) 1286; Shaw v. West. U. Tel. Co., 151 N. C. 638, 66 S. E. 668; Sherrill v. West. U. Tel. Co., 155 N. C. 250, 71 S. E. 330; Mullinax v. West. U. Tel. Co., 156 N. C. 541, 72 S. E. 583; Penn v. West. U. Tel. Co., 159 N. C. 306, 75 S. E. 16, 41 L. R. A. (N. S.) 223; Green v. West. U. Tel. Co., 136 N. C. 489, 49 S. E. 165, 103 Am. St. Rep. 955, 67 L. R. A. 985, 1 Ann. Cas. 349; Bryan v. West. U. Tel. Co., 133 N. C. 603, 45 S. E. 938; Darlington v. West. U. Tel. Co., 127 N. C. 448, 37 S. E. 479; Meadows v. West. U. Tel. Co., 132 N. C. 40, 43 S. E. 512; Kennon v. West. U. Tel. Co., 126 N. C. 232, 35 S. E. 468; Landie v. West. U. Tel. Co., 124 N. C. 528, 32 S. E. 886; Dowdy v. West. U. Tel. Co., 124 N. C. 522, 32 S. E. 802; Lyne v. West. U. Tel. Co., 123

courts. In fact, the earlier decisions have been criticized by later decisions of the same court.

§ 586. **Federal court view—how held.**—The federal court has held to the common-law rule on this subject, and no court before

N. C. 129, 31 S. E. 350; *Cashion v. West. U. Tel. Co.*, 123 N. C. 267, 31 S. E. 493; *Id.*, 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160; *Havener v. West. U. Tel. Co.*, 117 N. C. 540, 23 S. E. 457; *Sherrill v. West. U. Tel. Co.*, 116 N. C. 655, 21 S. E. 429; *Id.*, 117 N. C. 352, 23 S. E. 277; *Young v. West. U. Tel. Co.*, 107 N. C. 370, 11 S. E. 1044, 22 Am. St. Rep. 883, 9 L. R. A. 669.

*Oklahoma.*—See *West. U. Tel. Co. v. Chouteau*, 28 Okl. 664, 115 Pac. 879, Ann. Cas. 1912D, 824, 49 L. R. A. (N. S.) 206, in the absence of statute cannot recover.

*South Carolina.*—*Ogilvie v. West. U. Tel. Co.*, 83 S. C. 8, 64 S. E. 860, 137 Am. St. Rep. 790; *Busbee v. West. U. Tel. Co.*, 89 S. C. 567, 72 S. E. 499.

*Tennessee.*—*West. U. Tel. Co. v. Potts*, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. (N. S.) 479; *West. U. Tel. Co. v. Frith*, 105 Tenn. 167, 58 S. W. 118; *Gray v. West. U. Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301; *West. U. Tel. Co. v. Robinson*, 97 Tenn. 638, 37 S. W. 545, 34 L. R. A. 431; *West. U. Tel. Co. v. Mellon*, 96 Tenn. 66, 33 S. W. 725; *Wadsworth v. West. U. Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864.

In *Cates v. West. U. Tel. Co.*, supra, the court said: "I do not wish to be understood as not concurring with the able judges who took part in deciding the cases of *Young v. West. U. Tel. Co.*, 107 N. C. 370 [11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. Rep. 883], and *Thompson v. West. U. Tel. Co.*, 107 N. C. 449 [12 S. E. 427], for the principle as established by these cases receives my full assent. I believe that what we call the doctrine of mental anguish is based upon a sound principle of common law, which is elastic enough to meet new conditions as they arise, and to adjust itself and its well-settled rules to the ever-changing circumstances of a progressive civilization and the onward march of reform in the administration of justice. It would be a reproach to the law if telegraph companies can wantonly neglect their duty and obligation to their patrons with impunity and without any responsibility for their wrong, committed sometimes without the slightest excuse and under exasperating circumstances."

It is not mental anguish alone that entitles the plaintiff to recover. This must be coupled with the company's negligence. *Barnes v. Postal Tel. Cable Co.*, 156 N. C. 150, 72 S. E. 78; *West. U. Tel. Co. v. Crenshaw*, 93 Ark. 415, 125 S. W. 420.

In some jurisdictions the right to recover is limited to cases in which the plaintiff has some other cause of action against the telegraph company. *Blount v. West. U. Tel. Co.*, 126 Ala. 105, 27 South. 779; *West. U. Tel. Co. v. Howle*, 156 Ala. 331, 47 South. 341. See, also, *West. U. Tel. Co. v. Hill*, 163 Ala. 18, 50 South. 248, 19 Ann. Cas. 1058, 23 L. R. A. (N. S.) 648; *West. U. Tel. Co. v. Jackson*, supra; *West. U. Tel. Co. v. Wright*, 169 Ala. 104, 53 South. 95; *West. U. Tel. Co. v. Northcutt*, 158 Ala. 539, 48 South. 553, 132 Am. St. Rep. 38; *West. U. Tel. Co. v. Young* (Tex. Civ. App.) 133 S. W. 512; *West. U. Tel. Co. v. Saunders*, supra; *West. U. Tel. Co. v. Burns*, 164 Ala. 252, 51 South. 373. On the other hand, this view was expressly repudiated in *Shaw v. West. U. Tel. Co.*, supra. In this case the court said: "It would be reducing the law to an absurdity should it be held that if a person recovers one dollar for an injury to his person, or any other invasion of his rights, he may also recover damages for mental anguish caused by the wrong, but if he does not sustain any loss, great or small, apart from that caused by mental anguish resulting

which the question has come up has held any other view than that damages could not be recovered for mental suffering alone.<sup>19</sup> It was, however, conceded in one case that if there had been such gross negligence on the part of the company's agent as to indicate a wanton or malicious purpose in failing to transmit or deliver the message, the mental suffering of the plaintiff might be considered. The state in which the case arises may adhere to the rule in the *So Relle* Case, yet this fact need not be considered by the federal court, and this is true although the decisions in these states may have been largely induced by the provisions of the statutes in those states.<sup>20</sup>

§ 587. Ground upon which these cases are maintained—notice. The courts in those states which hold that damages may be recovered for mental suffering alone base their opinions for maintaining such cases on different theories.<sup>21</sup> Some hold that when the company has been guilty of a breach of a contract of sending, in which

from the wrongful act of another, it is *damnum absque injuria*, however much he may have suffered. This would be refining to the last degree and should not be accepted as a fair and equitable rule of the law; in some cases a person may suffer more—that is, in the sense of an injury to his rights—by mental anguish than if he had lost many dollars by the negligent act of the defendant in failing to deliver telegram."

<sup>19</sup> *West. U. Tel. Co. v. Sklar*, 126 Fed. 295, 61 C. C. A. 281; *Chase v. West. U. Tel. Co. (C. C.)* 44 Fed. 554, 10 L. R. A. 464; *West. U. Tel. Co. v. Wood*, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706; *Crawson v. West. U. Tel. Co. (C. C.)* 47 Fed. 544; *Tyler v. West. U. Tel. Co. (C. C.)* 54 Fed. 634; *Kester v. West. U. Tel. Co. (C. C.)* 55 Fed. 603; *Gahan v. West. U. Tel. Co. (C. C.)* 59 Fed. 433; *Stafford v. West. U. Tel. Co. (C. C.)* 73 Fed. 273; *McBride v. Sunset Tel. Co. (C. C.)* 96 Fed. 81; *Stansell v. West. U. Tel. Co. (C. C.)* 107 Fed. 668; *Alexander v. West. U. Tel. Co. (C. C.)* 126 Fed. 445; *Rowan v. West. U. Tel. Co. (C. C.)* 149 Fed. 550; *West. U. Tel. Co. v. Burris*, 179 Fed. 92, 102 C. C. A. 386.

<sup>20</sup> *West. U. Tel. Co. v. Sklar*, 126 Fed. 295, 61 C. C. A. 281.

<sup>21</sup> Some courts hold that, if a recovery was denied in such cases, an admitted wrong would be sanctioned by law. Thus, in *So Relle v. West. U. Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805, the court said: "The law will not permit any one to impose with impunity upon another, by his willful fault or neglect, such injury to his feelings as is the natural result from the disappointment shown by the allegations of appellant's petition, and then protect himself under the plea of *damnum absque injuria*." In *West. U. Tel. Co. v. Adair*, 115 Ala. 441, 22 South. 73, the court said: "If a party, for a valuable consideration paid, agrees to perform a duty for another, and he knows that his failure will result in pecuniary loss or inflict great mental distress, and he willfully or negligently fails to perform his contract, why should he not be required to respond for the consequences of his misconduct? We can perceive of no sound rule of law which will exonerate him." While in *Battle v. West. U. Tel. Co.*, 151 N. C. 629, 66 S. E. 661, the court said: "If the telegraph company will not require their employes to act, in the performance of their very important duties to the public and their patrons, with common intelligence and humanity, they must suffer the consequences of their neglect, and not complain of the law, when they are made to indemnify those



the plaintiff was a party or which was made for his benefit, the latter then has a cause of action. Having acquired a standing in court, he is then entitled to recover all damages which were the direct and proximate result of said breach.<sup>22</sup> There being a breach

they have wronged. There is no use to cite authorities for their ruling, although they are abundant, for common sense and a reasonable regard for the rights of others teach us that it must be the correct principle. \* \* \* What right in law, or even according to the rule which ordinarily obtains in business transactions of this kind, did the defendant have to withhold from the plaintiff information as to his child's serious illness, which it had been paid to impart to him? The answer to this simple question is too plain to require any further discussion as to its legal and moral duty under the circumstances. It had no right, and its operator and the delivery messenger should have known it." In *Wadsworth v. West. U. Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864, the court said: "To hold that the defendant is not liable in this case for the wrong and injury done to the feelings and affections of Mrs. Wadsworth by its default would be to disregard the purpose of the telegrams altogether, and to violate the rule of law which authorizes a recovery of damages appropriate to the objects of the contract broken, and, furthermore, such a holding would justify the conclusion that the defendant might, with impunity, have refused to receive and transmit such messages at all, and that it has the right in the future to do as it has done in this case, or, at least, that it cannot be required to respond in damages for doing so. To such a result, we think, no court should submit." In *West. U. Tel. Co. v. Odom*, 21 Tex. Civ. App. 537, 52 S. W. 632, the court said: "There is, perhaps, no class of communications sent over the telegraph wires which is estimated of greater concern by the general public than those messages which relate to sickness and death of one's relatives, and they constitute a large portion of the business of telegraph companies. To hold that recovery may not be had for mental suffering occasioned by negligent breaches of contracts for the transmission of such messages would give legal sanction to flagrant wrongs, and put the public at the mercy of such corporations in so far as this branch of telegraph business be concerned. That our courts fail to find a remedy in the common law, the legislature doubtless would have furnished it through statutory enactments for the principles of justice and humanity alike demand a remedy for all such wrongs. If these decisions of our courts are to continue to be recognized as sound expositions of the law, as we believe they should be, then the principle announced allowing the recovery of such damages must not be arbitrarily confined to cases where one is prevented from going to the sick bed, or attending the funeral of a dear one, but it must also be given application to such other cases of mental anguish as the rules of reason and logic would extend it. Otherwise the decisions would and should be regarded as arbitrary and not resting upon sound principle." Other courts advance the idea that, since these companies receive benefits and privileges from the public and such as cannot be enjoyed as of common right, they should be held liable for negligence in the performance of their public duties, even though such negligence does not inflict bodily injuries or financial loss. *Sherrill v. West. U. Tel. Co.*, 155 N. C. 250, 71 S. E. 330; *Cashion v. West. U. Tel. Co.*, 123 N. C. 267, 31 S. E. 493; *Green v. West. U. Tel. Co.*, 136 N. C. 489, 49 S. E. 165, 103 Am. St. Rep. 955, 67 L. R. A. 985, 1 Ann. Cas. 349; *Gulf, etc., R. Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269; *So Relle v. West. U. Tel. Co.*, supra. But see *Chapman v. West. U. Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 30 Am. St. Rep. 183, 17 L. R. A. 430.

<sup>22</sup> *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St.

of the contract—and it was held in one case that it was necessary for the action to be in contract and not in tort<sup>23</sup>—it was not necessary to prove nominal damages, since this would be a means of avoiding any damages. As was said: “To speak of the right to nominal damages as a condition for giving substantial damages, is a palpable contradiction. To give nominal damages necessarily denies any further recovery. \* \* \* It is manifest that to allow such a recovery is, in real substance, an effort to protect feelings by legal remedy.”<sup>24</sup> In some of the other states, the courts proceed on the theory of certain statutes therein declaring the duties and liabilities of these companies.<sup>25</sup> In Tennessee, for instance, there is one statute<sup>26</sup> which requires telegraph companies to transmit and deliver all proper messages “correctly and without unreasonable delay”; and it is declared by another statute that, on a failure to do so, the defaulting company shall be liable in damages to the party aggrieved. In a case brought under these statutes to recover damages for mental anguish and suffering in consequence of a message not being properly delivered and which related to the serious illness and death of plaintiff’s brother, the court said: “The act does not discriminate between messages appertaining to matters pecuniary merely and those having reference to matters of a domestic nature, as are those now before us. \* \* \* There is no discrimination with respect to the nature of the messages to be conveyed nor is there any discrimination with respect to the nature of the damages to be recovered for the company’s default. One section imposes a general duty, and the other gives a universal right of action for the breach of that duty. And of necessity the nature and

Rep. 148; *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 South. 414, 32 Am. St. Rep. 23; *Chapman v. West. U. Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 30 Am. St. Rep. 183, 17 L. R. A. 430. See, also, latter part of note 18, *supra*.

<sup>23</sup> *Blount v. West. U. Tel. Co.*, 126 Ala. 105, 27 South. 779. See § 583. See, also, other cases in note 138.

<sup>24</sup> *Chapman v. West. U. Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 30 Am. St. Rep. 183, 17 L. R. A. 430.

<sup>25</sup> *West. U. Tel. Co. v. Shenep*, 83 Ark. 476, 104 S. W. 154, 12 L. R. A. (N. S.) 886, 119 Am. St. Rep. 145; *West. U. Tel. Co. v. Hollingsworth*, 83 Ark. 39, 102 S. W. 681, 11 L. R. A. (N. S.) 497, 119 Am. St. Rep. 105, 13 Ann. Cas. 397; *Simmons v. West. U. Tel. Co.*, 63 S. C. 425, 41 S. E. 521, 57 L. R. A. 607; *Ark., etc., R. Co. v. Stroude*, 77 Ark. 109, 91 S. W. 18, 113 Am. St. Rep. 130; *West. U. Tel. Co. v. Chouteau*, 28 Okl. 664, 115 Pac. 879, Ann. Cas. 1912D, 824, 49 L. R. A. (N. S.) 206; *West. U. Tel. Co. v. McMullin*, 98 Ark. 347, 135 S. W. 909; *Brown v. West. U. Tel. Co.*, 85 S. C. 495, 67 S. E. 146, 137 Am. St. Rep. 914; *Cameron v. West. U. Tel. Co.*, 90 S. C. 503, 74 S. E. 929; *Graham v. West. U. Tel. Co.*, 93 S. C. 173, 76 S. E. 200.

<sup>26</sup> *Code Milliken & Vertrees*, § 1541. See, also, Act Feb. 20, 1901 (23 St. at Large, 748); *Code 1902*, vol. 1, § 2223, South Carolina.

amount of damages recoverable in each particular case are to be determined by the character of the message and the extent of the injury caused by the defendant's default."<sup>27</sup> But in order to recover damages in cases where the courts base their opinions on either theory, it is necessary that the company be informed, either by the face of the message, or by extrinsic evidence, of the nature and character of the message;<sup>28</sup> since, if it does not enter into the

<sup>27</sup> *Wadsworth v. West. U. Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 872.

<sup>28</sup> *Alabama*.—*Middleton v. West. U. Tel. Co.*, 183 Ala. 213, 62 South. 744, 49 L. R. A. (N. S.) 305; *West. U. Tel. Co. v. West*, 165 Ala. 399, 51 South. 740; *West. U. Tel. Co. v. Westmoreland*, 151 Ala. 319, 44 South. 382; *West. U. Tel. Co. v. Russell*, 4 Ala. App. 485, 58 South. 938.

*Arkansas*.—*West. U. Tel. Co. v. Shenep*, 83 Ark. 476, 104 S. W. 154, 12 L. R. A. (N. S.) 886, 119 Am. St. Rep. 145; *West. U. Tel. Co. v. Weniski*, 84 Ark. 457, 106 S. W. 486; *West. U. Tel. Co. v. Blackmer*, 82 Ark. 526, 102 S. W. 366; *West. U. Tel. Co. v. Raines*, 78 Ark. 545, 94 S. W. 700; *West. U. Tel. Co. v. Hogue*, 79 Ark. 33, 94 S. W. 924.

*Indiana*.—*West. U. Tel. Co. v. Bryant*, 17 Ind. App. 70, 46 N. E. 358; *West. U. Tel. Co. v. Henley*, 23 Ind. App. 14, 54 N. E. 775.

*Kentucky*.—*Postal Tel. Cable Co. v. Terrell*, 124 Ky. 822, 100 S. W. 292, 30 Ky. Law Rep. 1023, 14 L. R. A. (N. S.) 927; *Thurman v. West. U. Tel. Co.*, 127 Ky. 137, 105 S. W. 155, 32 Ky. Law Rep. 26, 14 L. R. A. (N. S.) 499; *West. U. Tel. Co. v. Reid*, 120 Ky. 231, 85 S. W. 1171, 70 L. R. A. 289; *West. U. Tel. Co. v. Glover*, 138 Ky. 500, 128 S. W. 587, 49 L. R. A. (N. S.) 309; *Bagby v. West. U. Tel. Co.*, 164 Ky. 15, 174 S. W. 738.

*Mississippi*.—*West. U. Tel. Co. v. Pearce*, 82 Miss. 489, 34 South. 152.

*North Carolina*.—*Bowers v. West. U. Tel. Co.*, 135 N. C. 504, 47 S. E. 597; *Williams v. West. U. Tel. Co.*, 136 N. C. 82, 48 S. E. 559, 1 Ann. Cas. 359; *Sparkman v. West. U. Tel. Co.*, 130 N. C. 447, 41 S. E. 881; *Darlington v. West. U. Tel. Co.*, 127 N. C. 448, 37 S. E. 479; *Kennon v. West. U. Tel. Co.*, 126 N. C. 232, 35 S. E. 468; *Dayvis v. West. U. Tel. Co.*, 139 N. C. 79, 51 S. E. 898.

*South Carolina*.—*Todd v. West. U. Tel. Co.*, 77 S. C. 522, 58 S. E. 433; *Cloy v. West. U. Tel. Co.*, 78 S. C. 109, 58 S. E. 972; *Cason v. West. U. Tel. Co.*, 77 S. C. 157, 57 S. E. 722; *Mitchiner v. West. U. Tel. Co.*, 75 S. C. 182, 55 S. E. 222; *Key v. West. U. Tel. Co.*, 76 S. C. 301, 56 S. E. 962; *Capers v. West. U. Tel. Co.*, 71 S. C. 29, 50 S. E. 537; *Jones v. West. U. Tel. Co.*, 70 S. C. 539, 50 S. E. 198; *Id.*, 75 S. C. 208, 55 S. E. 318; *Mitchiner v. West. U. Tel. Co.*, 70 S. C. 522, 50 S. E. 190; *Arial v. West. U. Tel. Co.*, 70 S. C. 418, 50 S. E. 6; *Fass v. West. U. Tel. Co.*, 82 S. C. 461, 64 S. E. 235. But see *Cameron v. West. U. Tel. Co.*, 90 S. C. 503, 74 S. E. 929; *Toale v. West. U. Tel. Co.*, 76 S. C. 248, 57 S. E. 117; *Dempsey v. West. U. Tel. Co.*, 77 S. C. 399, 58 S. E. 9.

*Texas*.—*West. U. Tel. Co. v. Wilson*, 97 Tex. 22, 75 S. W. 482; *West. U. Tel. Co. v. Arnold*, 96 Tex. 493, 73 S. W. 1043; *West. U. Tel. Co. v. Kuykendall*, 99 Tex. 323, 89 S. W. 965; *West. U. Tel. Co. v. Luck*, 91 Tex. 178, 41 S. W. 469, 66 Am. St. Rep. 869; *West. U. Tel. Co. v. Edmondson*, 91 Tex. 206, 42 S. W. 549; *West. U. Tel. Co. v. Carter*, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826; *West. U. Tel. Co. v. Kibble*, 53 Tex. Civ. App. 222, 115 S. W. 643; *McAllen v. West. U. Tel. Co.*, 70 Tex. 243, 7 S. W. 715; *West. U. Tel. Co. v. Bell* (Tex. Civ. App.) 90 S. W. 714; *West. U. Tel. Co. v. McFadden*, 32 Tex. Civ. App. 582, 75 S. W. 352; *Ricketts v. West. U. Tel. Co.*, 10 Tex. Civ.



contemplation of the parties at the time the contract was made that mental injuries would be the result of the breach of said contract, damages cannot be recovered therefor.<sup>29</sup>

§ 588. **View of subject in Louisiana.**—In Louisiana it is held that damages may be recovered for mental anguish or suffering

App. 226, 30 S. W. 1105; *De Voegler v. West. U. Tel. Co.*, 10 Tex. Civ. App. 229, 30 S. W. 1107; *West. U. Tel. Co. v. Gidcumb* (Tex. Civ. App.) 28 S. W. 699; *West. U. Tel. Co. v. Smith* (Tex. Civ. App.) 26 S. W. 216; *Ikard v. West. U. Tel. Co.* (Tex. Civ. App.) 22 S. W. 534; *West. U. Tel. Co. v. Hankins* (Tex. Civ. App.) 110 S. W. 543; *West. U. Tel. Co. v. Kirkpatrick*, 76 Tex. 217, 13 S. W. 70, 18 Am. St. Rep. 37; *West. U. Tel. Co. v. Arend*, 62 Tex. Civ. App. 576, 131 S. W. 1190; *West. U. Tel. Co. v. Olivarri* (Tex. Civ. App.) 110 S. W. 930; *Southwestern Tel., etc., Co. v. Givens* (Tex. Civ. App.) 139 S. W. 676; *Southwestern Tel., etc., Co. v. Wilcoxson* (Tex. Civ. App.) 129 S. W. 868; *West. U. Tel. Co. v. Edmonds* (Tex. Civ. App.) 146 S. W. 322; *West. U. Tel. Co. v. Horn* (Tex. Civ. App.) 149 S. W. 557.

See *Lyles v. West. U. Tel. Co.*, 77 S. C. 174, 57 S. E. 725, 12 L. R. A. (N. S.) 534; *West. U. Tel. Co. v. Hogue*, supra, rule not affected by reason of the statute adopting the doctrine; *Cordell v. West. U. Tel. Co.*, 149 N. C. 402, 63 S. E. 71, 22 L. R. A. (N. S.) 540, where action is founded on pure tort the rule as stated in the text does not apply.

*Sufficiency of notice of plaintiff's interest in telegram.*—See *West. U. Tel. Co. v. Jenkins* (Tex. Civ. App.) 152 S. W. 198, "Tom Tucker's baby died today. If any can come, answer"; *West. U. Tel. Co. v. Randles* (Tex. Civ. App.) 34 S. W. 447, "Father fatally hurt. Come if you can", and, "Father died at 5 this morning. Buried at 4 this evening"; *West. U. Tel. Co. v. Stubbs*, 43 Tex. Civ. App. 132, 94 S. W. 1083; *West. U. Tel. Co. v. Russell* (Tex. Civ. App.) 31 S. W. 698; *West. U. Tel. Co. v. Grigsby* (Tex. Civ. App.) 29 S. W. 406; *West. U. Tel. Co. v. Glover*, 138 Ky. 500, 128 S. W. 587, 49 L. R. A. (N. S.) 308. But see *West. U. Tel. Co. v. Kirkpatrick*, supra; *Maxville v. West. U. Tel. Co.* (Tex. Civ. App.) 140 S. W. 464; *West. U. Tel. Co. v. Herring* (Tex. Civ. App.) 146 S. W. 699; *Herring v. West. U. Tel. Co.*, 60 Tex. Civ. App. 5, 127 S. W. 882; *West. U. Tel. Co. v. Reid*, supra; *West. U. Tel. Co. v. Taylor* (Tex. Civ. App.) 162 S. W. 999; *Poteet v. West. U. Tel. Co.*, 74 S. C. 491, 55 S. E. 113.

*The company may derive notice either from the telegram itself or by information given to its agent at the time the message was delivered to the company.*—See *West. U. Tel. Co. v. Toms*, 99 Ark. 117, 137 S. W. 559; *West. U. Tel. Co. v. Raines*, 78 Ark. 545, 94 S. W. 700; *West. U. Tel. Co. v. Griffin*, 92 Ark. 219, 122 S. W. 489; *Jones v. West. U. Tel. Co.*, 75 S. C. 208, 55 S. E. 318; *West. U. Tel. Co. v. Jobe*, 6 Tex. Civ. App. 403, 25 S. W. 168, 1036; *Erie, etc., Tel. Co. v. Grimes*, 82 Tex. 89, 17 S. W. 831; *Southwestern, etc., Tel. Co. v. Taylor*, 26 Tex. Civ. App. 79, 63 S. W. 1076; *Lyles v. West. U. Tel. Co.*, supra. See, also, § 544 et seq. But see *West. U. Tel. Co. v. Kirkpatrick*, supra; *West. U. Tel. Co. v. Bell* (Tex. Civ. App.) 90 S. W. 714.

*Social conversation with agent on the streets before the delivery of the message not notice to company.*—See *Darlington v. West. U. Tel. Co.*, supra; *West. U. Tel. Co. v. Moore*, 76 Tex. 66, 12 S. W. 949, 18 Am. St. Rep. 25. See, also, § 542.

*Notice may be afforded by other telegrams.*—See *West. U. Tel. Co. v. Frith*,

<sup>29</sup> *West. U. Tel. Co. v. Henry*, 87 Tex. 165, 27 S. W. 63; *West. U. Tel. Co. v. Hogue*, 79 Ark. 33, 94 S. W. 924; *West. U. Tel. Co. v. Vickery* (Tex. Civ. App.) 158 S. W. 792. See chapter XX.

disconnected from pecuniary damages or physical injuries. The view the courts in that state entertain on this subject is not necessarily derived from the opinion in the *So Relle Case*, or by virtue of any statutory enactments. It must be remembered that the laws in that state are not founded on the common-law principles; but, in view of the peculiar provisions of the civil law, which is the basic law of Louisiana, such damages have been allowed.<sup>30</sup>

§ 589. **Instances in which damages are allowed.**—The cases in which damages are allowed for mental suffering and anguish are such as relate to the serious illness, death<sup>31</sup> or time set for burial<sup>32</sup> of some one related<sup>33</sup> to the party to whom the message is sent. But in recent cases it is held that the plaintiff may recover compensatory damages for mental suffering disconnected from any physical pain or attending circumstances of sickness or death.<sup>34</sup>

105 Tenn. 167, 58 S. W. 118; *Thomas v. West. U. Tel. Co.*, 120 Ky. 194, 85 S. W. 760; *Jones v. West. U. Tel. Co.*, *supra*. But see *West. U. Tel. Co. v. Weniski*, *supra*.

*Whether telegraph company should seek information.*—See *West. U. Tel. Co. v. Kibble*, 53 Tex. Civ. App. 222, 115 S. W. 643, holding that it need not; *West. U. Tel. Co. v. Porter* (Tex. Civ. App.) 26 S. W. 866, holding that it should. See, also, § 542.

*A person cannot recover of whose connection with the telegram the company had no information.*—See *West. U. Tel. Co. v. Murray*, 29 Tex. Civ. App. 207, 68 S. W. 549; *Mitchiner v. West. U. Tel. Co.*, *supra*; *Jones v. West. U. Tel. Co.*, *supra*; *Weatherford, etc., R. Co. v. Seals* (Tex. Civ. App.) 41 S. W. 841; *Du Bose v. West. U. Tel. Co.*, 73 S. C. 218, 53 S. E. 175; *West. U. Tel. Co. v. West*, *supra*; *Landry v. West. U. Tel. Co.*, 102 Tex. 67, 113 S. W. 10; *West. U. Tel. Co. v. Craven* (Tex. Civ. App.) 95 S. W. 633. See, also, §§ 533, 544.

<sup>30</sup> *Graham v. West. U. Tel. Co.*, 109 La. Ann. 1069, 34 South. 91.

<sup>31</sup> *West. U. Tel. Co. v. Westmoreland*, 151 Ala. 319, 44 South. 382; *West. U. Tel. Co. v. Sledge*, 153 Ala. 291, 45 South. 59; *West. U. Tel. Co. v. McCaul*, 115 Tenn. 99, 90 S. W. 856; *Sledge v. West. U. Tel. Co.*, 163 Ala. 4, 50 South. 886. See other cases in note 34.

<sup>32</sup> *West. U. Tel. Co. v. McCaul*, 115 Tenn. 99, 90 S. W. 856; *West. U. Tel. Co. v. Reed*, 37 Tex. Civ. App. 445, 84 S. W. 296. See other cases in note 34.

<sup>33</sup> *West. U. Tel. Co. v. Ayers*, 131 Ala. 391, 31 South. 78, 90 Am. St. Rep. 92; *Lee v. West. U. Tel. Co.*, 130 Ky. 202, 113 S. W. 55. See § 605 et seq.

<sup>34</sup> *Thurman v. West. U. Tel. Co.*, 127 Ky. 137, 105 S. W. 155, 32 Ky. Law Rep. 26, 14 L. R. A. (N. S.) 499; *West. U. Tel. Co. v. Hanley*, 85 Ark. 263, 107 S. W. 1168; *Postal Tel. Cable Co. v. Terrell*, 124 Ky. 822, 100 S. W. 292, 14 L. R. A. (N. S.) 927; *Green v. West. U. Tel. Co.*, 136 N. C. 489, 49 S. E. 165, 103 Am. St. Rep. 955, 67 L. R. A. 985, 1 Ann. Cas. 349; *Dayvis v. West. U. Tel. Co.*, 139 N. C. 79, 51 S. E. 898; *West. U. Tel. Co. v. Burgess* (Tex. Civ. App.) 56 S. W. 237.

*Damages for mental anguish have been allowed as result of being—First, absent from deathbed.*—See cases in note 31, *supra*. See, also, *West. U. Tel. Co. v. Cleveland*, 169 Ala. 131, 53 South. 80, Ann. Cas. 1912B, 534; *West. U. Tel. Co. v. De Andrea*, 45 Tex. Civ. App. 395, 100 S. W. 977; *West. U. Tel. Co. v. Hughey*, 55 Tex. Civ. App. 403, 118 S. W. 1130; *Southwestern Tel., etc., Co.*

### § 590. Limitation of rule—prolongation of mental anguish.—

There has been no case where the liabilities of telegraph companies were concerned, which has been the cause of so much litigation over unreasonable claims as the *So Relle Case*. It is the peculiar nature of the complaint that makes the damage so difficult to fix, and thereby handle such actions with justice. No one but the

*v. Taylor*, 26 Tex. Civ. App. 79, 62 S. W. 1076; *West. U. Tel. Co. v. Hale*, 11 Tex. Civ. App. 79, 32 S. W. 814.

*Second, absent from funeral.*—See cases in note 32, *supra*. See, also, *West. U. Tel. Co. v. Porterfield* (Tex. Civ. App.) 84 S. W. 850; *West. U. Tel. Co. v. McMullin*, 98 Ark. 347, 135 S. W. 909; *West. U. Tel. Co. v. Erwin* (Tex.) 19 S. W. 1002; *West. U. Tel. Co. v. Shaw*, 40 Tex. Civ. App. 277, 90 S. W. 58; *West. U. Tel. Co. v. Fuel*, 165 Ala. 391, 51 South. 571. But see *Buchanan v. West. U. Tel. Co.* (Tex. Civ. App.) 100 S. W. 974.

*Third, being unable to see remains before decomposition set in.*—See *Thomas v. West. U. Tel. Co.*, 120 Ky. 194, 85 S. W. 760; *West. U. Tel. Co. v. Porterfield*, *supra*; *West. U. Tel. Co. v. Hamilton*, 36 Tex. Civ. App. 300, 81 S. W. 1052; *West. U. Tel. Co. v. DeJarles*, 8 Tex. Civ. App. 109, 27 S. W. 792; *West. U. Tel. Co. v. Jeanes* (Tex. Civ. App.) 29 S. W. 1130. But see *Woods v. West. U. Tel. Co.*, 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581; *Kyles v. Southern R. Co.*, 147 N. C. 394, 61 S. E. 278, 16 L. R. A. (N. S.) 405.

*Fourth, because of mistaken belief that relative was dead.*—See *Lay v. Postal Tel. Cable Co.*, 171 Ala. 172, 54 South. 529; *West. U. Tel. Co. v. Odom*, 21 Tex. Civ. App. 537, 52 S. W. 632; *West. U. Tel. Co. v. Hines*, 22 Tex. Civ. App. 315, 54 S. W. 627; *Taylor v. West. U. Tel. Co.*, 31 Ky. Law Rep. 240, 101 S. W. 969; *West. U. Tel. Co. v. Buchanan* (Tex. Civ. App.) 129 S. W. 850.

*Fifth, because of failure to meet at station when traveling with corpse.*—See *West. U. Tel. Co. v. Crowley*, 158 Ala. 583, 48 South. 381; *Cowan v. West. U. Tel. Co.*, 122 Iowa, 379, 90 N. W. 281, 101 Am. St. Rep. 268, 64 L. R. A. 545; *West. U. Tel. Co. v. Long*, 148 Ala. 202, 41 South. 965; *West. U. Tel. Co. v. McMorris*, 158 Ala. 563, 48 South. 349, 132 Am. St. Rep. 46; *West. U. Tel. Co. v. Giffin*, 27 Tex. Civ. App. 306, 65 S. W. 661; *Lyles v. West. U. Tel. Co.*, 84 S. C. 1, 65 S. E. 832, 137 Am. St. Rep. 829. But see *West. U. Tel. Co. v. Turner* (Tex. Civ. App.) 78 S. W. 362.

*Sixth, because of a delayed burial, or being made in an unsuitable place or manner.*—See *West. U. Tel. Co. v. Arant*, 88 Ark. 499, 115 S. W. 136; *West. U. Tel. Co. v. McNairy*, 34 Tex. Civ. App. 389, 78 S. W. 969; *West. U. Tel. Co. v. Bowen*, 97 Tex. 621, 81 S. W. 27, reversing (Civ. App.) 76 S. W. 613; *Lyles v. West. U. Tel. Co.*, 77 S. C. 174, 57 S. E. 725, 12 L. R. A. (N. S.) 534; *Id.*, 84 S. C. 1, 65 S. E. 832, 137 Am. St. Rep. 829; *Cumberland Tel., etc., Co. v. Quigley*, 129 Ky. 788, 112 S. W. 897, 19 L. R. A. (N. S.) 575; *West. U. Tel. Co. v. Carter*, 2 Tex. Civ. App. 624, 21 S. W. 688. But see *West. U. Tel. Co. v. Bangs*, 94 Ark. 44, 125 S. W. 1012.

*Seventh, because of being absent from sick bed.*—See cases in note 31, *supra*. See, also, *West. U. Tel. Co. v. Rowell*, 153 Ala. 295, 45 South. 73; *Hamrick v. West. U. Tel. Co.*, 140 N. C. 151, 52 S. E. 232; *Ogilvie v. West. U. Tel. Co.*, 83 S. C. 8, 64 S. E. 860, 137 Am. St. Rep. 790; *Newport, etc., R. Co. v. Griffin*, 92 Tenn. 694, 22 S. W. 737. But see *West. U. Tel. Co. v. Johnson*, 164 Ala. 229, 51 South. 230.

*Eighth, because of the absence of minister from the sick bed.*—*West. U. Tel. Co. v. Robinson*, 97 Tenn. 638, 37 S. W. 545, 34 L. R. A. 431. But see *West. U. Tel. Co. v. Arnold*, 96 Tex. 493, 73 S. W. 1043.

*Ninth, because of being exposed to disuse.*—See *Rich v. West. U. Tel. Co.* (Tex. Civ. App.) 110 S. W. 93; *West. U. Tel. Co. v. Rich*, 59 Tex. Civ. App. 395,



plaintiff knows the extent of his mental sufferings, and, for this reason, it is not only difficult to prove the extent of such injuries, in order that he may recover a sufficient compensation therefor, but it is much more difficult for defendant company to make any defense in these cases. The courts have long since realized this fact and have attempted in various ways to put a limit to such actions, which have been an object of much criticism and discord among their own courts.<sup>35</sup> For instance, a distinction seems to have been drawn between the negligence in failing to deliver a message, which

126 S. W. 686; *West. U. Tel. Co. v. Murray*, 29 Tex. Civ. App. 207, 68 S. W. 549; *Mitchiner v. West. U. Tel. Co.*, 75 S. C. 182, 55 S. E. 222.

*Tenth, because of the inability to attend an insane brother.*—See *West. U. Tel. Co. v. McIlvoy*, 107 Ky. 633, 55 S. W. 428.

*Eleventh, because of the failure to prevent an unsuitable marriage.*—See *West. U. Tel. Co. v. Procter*, 6 Tex. Civ. App. 300, 25 S. W. 811.

Some hold that the doctrine should be restricted to matters of a personal and social nature, *Robinson v. West. U. Tel. Co.*, 68 S. W. 656, 24 Ky. Law Rep. 452, 57 L. R. A. 611; *West. U. Tel. Co. v. Shenep*, 83 Ark. 476, 104 S. W. 154, 12 L. R. A. (N. S.) 886, 119 Am. St. Rep. 145; *Todd v. West. U. Tel. Co.*, 77 S. C. 522, 58 S. E. 433; *Capers v. West. U. Tel. Co.*, 71 S. C. 29, 50 S. E. 537; *Lyles v. West. U. Tel. Co.*, *supra*; *Cloy v. West. U. Tel. Co.*, 78 S. C. 109, 58 S. E. 972. See *Lay v. Postal Tel. Cable Co.*, 171 Ala. 172, 54 South. 529; *West. U. Tel. Co. v. Westmoreland*, 151 Ala. 319, 44 South. 382; *West. U. Tel. Co. v. Sledge*, 153 Ala. 291, 45 South. 59; *West. U. Tel. Co. v. McCaul*, 115 Tenn. 99, 90 S. W. 856; while others hold that it extends to all cases, *Thurman v. West. U. Tel. Co.*, 127 Ky. 137, 105 S. W. 155, 32 Ky. Law Rep. 26, 14 L. R. A. (N. S.) 499; *Postal Tel. Cable Co. v. Terrell*, 124 Ky. 822, 100 S. W. 292, 30 Ky. Law Rep. 1023, 14 L. R. A. (N. S.) 927; *Gulf, etc., R. Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269; *West. U. Tel. Co. v. Gossett*, 15 Tex. Civ. App. 52, 38 S. W. 536; *West. U. Tel. Co. v. Gidcumb* (Tex. Civ. App.) 28 S. W. 699; *West. U. Tel. Co. v. Burgess* (Tex. Civ. App.) 56 S. W. 237; *West. U. Tel. Co. v. Richards* (Tex. Civ. App.) 158 S. W. 1187; *West. U. Tel. Co. v. McFarlane* (Tex. Civ. App.) 161 S. W. 57; *Barnes v. West. U. Tel. Co.*, 27 Nev. 438, 76 Pac. 931, 103 Am. St. Rep. 766, 1 Ann. Cas. 346, 65 L. R. A. 666.

<sup>35</sup> Various rules and limitations have been adopted. Thus see *West. U. Tel. Co. v. Shenep*, 83 Ark. 476, 104 S. W. 154, 12 L. R. A. (N. S.) 886, 119 Am. St. Rep. 145; *West. U. Tel. Co. v. Ayers*, 131 Ala. 391, 31 South. 78, 90 Am. St. Rep. 92; *West. U. Tel. Co. v. Stratemeier*, 6 Ind. App. 125, 32 N. E. 871; *Robinson v. West. U. Tel. Co.*, 24 Ky. Law Rep. 452, 68 S. W. 656, 57 L. R. A. 611; *Lee v. West. U. Tel. Co.*, 130 Ky. 202, 113 S. W. 55; *West. U. Tel. Co. v. McCaul*, 115 Tenn. 99, 90 S. W. 856; *Capers v. West. U. Tel. Co.*, 71 S. C. 29, 50 S. E. 537; *West. U. Tel. Co. v. Edmondson*, 91 Tex. 206, 42 S. W. 549; *West. U. Tel. Co. v. Arnold*, 96 Tex. 493, 73 S. W. 1043; *Rowell v. West. U. Tel. Co.*, 75 Tex. 26, 12 S. W. 534; *West. U. Tel. Co. v. Reed*, 37 Tex. Civ. App. 445, 84 S. W. 296. The cases are not entirely uniform in the same or different states. See *West. U. Tel. Co. v. Hollingsworth*, 83 Ark. 39, 102 S. W. 681, 11 L. R. A. (N. S.) 497, 119 Am. St. Rep. 105, 13 Ann. Cas. 397; *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; *West. U. Tel. Co. v. Reid*, 120 Ky. 231, 85 S. W. 1171, 27 Ky. Law Rep. 659, 70 L. R. A. 289. The rules and limitations recognized in some states disapproved in others. *West. U. Tel. Co. v. Hollingsworth*, *supra*; *West. U. Tel. Co. v. Ayers*, *supra*; *West. U. Tel. Co. v. Moxley*, 80 Ark. 554, 98 S. W. 112; *West. U. Tel. Co. v. Arnold*, *supra*. See cases under note 147.

causes mental pain and suffering and failing to deliver one which, if delivered, would relieve such suffering.<sup>36</sup> In a case<sup>37</sup> which held this distinction, it seems that the plaintiff and his wife had received information of the dangerous illness of the latter's mother. Subsequently, a message was sent containing information of the mother's improved condition. "The damage here complained of was the mere continued anxiety caused by the failure to promptly deliver the message. Some kind of unpleasant emotion in the mind of the injured party is probably the result of the breach of the contract in most cases. But the cases are rare in which such emotions can be held to be an element of damages resulting from the breach. For injuries to feelings in such cases the courts cannot give redress. Any other rule would result in intolerable litigation."<sup>38</sup> As will

<sup>36</sup> *Sparkman v. West. U. Tel. Co.*, 130 N. C. 447, 41 S. E. 881; *West. U. Tel. Co. v. Leland*, 156 Ala. 334, 47 South. 62; *West. U. Tel. Co. v. Edmondson*, 91 Tex. 206, 42 S. W. 549; *West. U. Tel. Co. v. Giffin*, 93 Tex. 530, 56 S. W. 744, 77 Am. St. Rep. 896; *Rowell v. West. U. Tel. Co.*, 75 Tex. 26, 12 S. W. 534; *Kopperl v. West. U. Tel. Co.* (Tex. Civ. App.) 85 S. W. 1018; *Morrison v. West. U. Tel. Co.*, 24 Tex. Civ. App. 347, 59 S. W. 1127; *West. U. Tel. Co. v. Bass*, 28 Tex. Civ. App. 418, 67 S. W. 515; *Akard v. West. U. Tel. Co.* (Tex. Civ. App.) 44 S. W. 538; *Johnson v. West. U. Tel. Co.*, 14 Tex. Civ. App. 536, 38 S. W. 64; *Rich v. West. U. Tel. Co.* (Tex. Civ. App.) 110 S. W. 93. See *Middleton v. West. U. Tel. Co.*, 183 Ala. 213, 62 South. 744, 49 L. R. A. (N. S.) 305.

<sup>37</sup> *Rowell v. West. U. Tel. Co.*, 75 Tex. 26, 12 S. W. 534.

<sup>38</sup> *McCarthy v. West. U. Tel. Co.* (Tex. Civ. App.) 56 S. W. 568; *Rowell v. West. U. Tel. Co.*, 75 Tex. 26, 12 S. W. 534; *Chapman v. West. U. Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 30 Am. St. Rep. 183, 17 L. R. A. 430; *Francis v. West. U. Tel. Co.*, 58 Minn. 252, 55 N. W. 1078, 49 Am. St. Rep. 507, 25 L. R. A. 406; *West. U. Tel. Co. v. Rogers*, 68 Miss. 748, 9 South. 823, 24 Am. St. Rep. 300, 13 L. R. A. 859; *West. U. Tel. Co. v. Chouteau*, 28 Okl. 664, 115 Pac. 879, Ann. Cas. 1912D, 824, 49 L. R. A. (N. S.) 208. See, also, § 611. The same rule has been applied in regard to a message inquiring as to the condition of a sick relative, *West. U. Tel. Co. v. Bass*, 28 Tex. Civ. App. 418, 67 S. W. 515; *West. U. Tel. Co. v. O'Callaghan*, 32 Tex. Civ. App. 336, 74 S. W. 798; *Akard v. West. U. Tel. Co.* (Tex. Civ. App.) 44 S. W. 538; or one in reply to such, *Kopperl v. West. U. Tel. Co.* (Tex. Civ. App.) 85 S. W. 1018. But in other cases this distinction has been expressly disapproved. *West. U. Tel. Co. v. Hollingsworth*, 83 Ark. 39, 102 S. W. 681, 11 L. R. A. (N. S.) 497, 119 Am. St. Rep. 105, 13 Ann. Cas. 397; *Dayvis v. West. U. Tel. Co.*, 139 N. C. 79, 51 S. E. 898; *Sparkman v. West. U. Tel. Co.*, 130 N. C. 447, 41 S. E. 881; *Bush v. Telephone Co.*, 93 S. C. 176, 76 S. E. 197; *Fass v. West. U. Tel. Co.*, 82 S. C. 461, 64 S. E. 235; *Willis v. West. U. Tel. Co.*, 69 S. C. 531, 48 S. E. 538, 104 Am. St. Rep. 828, 2 Ann. Cas. 52; *Middleton v. West. U. Tel. Co.*, 183 Ala. 213, 62 South. 744, 49 L. R. A. (N. S.) 305; *Maley v. West. U. Tel. Co.*, 151 Iowa, 228, 130 N. W. 1086, 49 L. R. A. (N. S.) 327; *Suttle v. West. U. Tel. Co.*, 148 N. C. 480, 62 S. E. 593, 128 Am. St. Rep. 631; *Alexander v. West. U. Tel. Co.*, 158 N. C. 473, 74 S. E. 449, 42 L. R. A. (N. S.) 407; *Hamilton v. West. U. Tel. Co.*, 96 S. C. 398, 80 S. E. 706. But see *West. U. Tel. Co. v. Edmondson*, 91 Tex. 206, 42 S. W. 549, cited in 66 Am. St. Rep. 873, note; *West. U. Tel. Co. v. Giffin*, 93 Tex. 530, 56 S. W. 744, 77 Am. St. Rep. 896; *Goodhue v. West. U. Tel. Co.*, 57 Tex. Civ. App. 297, 122 S. W. 41; *West. U. Tel. Co. v. Steele* (Tex. Civ. App.) 110 S. W. 546; *Akard*

be seen, the distinction between these cases was so unsubstantial that it was evidently resorted to for the express purpose of obstructing the tide of "intolerable litigation" flowing from the decisions following the *So Relle* Case.

§ 591. *Same continued—suffering must be real.*—Another means by which the flow of this "intolerable litigation" has been attempted to be obstructed is by the rule laid down in some of those cases, and closely adhered to, that in order for damages to be recovered in such cases, the mental suffering must be real and not such as may be the result of a too sensitive or excitable mental constitution or a distorted imagination.<sup>39</sup> "If grief or sorrow can be

*v. West. U. Tel. Co., supra; West. U. Tel. Co. v. Young (Tex. Civ. App.)* 130 S. W. 257; *Rich v. West. U. Tel. Co. (Tex. Civ. App.)* 110 S. W. 93; *Gaddis v. West. U. Tel. Co., 33 Tex. Civ. App.* 391, 77 S. W. 37; *West. U. Tel. Co. v. Reed, 37 Tex. Civ. App.* 445, 84 S. W. 296; *Kopperl v. West. U. Tel. Co., supra*. But see *West. U. Tel. Co. v. Cavin, 30 Tex. Civ. App.* 152, 70 S. W. 229. Damages have been allowed as a result of a delay in receiving benefit of telegram. *Willis v. West. U. Tel. Co., supra; West. U. Tel. Co. v. Northcutt, 158 Ala.* 539, 48 South. 553, 132 Am. St. Rep. 38; *West. U. Tel. Co. v. Burgess (Tex. Civ. App.)* 56 S. W. 237; *West. U. Tel. Co. v. Barrett, 55 Tex. Civ. App.* 323, 118 S. W. 1089. See *Ellison v. West. U. Tel. Co., 163 N. C.* 5, 79 S. E. 277; *Harrison v. West. U. Tel. Co., 163 N. C.* 18, 79 S. E. 281; *Howard v. West. U. Tel. Co., 106 Ark.* 559, 153 S. W. 803.

<sup>39</sup> *McAllen v. West. U. Tel. Co., 70 Tex.* 243, 7 S. W. 715; *Morrison v. West. U. Tel. Co., 24 Tex. Civ. App.* 347, 59 S. W. 1127; *Hancock v. West. U. Tel. Co., 137 N. C.* 497, 49 S. E. 952, 69 L. R. A. 403; *Rowell v. West. U. Tel. Co., 75 Tex.* 26, 12 S. W. 534; *West. U. Tel. Co. v. Bell (Tex. Civ. App.)* 61 S. W. 942; *West. U. Tel. Co. v. Archie, 92 Ark.* 59, 121 S. W. 1045; *West. U. Tel. Co. v. McKenzie, 96 Ark.* 218, 131 S. W. 684, 49 L. R. A. (N. S.) 296; *West. U. Tel. Co. v. Garlington, 101 Ark.* 487, 142 S. W. 854, 49 L. R. A. (N. S.) 300; *West. U. Tel. Co. v. Oastler, 90 Ark.* 268, 119 S. W. 285, 49 L. R. A. (N. S.) 325; *Hart v. West. U. Tel. Co., 53 Tex. Civ. App.* 275, 115 S. W. 638; *West. U. Tel. Co. v. Rich, 59 Tex. Civ. App.* 395, 126 S. W. 686; *West. U. Tel. Co. v. Buchanan (Tex. Civ. App.)* 129 S. W. 850; *Maley v. West. U. Tel. Co., 151 Iowa,* 228, 130 N. W. 1086, 49 L. R. A. (N. S.) 327; *West. U. Tel. Co. v. Bangs, 94 Ark.* 44, 125 S. W. 1012. See *Cumberland Tel., etc., Co. v. Quigley, 129 Ky.* 788, 112 S. W. 897, 19 L. R. A. (N. S.) 575; *Lyles v. West. U. Tel. Co., 84 S. C.* 1, 65 S. E. 832, 137 Am. St. Rep. 829; *West. U. Tel. Co. v. McMullin, 98 Ark.* 347, 135 S. W. 909; *West. U. Tel. Co. v. Shenep, 83 Ark.* 476, 114 S. W. 154, 12 L. R. A. (N. S.) 886, 119 Am. St. Rep. 145; *Howard v. West. U. Tel. Co., 106 Ark.* 559, 153 S. W. 804; *Cashion v. West. U. Tel. Co., 123 N. C.* 267, 31 S. E. 493; *Bowers v. West. U. Tel. Co., 135 N. C.* 504, 47 S. E. 597. The same rule prevails in jurisdictions in which there is a statute giving a right of action for mental anguish. *Willis v. West. U. Tel. Co., 69 S. C.* 531, 48 S. E. 538, 104 Am. St. Rep. 828, 2 Ann. Cas. 52. The mental suffering caused by the negligence of the company must be of the kind properly designated as anguish. *Dayvis v. West. U. Tel. Co., 139 N. C.* 79, 51 S. E. 898; *West. U. Tel. Co. v. O'Callaghan, 32 Tex. Civ. App.* 336, 74 S. W. 798; *Mackay Tel. Cable Co. v. Vaughan, 111 Ark.* 504, 163 S. W. 158, 51 L. R. A. (N. S.) 404; *Johnson v. West. U. Tel. Co., 14 Tex. Civ. App.* 536, 38 S. W. 64; *West. U. Tel. Co. v. Vickery (Tex. Civ. App.)* 158 S. W. 792; *West. U. Tel. Co. v. Long, 90 Ark.* 263, 118 S. W. 405; *Ricketts v. West. U. Tel. Co., 10 Tex. Civ. App.* 22, 30 S. W. 1105; *DeVoegler*



produced by things unreal, mere pigments of the brain, or a tort, an individual of a somber, gloomy imagination would often be entitled to large damages on account of mental suffering, while others of a buoyant fancy, for the same breach of duty, would not be entitled to anything; and damages, instead of being measured by the rule of law as applied to the rule of facts, would largely depend upon the fertility of the imagination of the suitor."<sup>40</sup> Thus mere anxiety resulting from plaintiff's inability to learn what he seeks to know of his relatives is no ground for recovery of damages.<sup>41</sup> Neither is a suit maintainable on the ground of mere anger or resentment in failing to deliver a message in regard to a death;<sup>42</sup> nor the worry over the loss of a position by a student, although the worry seriously interfered with his studies;<sup>43</sup> nor for a delay of a message asking for money<sup>44</sup> or money transfer message;<sup>45</sup> nor for the nondelivery or delay of a mere business message.<sup>46</sup>

§ 592. Same continued—must be the result of the cause of complaint.—Juries are so easily misled through prejudice, sympathy and ignorance from the main cause of the action, in such cases, to

v. West. U. Tel. Co., 10 Tex. Civ. App. 229, 30 S. W. 1107; West. U. Tel. Co. v. Garlington, 101 Ark. 487, 142 S. W. 854, 49 L. R. A. (N. S.) 300; West. U. Tel. Co. v. Partlow, 30 Tex. Civ. App. 599, 71 S. W. 584; Smith v. Postal Tel. Cable Co., 167 N. C. 248, 83 S. E. 475.

<sup>40</sup> McAllen v. West. U. Tel. Co., 70 Tex. 243, 7 S. W. 715.

<sup>41</sup> Akard v. West. U. Tel. Co. (Tex. Civ. App.) 44 S. W. 538; West. U. Tel. Co. v. Shenep, 83 Ark. 476, 104 S. W. 154, 12 L. R. A. (N. S.) 886, 119 Am. St. Rep. 145; Capers v. West. U. Tel. Co., 71 S. C. 29, 50 S. E. 537; Hancock v. West. U. Tel. Co., 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403, holding that the term "anguish" means intense pain of body or mind and is derived from *anguis*, a snake, referring to the writhing or twisting of the animal body, and also holding that the term "regret" indicates no higher degree of mental suffering than disappointment, and does not constitute mental anguish.

<sup>42</sup> West. U. Tel. Co. v. Bell (Tex. Civ. App.) 61 S. W. 942.

<sup>43</sup> West. U. Tel. Co. v. Partlow, 30 Tex. Civ. App. 599, 71 S. W. 584; West. U. Tel. Co. v. Shenep, 83 Ark. 476, 104 S. W. 154, 12 L. R. A. (N. S.) 886, 119 Am. St. Rep. 145.

<sup>44</sup> Gooch v. West. U. Tel. Co., 90 S. W. 587, 28 Ky. Law Rep. 828.

<sup>45</sup> De Voegler v. West. U. Tel. Co., 10 Tex. Civ. App. 229, 30 S. W. 1107; Ricketts v. West. U. Tel. Co., 10 Tex. Civ. App. 226, 30 S. W. 1105; Robinson v. West. U. Tel. Co., 68 S. W. 656, 24 Ky. Law Rep. 452, 57 L. R. A. 611. But see Cumberland Tel., etc., Co. v. Quigley, 129 Ky. 788, 112 S. W. 897, 19 L. R. A. (N. S.) 575.

<sup>46</sup> Gooch v. West. U. Tel. Co., 90 S. W. 587, 28 Ky. Law Rep. 828; Robinson v. West. U. Tel. Co., 68 S. W. 656, 24 Ky. Law Rep. 452, 57 L. R. A. 611; West. U. Tel. Co. v. Shenep, 83 Ark. 476, 104 S. W. 154, 12 L. R. A. (N. S.) 886, 119 Am. St. Rep. 145; Todd v. West. U. Tel. Co., 77 S. C. 522, 58 S. E. 433; Capers v. West. U. Tel. Co. 71 S. C. 29, 50 S. E. 537; Cason v. West. U. Tel. Co., 77 S. C. 157, 57 S. E. 722; De Voegler v. West. U. Tel. Co., 10 Tex. Civ. App. 229, 30 S. W. 1107; West. U. Tel. Co. v. Gideumb (Tex. Civ. App.) 28 S. W. 699; Ricketts v. West. U. Tel. Co., 10 Tex. Civ. App. 226, 30 S. W. 1105.

sufferings of the mind, resulting from other causes, that it should always be the duty of the courts, on proper request, to instruct them that a recovery could only be had for the injuries resulting directly and proximately from the cause of complaint, and that none other should be considered in their deliberation.<sup>47</sup> As said heretofore, the plaintiff is the only party who knows the extent of his suffering, and in attempting to show these to others he is liable to expose the injury arising from other kindred causes. His injuries may be the result of several causes; so it would be difficult for him to measure out and divide the whole so as to give the extent of suffering resulting from the cause of complaint. This fact was not lost sight of by Judge Watts, who rendered the decision in the *So Relle* Case. In closing his opinion, he said: "It should be remarked that great caution ought to be observed in the trial of cases like this; as it will be so easy and natural to confound the corroding grief occasioned by the loss of the parent or other

<sup>47</sup> *Beasley v. West. U. Tel. Co.* (C. C.) 39 Fed. 187; *Rosser v. West. U. Tel. Co.*, 130 N. C. 251, 41 S. E. 378; *Cashion v. West. U. Tel. Co.*, 123 N. C. 267, 31 S. E. 493; *Id.*, 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160; *Wadsworth v. West. U. Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864; *So Relle v. West. U. Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805; *Gulf, etc., R. Co. v. Levy*, 59 Tex. 543, 46 Am. Rep. 269; *West. U. Tel. Co. v. Wingate*, 6 Tex. Civ. App. 394, 25 S. W. 439; *West. U. Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772; *Johnson v. West. U. Tel. Co.*, 14 Tex. Civ. App. 536, 38 S. W. 64; *West. U. Tel. Co. v. Shumate*, 2 Tex. Civ. App. 429, 21 S. W. 109; *West. U. Tel. Co. v. Warren* (Tex. Civ. App.) 36 S. W. 314; *West. U. Tel. Co. v. Stephens*, 2 Tex. Civ. App. 129, 21 S. W. 148; *West. U. Tel. Co. v. Edmondson*, 91 Tex. 206, 42 S. W. 549, cited in 66 Am. St. Rep. 873, note. So the suffering must have been the proximate result of the negligence or default complained of. *West. U. Tel. Co. v. Leland*, 156 Ala. 334, 47 South. 62; *Thurman v. West. U. Tel. Co.*, 127 Ky. 137, 105 S. W. 157, 32 Ky. Law Rep. 26, 14 L. R. A. (N. S.) 499; *West. U. Tel. Co. v. Briscoe*, 18 Ind. App. 22, 47 N. E. 473; *Higdon v. West. U. Tel. Co.*, 132 N. C. 726, 44 S. E. 558; *Smith v. West. U. Tel. Co.*, 72 S. C. 116, 51 S. E. 537; *Arial v. West. U. Tel. Co.*, 70 S. C. 418, 50 S. E. 6; *Landry v. West. U. Tel. Co.*, 102 Tex. 67, 113 S. W. 10, reversing (Civ. App.) 108 S. W. 461; *West. U. Tel. Co. v. Linn*, 87 Tex. 7, 26 S. W. 490, 47 Am. St. Rep. 58; *West. U. Tel. Co. v. Taylor* (Tex. Civ. App.) 81 S. W. 69; *Taliferro v. West. U. Tel. Co.*, 54 S. W. 825, 21 Ky. Law Rep. 1290; *Mitchiner v. West. U. Tel. Co.*, 75 S. C. 182, 55 S. E. 222; *West. U. Tel. Co. v. Gulick*, 48 Tex. Civ. App. 78, 106 S. W. 698. See, also, *West. U. Tel. Co. v. Bickerstaff*, 100 Ark. 1, 138 S. W. 997, Ann. Cas. 1913B, 242; *Beal v. West. U. Tel. Co.*, 153 N. C. 331, 69 S. E. 247; *Barnes v. Postal Tel. Cable Co.*, 156 N. C. 150, 72 S. E. 78; *Kolb v. West. U. Tel. Co.* (Tex. Civ. App.) 138 S. W. 1081; *Southern Bell Tel., etc., Co. v. Reynolds*, 139 Ga. 385, 77 S. E. 388. Any evidence which will aid the jury in this respect should be admitted. *West. U. Tel. Co. v. Crocker*, 135 Ala. 492, 33 South. 45, 59 L. R. A. 398; *Hancock v. West. U. Tel. Co.*, 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403; *West. U. Tel. Co. v. Simmons*, 32 Tex. Civ. App. 578, 75 S. W. 822. See, also, *Mackay Tel. Cable Co. v. Vaughan*, 111 Ark. 504, 163 S. W. 158, 51 L. R. A. (N. S.) 404.

relative with the disappointment and regret occasioned by the fault or neglect of the company, for it is only the latter for which a recovery may be had; and the attention of the juries might well be called to that fact.”<sup>48</sup>

§ 593. Same continued—suffering must be of the plaintiff.—There is no doubt that the mind may be as seriously injured as any part of the body; in fact there is such a close union between the two that one can hardly suffer without the other being affected more or less. So it is not that we intend to be understood in saying that the mind cannot be injured, for which damages may be recovered, but that the difficulty of proving the injury is so great it should not—only in certain cases—be the only grounds for an action. There is a marked resemblance between the sufferings of the mind, caused by injuries thereto, and the sufferings of the body, and yet this can only be appreciated by the injured person himself. If we could discern them both, the results with respect to us would be exactly the same; but, while one can be seen or examined, and the extent of suffering thereby, to a proximate degree, measured, yet there is no way that the injuries to the mind can be so ascertained or determined.<sup>49</sup> It is generally held that, if there is an injury to the body, damages may be recovered for mental suffering which is the direct result of the same cause that produced the bodily injury,<sup>50</sup> but in no instance can the same damages be recovered in actions for physical pain resulting from a different cause than that of the latter. Neither can the physical sufferings of another be considered in a case brought exclusively by the plaintiff for his own bodily hurts, as he is the only person affected with respect to that action. It is generally held, therefore, in those cases where damages may be recovered for mental anguish alone that the suffering of the plaintiff's

<sup>48</sup> So *Relle v. West. U. Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 808.

<sup>49</sup> It is necessary to get the distinction between mental anguish caused by the sickness or death and that caused by the defendant's negligence and call the jury's attention thereto. *West. U. Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728; *Sherrill v. West. U. Tel. Co.*, 155 N. C. 250, 71 S. E. 330; *Ellison v. West. U. Tel. Co.*, 163 N. C. 5, 79 S. E. 277. See *Hancock v. West. U. Tel. Co.*, 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403; *West. U. Tel. Co. v. Benson*, 159 Ala. 254, 48 South. 712; *Hunter v. West. U. Tel. Co.*, 135 N. C. 458, 47 S. E. 745; So *Relle v. West. U. Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805; *West. U. Tel. Co. v. Bowles* (Tex. Civ. App.) 76 S. W. 456; *West. U. Tel. Co. v. Steele* (Tex. Civ. App.) 110 S. W. 546; *West. U. Tel. Co. v. Smith* (Tex. Civ. App.) 30 S. W. 937; *West. U. Tel. Co. v. Wingate*, 6 Tex. Civ. App. 394, 25 S. W. 439.

<sup>50</sup> See § 612.



mind<sup>51</sup> and not that of others<sup>52</sup> who may be affected thereby, can be considered by a jury. Thus, when the plaintiff's relatives endure suffering and distress of mind on account of his absence, this fact cannot be considered in awarding him damages for his mental anguish.<sup>53</sup>

§ 594. Same continued—anguish from independent causes.—A distinction has been drawn, as heretofore noted, in those states holding that mental distress alone was sufficient grounds for an action between injuries to the mind caused by a delay or non-delivery of a message and that resulting from independent causes.<sup>54</sup> Thus, in an action on a delayed message sent by the mother to her daughter in regard to the serious illness of the latter's father, the company will not be liable to the mother in damages for her mental suffering and distress, caused by the want of the consoling presence of her daughter at the burial, where she could and would have been present, but could not have been present at the death if the message had not been delayed.<sup>55</sup> Neither is mental anguish and suspense caused by a tardy delivery of a message announcing the serious illness of plaintiff's father, and which delayed her twenty-four hours in starting by rail to see him, a ground to be considered, where the plaintiff could not have arrived at his home in time for the funeral had the message been delivered promptly.<sup>56</sup> In another case, a son telegraphed his father to send a carriage to meet him at a certain place and to wire him when the carriage would arrive. He waited several days for a reply to his message, and on account of failing to get one, he suffered great distress of mind. It was held that this suffering could not be considered in an action to recover damages

<sup>51</sup> West. U. Tel. Co. v. Stratemeier, 6 Ind. App. 125, 32 N. E. 871; Gulf, etc., R. Co. v. Richardson, 79 Tex. 649, 15 S. W. 689.

<sup>52</sup> West. U. Tel. Co. v. Stratemeier, 6 Ind. App. 125, 32 N. E. 871; Sabine Val. Tel. Co. v. Oliver, 46 Tex. Civ. App. 428, 102 S. W. 925; West. U. Tel. Co. v. Lovett, 24 Tex. Civ. App. 84, 58 S. W. 204; West. U. Tel. Co. v. Procter, 6 Tex. Civ. App. 300, 25 S. W. 811. But the mere fact that others are caused to suffer will not prevent the plaintiff from recovering. Gulf, etc., Co. v. Richardson, 79 Tex. 649, 15 S. W. 689.

<sup>53</sup> Gulf, etc., Tel. Co. v. Richardson, 79 Tex. 649, 15 S. W. 689; West. U. Tel. Co. v. Lovett, 24 Tex. Civ. App. 84, 58 S. W. 204.

<sup>54</sup> Sparkman v. West. U. Tel. Co., 130 N. C. 447, 41 S. E. 881; McCarthy v. West. U. Tel. Co. (Tex. Civ. App.) 56 S. W. 568; West. U. Tel. Co. v. Edmondson, 91 Tex. 206, 42 S. W. 549, cited in 66 Am. St. Rep. 873, note; West. U. Tel. Co. v. Bass, 28 Tex. Civ. App. 418, 67 S. W. 515; West. U. Tel. Co. v. Parks (Tex. Civ. App.) 25 S. W. 813. See §§ 591, 592. See, also, other cases cited in note 49, *supra*.

<sup>55</sup> West. U. Tel. Co. v. Luck, 91 Tex. 178, 41 S. W. 469, 66 Am. St. Rep. 869. See, also, Rowell v. West. U. Tel. Co., 75 Tex. 26, 12 S. W. 534. See, also, § 548.

<sup>56</sup> West. U. Tel. Co. v. Luck, 91 Tex. 178, 41 S. W. 469, 66 Am. St. Rep. 869.

for mental worry caused by the message not being delivered.<sup>57</sup> So also where plaintiff and his wife had received information of the dangerous illness of the latter's mother, and subsequently a message was sent informing them of her improved condition, but the company failed to deliver it. It was held that there could be recovery for the mental anguish suffered by the plaintiff and his wife which a delivery of the message would have relieved.<sup>58</sup>

§ 595. **Unwarranted apprehension.**—Where there is an unwarranted apprehension on the part of plaintiff, and as a result of which mental anguish is suffered, a recovery cannot be had therefor,<sup>59</sup> but if such suffering is based upon circumstances which do not actually exist, a recovery will not be denied therefor because of this mere fact alone.<sup>60</sup> If the action is prosecuted on circumstances of this nature, the reasonableness and extent of the plaintiff's suffering will be facts for the determination of the jury;<sup>61</sup> and so, if as a result of the company's negligence or default, the plaintiff is reasonably caused to believe in the existence of certain facts which do not actually exist, but which, if true, would warrant the recovery of mental anguish, a recovery may be had.<sup>62</sup>

§ 596. **Failure to meet plaintiff.**—Ordinarily there cannot be a recovery for mental anguish because the plaintiff was not met at a railroad station or similar place, as a result of the negligence or default of the company,<sup>63</sup> unless he was traveling with a corpse,<sup>64</sup>

<sup>57</sup> *McAllen v. West. U. Tel. Co.*, 70 Tex. 243, 7 S. W. 715.

<sup>58</sup> *Rowell v. West. U. Tel. Co.*, 75 Tex. 26, 12 S. W. 534. See, also, § 590.

<sup>59</sup> *McAllen v. West. U. Tel. Co.*, 70 Tex. 243, 7 S. W. 715; *Hart v. West. U. Tel. Co.*, 53 Tex. Civ. App. 275, 115 S. W. 638; *Morrison v. West. U. Tel. Co.*, 24 Tex. Civ. App. 347, 59 S. W. 1127; *Ricketts v. West. U. Tel. Co.*, 10 Tex. Civ. App. 226, 30 S. W. 1105; *West. U. Tel. Co. v. McKenzie*, 96 Ark. 218, 131 S. W. 684, 49 L. R. A. (N. S.) 296; *West. U. Tel. Co. v. Shenep*, 83 Ark. 476, 104 S. W. 154, 119 Am. St. Rep. 145, 12 L. R. A. (N. S.) 886; *West. U. Tel. Co. v. Archie*, 92 Ark. 59, 121 S. W. 1045; *Cashion v. West. U. Tel. Co.*, 123 N. C. 267, 31 S. E. 493; *West. U. Tel. Co. v. McMullin*, 98 Ark. 347, 135 S. W. 909; *Bowers v. West. U. Tel. Co.*, 135 N. C. 504, 47 S. E. 597; *West. U. Tel. Co. v. Oastler*, 90 Ark. 268, 119 S. W. 285, 49 L. R. A. (N. S.) 325.

<sup>60</sup> *West. U. Tel. Co. v. Hines*, 22 Tex. Civ. App. 315, 54 S. W. 627.

<sup>61</sup> *Green v. West. U. Tel. Co.*, 136 N. C. 506, 49 S. E. 171, 1 Ann. Cas. 358.

<sup>62</sup> *Taylor v. West. U. Tel. Co.*, 101 S. W. 969, 31 Ky. Law Rep. 240; *Green v. West. U. Tel. Co.*, 136 N. C. 506, 49 S. E. 171, 1 Ann. Cas. 358; *Rich v. West. U. Tel. Co.* (Tex. Civ. App.) 110 S. W. 93; *West. U. Tel. Co. v. Patton* (Tex. Civ. App.) 55 S. W. 973; *West. U. Tel. Co. v. Hines*, 22 Tex. Civ. App. 315, 54 S. W. 627; *West. U. Tel. Co. v. Odom*, 21 Tex. Civ. App. 537, 52 S. W. 632; *Lay v. Postal Tel. Cab. Co.*, 171 Ala. 172, 54 South. 529.

<sup>63</sup> *West. U. Tel. Co. v. Hogue*, 79 Ark. 33, 94 S. W. 924; *West. U. Tel. Co. v. Westmoreland*, 151 Ala. 319, 44 South. 382; *West. U. Tel. Co. v. Sledge*, 153 Ala. 291, 45 South. 59; *West. U. Tel. Co. v. Howle*, 156 Ala. 331, 47

<sup>64</sup> See note 64 on following page.

and there was such a relationship between him and the deceased as to warrant a recovery on this ground.<sup>65</sup> In order to recover in such cases, however, the company must be informed in some manner that the sender is accompanied by a corpse,<sup>66</sup> that the message could have been duly delivered,<sup>67</sup> and that, in consequence of which, the sender would have been met, or the burial arrangements made.<sup>68</sup> A recovery has been allowed where the question of sickness or death was not involved,<sup>69</sup> the company being informed that such suffering would result in case of its negligence.<sup>70</sup>

§ 597. **Summoning a physician.**—Where, through the default or negligence of a telegraph company, a message summoning a physician is delayed or not delivered, the question has arisen whether the sender could recover for his mental anguish due to the absence of the physician and to witnessing the suffering of his sick relative. The authorities do not agree on this question, even in the same jurisdiction.<sup>71</sup> Some expressly deny the right to recover,<sup>72</sup> while

South. 341; *West. U. Tel. Co. v. Henley*, 23 Ind. App. 14, 54 N. E. 775; *Todd v. West. U. Tel. Co.*, 77 S. C. 522, 58 S. E. 433; *Williams v. West. U. Tel. Co.*, 136 N. C. 82, 48 S. E. 559, 1 Ann. Cas. 359; *McAllen v. West. U. Tel. Co.*, 70 Tex. 243, 7 S. W. 715.

<sup>64</sup> *West. U. Tel. Co. v. McMorris*, 158 Ala. 563, 48 South. 349, 132 Am. St. Rep. 46; *West. U. Tel. Co. v. Crowley*, 158 Ala. 583, 48 South. 381; *West. U. Tel. Co. v. Long*, 148 Ala. 202, 41 South. 965; *West. U. Tel. Co. v. Turner* (Tex. Civ. App.) 78 S. W. 362; *Lyles v. West. U. Tel. Co.*, 77 S. C. 174, 57 S. E. 725, 12 L. R. A. (N. S.) 534; *West. U. Tel. Co. v. Giffin*, 27 Tex. Civ. App. 306, 65 S. W. 661. But see *West. U. Tel. Co. v. Burch*, 36 Tex. Civ. App. 237, 81 S. W. 552.

<sup>65</sup> *West. U. Tel. Co. v. McMorris*, 158 Ala. 563, 48 South. 349, 132 Am. St. Rep. 46.

<sup>66</sup> *West. U. Tel. Co. v. Kuykendall*, 99 Tex. 323, 89 S. W. 965.

<sup>67</sup> *West. U. Tel. Co. v. McMorris*, 158 Ala. 563, 48 South. 349, 132 Am. St. Rep. 46.

<sup>68</sup> *Hancock v. West. U. Tel. Co.*, 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403; *West. U. Tel. Co. v. McMorris*, 158 Ala. 563, 48 South. 349, 132 Am. St. Rep. 46. See *West. U. Tel. Co. v. White* (Tex. Civ. App.) 149 S. W. 790. Compare *West. U. Tel. Co. v. Crowley*, 158 Ala. 583, 48 South. 381.

<sup>69</sup> *West. U. Tel. Co. v. Hanley*, 85 Ark. 263, 107 S. W. 1168; *Postal Tel. Cab. Co. v. Terrell*, 124 Ky. 822, 100 S. W. 292, 30 Ky. Law Rep. 1023, 14 L. R. A. (N. S.) 927; *Green v. West. U. Tel. Co.*, 136 N. C. 489, 49 S. E. 165, 103 Am. St. Rep. 955, 67 L. R. A. 985, 1 Ann. Cas. 349; *Toale v. West. U. Tel. Co.*, 76 S. C. 248, 57 S. E. 117; *West. U. Tel. Co. v. Siddall* (Tex. Civ. App.) 86 S. W. 343; *West. U. Tel. Co. v. Norton* (Tex. Civ. App.) 62 S. W. 1081.

<sup>70</sup> See *West. U. Tel. Co. v. Siddall* (Tex. Civ. App.) 86 S. W. 343; *Postal Tel. Cab. Co. v. Terrell*, 124 Ky. 822, 100 S. W. 292, 30 Ky. Law Rep. 1023, 14 L. R. A. (N. S.) 927.

<sup>71</sup> See *West. U. Tel. Co. v. Reid*, 120 Ky. 231, 85 S. W. 1171, 27 Ky. Law Rep. 659, 70 L. R. A. 289; *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; *West. U. Tel. Co. v. Kendzora* (Tex. Civ. App.) 26 S. W. 245.

<sup>72</sup> *West. U. Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep.



others recognize the right,<sup>73</sup> provided the negligence or default complained of was the proximate cause of such suffering.<sup>74</sup>

§ 598. **Same continued—must have prevented the injury.**—As has been heretofore noted, damages cannot be recovered from a telegraph company for pecuniary loss in consequence of its negligent transmission or delivery of a message, when the same could not have been prevented had the message been properly delivered.<sup>75</sup> The same rule applies to cases brought to recover damages for mental suffering. So, if the suffering to the mind could not have been prevented had the message been promptly delivered, the plaintiff cannot recover, although the company negligently delayed its delivery.<sup>76</sup> In cases brought to recover damages for distress of

772, 1 L. R. A. 728; West. U. Tel. Co. v. Reid, 120 Ky. 231, 85 S. W. 1171, 27 Ky. Law Rep. 659, 70 L. R. A. 289. See West. U. Tel. Co. v. Williams, 129 Ky. 515, 112 S. W. 651, 19 L. R. A. (N. S.) 409.

<sup>73</sup> West. U. Tel. Co. v. Henderson, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; West. U. Tel. Co. v. Haley, 143 Ala. 586, 39 South. 386; Gulf, etc., Tel. Co. v. Richardson, 79 Tex. 649, 15 S. W. 689; West. U. Tel. Co. v. Kendzora (Tex. Civ. App.) 26 S. W. 245; West. U. Tel. Co. v. Cavin, 30 Tex. Civ. App. 152, 70 S. W. 229; West. U. Tel. Co. v. Stephens, 2 Tex. Civ. App. 129, 21 S. W. 148.

<sup>74</sup> West. U. Tel. Co. v. Haley, 143 Ala. 586, 39 South. 386. See, also, Slaughter v. West. U. Tel. Co. (Tex. Civ. App.) 112 S. W. 688.

<sup>75</sup> See §§ 549, 550, 598.

<sup>76</sup> Where the plaintiff is kept away from the deathbed of a relative. Cumberland Tel. Co. v. Brown, 104 Tenn. 56, 55 S. W. 155, 50 L. R. A. 277, 78 Am. St. Rep. 906; West. U. Tel. Co. v. Smith, 88 Tex. 9, 28 S. W. 931, 30 S. W. 549; West. U. Tel. Co. v. Housewright, 5 Tex. Civ. App. 1, 23 S. W. 824. See, also, West. U. Tel. Co. v. Eskridge, 7 Ind. App. 208, 33 N. E. 238; West. U. Tel. Co. v. Smith (Tex. Civ. App.) 30 S. W. 937; West. U. Tel. Co. v. Drake, 14 Tex. Civ. App. 601, 38 S. W. 632; West. U. Tel. Co. v. Johnson, 16 Tex. Civ. App. 546, 41 S. W. 367; West. U. Tel. Co. v. Waller (Tex. Civ. App.) 47 S. W. 396; West. U. Tel. Co. v. Norris, 25 Tex. Civ. App. 43, 60 S. W. 982. Where plaintiff is kept away from the funeral of some relative. West. U. Tel. Co. v. Stone (Tex. Civ. App.) 27 S. W. 144; West. U. Tel. Co. v. Linn, 87 Tex. 7, 26 S. W. 490, 47 Am. St. Rep. 58; West. U. Tel. Co. v. Motley, 87 Tex. 38, 27 S. W. 52, reversing (Civ. App.) 27 S. W. 51. It is also essential that the failure of the company to discharge its duty promptly be the proximate cause of the distress and suffering for which damages are sought: West. U. Tel. Co. v. Andrews, 78 Tex. 305, 14 S. W. 641; West. U. Tel. Co. v. Hendricks, 26 Tex. Civ. App. 366, 63 S. W. 341. Compare Phillips v. West. U. Tel. Co. (Tex. Civ. App.) 69 S. W. 997; West. U. Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772.

*Independent act of third person.*—The rule has been announced in some cases that there cannot be a recovery where the independent act of a third person was required to effect a delivery. Taliferro v. West. U. Tel. Co., 21 Ky. Law Rep. 1290, 54 S. W. 825; West. U. Tel. Co. v. Motley, 87 Tex. 38, 27 S. W. 52, reversing (Civ. App.) 27 S. W. 51; West. U. Tel. Co. v. Linn, 87 Tex. 7, 26 S. W. 490, 47 Am. St. Rep. 58. In other cases the mere fact that the independent act was required is held insufficient, if it be shown that such act would have been performed. West. U. Tel. Co. v. Clark, 14 Tex. Civ. App. 563, 38 S. W. 225; Cobb v. West. U. Tel. Co., 85 S. C. 430, 67 S. E. 549; Doster v. West. U.

mind, it is incumbent upon the plaintiff to show that he not only could, but would, have prevented the injury complained of, if the message had been promptly delivered to him. So there can be no recovery for not being present at a deathbed or funeral, unless, had the message been duly delivered, plaintiff not only could, but would, have gone,<sup>77</sup> and arrived in time,<sup>78</sup> which must be affirmatively shown:<sup>79</sup> or where his failure to do so was due to his being erroneously informed that a train which he might have taken had already gone,<sup>80</sup> or to the fact that the train which he did take and

Tel. Co., 77 S. C. 56, 57 S. E. 671; West. U. Tel. Co. v. Caldwell, 126 Ky. 42, 102 S. W. 840, 12 L. R. A. (N. S.) 748; West. U. Tel. Co. v. Drake, 14 Tex. Civ. App. 601, 38 S. W. 632.

<sup>77</sup> West. U. Tel. Co. v. Adams (Tex. Civ. App.) 80 S. W. 93; Cumberland Tel. Co. v. Brown, 104 Tenn. 56, 55 S. W. 155, 78 Am. St. Rep. 906, 50 L. R. A. 277; West. U. Tel. Co. v. Newnum (Tex. Civ. App.) 78 S. W. 700; West. U. Tel. Co. v. Johnson, 16 Tex. Civ. App. 546, 41 S. W. 367. Compare *Harrison v. West. U. Tel. Co.*, 71 S. C. 386, 51 S. E. 119; West. U. Tel. Co. v. Young (Tex. Civ. App.) 130 S. W. 257.

<sup>78</sup> *Smith v. West. U. Tel. Co.*, 72 S. C. 116, 51 S. E. 537; Cumberland Tel. Co. v. Brown, 104 Tenn. 56, 55 S. W. 155, 78 Am. St. Rep. 906, 50 L. R. A. 277; Howard v. West. U. Tel. Co., 84 S. W. 764, 27 Ky. Law Rep. 244; West. U. Tel. Co. v. Motley, 87 Tex. 38, 27 S. W. 52; Sabine Val. Tel. Co. v. Odom, 46 Tex. Civ. App. 428, 102 S. W. 925; West. U. Tel. Co. v. Linn, 87 Tex. 7, 26 S. W. 490, 47 Am. St. Rep. 58; West. U. Tel. Co. v. Ford, 40 Tex. Civ. App. 474, 90 S. W. 677; West. U. Tel. Co. v. Stone (Tex. Civ. App.) 27 S. W. 144; West. U. Tel. Co. v. Hendricks, 26 Tex. Civ. App. 366, 63 S. W. 341; West. U. Tel. Co. v. Wright, 169 Ala. 104, 53 South. 95; Harrelson v. West. U. Tel. Co., 90 S. C. 132, 72 S. E. 882. But see *Hughes v. West. U. Tel. Co.*, 72 S. C. 516, 52 S. E. 107.

<sup>79</sup> *Cumberland Tel. Co. v. Brown*, 104 Tenn. 56, 55 S. W. 155, 78 Am. St. Rep. 906, 50 L. R. A. 277; *Howard v. West. U. Tel. Co.*, 119 Ky. 625, 84 S. W. 764, 86 S. W. 982, 27 Ky. Law Rep. 244, 858, 7 Ann. Cas. 1065; West. U. Tel. Co. v. Bell, 42 Tex. Civ. App. 462, 92 S. W. 1036; West. U. Tel. Co. v. Adams (Tex. Civ. App.) 80 S. W. 93. But see *Sutton v. West. U. Tel. Co.*, 129 Ky. 166, 110 S. W. 874, 33 Ky. Law Rep. 577.

*The same must be alleged in declaration.*—West. U. Tel. Co. v. Bell, *supra*; West. U. Tel. Co. v. Smith (Tex. Civ. App.) 133 S. W. 1062; West. U. Tel. Co. v. Stracner (Tex. Civ. App.) 152 S. W. 845; *Capers v. West. U. Tel. Co.*, 71 S. C. 29, 50 S. E. 537; *Southwestern Tel., etc., Co. v. Givens* (Tex. Civ. App.) 139 S. W. 676; West. U. Tel. Co. v. Forest (Tex. Civ. App.) 157 S. W. 204; *Bennett v. West. U. Tel. Co.*, 128 N. C. 103, 38 S. E. 294, cured by a failure to demur. But see *West. U. Tel. Co. v. Griffith*, 161 Ala. 241, 50 South. 91; West. U. Tel. Co. v. Rowe, 44 Tex. Civ. App. 84, 98 S. W. 228; *Harrison v. West. U. Tel. Co.*, 71 S. C. 386, 51 S. E. 119. As to sufficiency of such allegation, see *West. U. Tel. Co. v. Hughey*, 55 Tex. Civ. App. 403, 118 S. W. 1130; West. U. Tel. Co. v. Cates (Tex. Civ. App.) 132 S. W. 93; West. U. Tel. Co. v. Eskridge, 7 Ind. App. 208, 33 N. E. 238; West. U. Tel. Co. v. Stracner, *supra*; West. U. Tel. Co. v. Lyman, 3 Tex. Civ. App. 460, 22 S. W. 656; West. U. Tel. Co. v. Gahan, 17 Tex. Civ. App. 657, 44 S. W. 933.

<sup>80</sup> *Higdon v. West. U. Tel. Co.*, 132 N. C. 726, 44 S. E. 558.

*Presumption that train ran on the schedule time.*—In order that the prompt delivery of a telegram may accomplish its purpose, it is frequently necessary that a particular train be taken; so the courts in a few cases have adopted the

which should have arrived in time was late,<sup>81</sup> or to the fact that he stopped off at an intermediate point.<sup>82</sup> Whether he could and would have gone had he received the message promptly is a question for the jury, although he may have testified that he could and would have done so.<sup>83</sup> In order to show the existence or proximate character of damages which are sought to be recovered, the testimony of the other party to the message or of some third person as to what he would have done in case the message had been duly transmitted and delivered has in some cases been admissible,<sup>84</sup> it

rule that it will be presumed that the train ran upon schedule time. *West. U. Tel. Co. v. Harris* (Tex. Civ. App.) 132 S. W. 876; *West. U. Tel. Co. v. McDavid* (Tex. Civ. App.) 121 S. W. 893; *West. U. Tel. Co. v. McDavid*, 103 Tex. 601, 132 S. W. 115.

<sup>81</sup> *West. U. Tel. Co. v. Briscoe*, 18 Ind. App. 22, 47 N. E. 473. But see *Sutton v. West. U. Tel. Co.*, 110 S. W. 874, 33 Ky. Law Rep. 577.

<sup>82</sup> *West. U. Tel. Co. v. Birchfield*, 14 Tex. Civ. App. 664, 38 S. W. 635.

<sup>83</sup> *West. U. Tel. Co. v. May*, 8 Tex. Civ. App. 176, 27 S. W. 760. See, also, *Evans v. West. U. Tel. Co.* (Tex. Civ. App.) 56 S. W. 609.

<sup>84</sup> *Carter v. West. U. Tel. Co.*, 141 N. C. 374, 54 S. E. 274; *Doster v. West. U. Tel. Co.*, 77 S. C. 56, 57 S. E. 671; *Wallingford v. West. U. Tel. Co.*, 60 S. C. 201, 38 S. E. 443, 629; *Texas, etc., Tel. Co. v. Mackenzie*, 36 Tex. Civ. App. 178, 81 S. W. 581; *West. U. Tel. Co. v. Karr*, 5 Tex. Civ. App. 60, 24 S. W. 302; *McPeck v. West. U. Tel. Co.*, 107 Iowa, 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214; *Bennett v. West. U. Tel. Co.*, 129 Iowa, 607, 106 N. W. 13; *Battle v. West. U. Tel. Co.*, 151 N. C. 629, 66 S. E. 661; *West. U. Tel. Co. v. Mitchell*, 91 Tex. 454, 44 S. W. 274, 66 Am. St. Rep. 906, 40 L. R. A. 209; *West. U. Tel. Co. v. Lawson*, 182 Fed. 369, 105 C. C. A. 451; *Robinson v. West. U. Tel. Co.*, 169 Mich. 503, 135 N. W. 292; *Cain v. West. U. Tel. Co.*, 89 Kan. 797, 133 Pac. 874. See *Trevisani v. Postal Tel. Cable Co.*, 176 Ill. App. 139; *West. U. Tel. Co. v. Sights*, 34 Okl. 461, 126 Pac. 234, 42 L. R. A. (N. S.) 419, Ann. Cas. 1914C, 204; *Bright v. West. U. Tel. Co.*, 132 N. C. 317, 43 S. E. 841; *Ellison v. West. U. Tel. Co.*, 163 N. C. 5, 79 S. E. 277; *Harrison v. West. U. Tel. Co.*, 163 N. C. 18, 79 S. E. 281; *West. U. Tel. Co. v. Benson*, 159 Ala. 254, 48 South. 712; *West. U. Tel. Co. v. Harris* (Tex. Civ. App.) 132 S. W. 876; *Kivett v. West. U. Tel. Co.*, 156 N. C. 296, 72 S. E. 388; *Willis v. West. U. Tel. Co.*, 69 S. C. 531, 48 S. E. 538, 104 Am. St. Rep. 828, 2 Ann. Cas. 52; *West. U. Tel. Co. v. Powell*, 54 Tex. Civ. App. 466, 118 S. W. 226; *West. U. Tel. Co. v. Cooper*, 29 Tex. Civ. App. 591, 69 S. W. 427; *West. U. Tel. Co. v. Waller* (Tex. Civ. App.) 47 S. W. 396; *Sutton v. West. U. Tel. Co.*, 129 Ky. 166, 110 S. W. 874.

In an action by the sender, the addressee may testify as to what he would have done had the message been duly delivered. *West. U. Tel. Co. v. Benson*, supra; *Carter v. West. U. Tel. Co.*, supra; *Bright v. West. U. Tel. Co.*, supra; *West. U. Tel. Co. v. Karr*, supra; *Hancock v. West. U. Tel. Co.*, 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403; *Beal v. West. U. Tel. Co.*, 153 N. C. 331, 69 S. E. 247. And when the addressee sues he may testify as to what he himself would have done. *West. U. Tel. Co. v. Norris*, 25 Tex. Civ. App. 43, 60 S. W. 982; *West. U. Tel. Co. v. Shofner*, 87 Ark. 303, 112 S. W. 751; *Battle v. West. U. Tel. Co.*, supra; *Willis v. West. U. Tel. Co.*, supra; *Bright v. West. U. Tel. Co.*, supra; *Hancock v. West. U. Tel. Co.*, supra; *Beal v. West. U. Tel. Co.*, supra; and may show by the sender's testimony of the original message what the latter would have done in response to the plaintiff's action, *West. U. Tel. Co. v. Norris*, supra.



being often the only means of showing such fact,<sup>85</sup> however, except in mental anguish cases<sup>86</sup> this does not seem to be the general rule.<sup>87</sup>

§ 599. **Same continued—postponement of funeral services.**—It has been attempted to be shown in some cases in order to evade the above rule that, notwithstanding the fact that the desired object of the message could not have been complied with had it been promptly delivered, yet had it been received in time, other arrangements could have been made by which the injury would have been prevented.<sup>88</sup> But this rule cannot be evaded by showing that, if the message had been promptly delivered, the plaintiff might have arranged a postponement of the funeral until he could have gotten there.<sup>89</sup> The conditions attached to such a state of affairs are too uncertain. For instance, the funeral might or might not have been

<sup>85</sup> *Doster v. West. U. Tel. Co.*, 77 S. C. 56, 57 S. E. 671.

*As to sufficiency of proof in such cases*, see *West. U. Tel. Co. v. Crowley*, 158 Ala. 583, 48 South. 381; *West. U. Tel. Co. v. Zane*, 6 Tex. Civ. App. 585, 25 S. W. 722; *Battle v. West. U. Tel. Co.*, 151 N. C. 629, 66 S. E. 661; *Gulf, etc., Tel. Co. v. Richardson*, 79 Tex. 649, 15 S. W. 689; *West. U. Tel. Co. v. Ridenour*, 35 Tex. Civ. App. 574, 80 S. W. 1030; *Sherrill v. West. U. Tel. Co.*, 155 N. C. 250, 71 S. E. 330; *West. U. Tel. Co. v. Chambers*, 34 Tex. Civ. App. 17, 77 S. W. 273; *West. U. Tel. Co. v. Webb*, 98 Ark. 87, 135 S. W. 366; *Nitka v. West. U. Tel. Co.*, 149 Wis. 106, 135 N. W. 492, Ann. Cas. 1913C, 863, 49 L. R. A. (N. S.) 337; *Potter v. West. U. Tel. Co.*, 138 Iowa, 406, 116 N. W. 130; *West. U. Tel. Co. v. Russell*, 4 Ala. App. 485, 58 South. 938; *West U. Tel. Co. v. Robbins*, 3 Ala. App. 234, 56 South. 879; *West. U. Tel. Co. v. Young* (Tex. Civ. App.) 133 S. W. 512; *West. U. Tel. Co. v. Moran*, 52 Tex. Civ. App. 117, 113 S. W. 625; *Smith v. West. U. Tel. Co.*, 77 S. C. 378, 58 S. E. 6, 12 Ann. Cas. 654; *West. U. Tel. Co. v. Crowley*, *supra*; *West. U. Tel. Co. v. Shofner*, 87 Ark. 303, 112 S. W. 751; *West. U. Tel. Co. v. Alford*, 110 Ark. 379, 161 S. W. 1027, 50 L. R. A. (N. S.) 94. See *West. U. Tel. Co. v. Williams*, 129 Ky. 515, 112 S. W. 651, 19 L. R. A. (N. S.) 409.

<sup>86</sup> See § 601, and cases cited thereunder.

<sup>87</sup> *West. U. Tel. Co. v. Watson*, 94 Ga. 202, 21 S. E. 457, 47 Am. St. Rep. 151; *West. U. Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846; *Hall v. West. U. Tel. Co.*, 59 Fla. 275, 51 South. 819, 27 L. R. A. (N. S.) 639; *Bass v. Postal Tel. Cable Co.*, 127 Ga. 423, 56 S. E. 465, 12 L. R. A. (N. S.) 489; *Wilson v. West. U. Tel. Co.*, 124 Ga. 131, 52 S. E. 153; *West U. Tel. Co. v. Adams Machine Co.*, 92 Miss. 849, 47 South. 412; *West. U. Tel. Co. v. Webb* (Miss.) 48 South. 408. And compare *Richmond Hosiery Mills v. West. U. Tel. Co.*, 123 Ga. 216, 51 S. E. 290.

<sup>88</sup> *West. U. Tel. Co. v. Swearingin*, 97 Tex. 293, 78 S. W. 491, 104 Am. St. Rep. 576; *West. U. Tel. Co. v. Caldwell*, 126 Ky. 42, 102 S. W. 840, 31 Ky. Law Rep. 497, 12 L. R. A. (N. S.) 748; *West. U. Tel. Co. v. Simmons* (Tex. Civ. App.) 93 S. W. 686; *West. U. Tel. Co. v. Chambers*, 34 Tex. Civ. App. 17, 77 S. W. 273; *West. U. Tel. Co. v. Norris*, 25 Tex. Civ. App. 43, 60 S. W. 982; *West. U. Tel. Co. v. Vanway* (Tex. Civ. App.) 54 S. W. 414; *Roach v. Jones*, 18 Tex. Civ. App. 231, 44 S. W. 677; *Sherrill v. West. U. Tel. Co.*, 155 N. C. 250, 71 S. E. 330.

<sup>89</sup> *West. U. Tel. Co. v. Linn*, 87 Tex. 7, 26 S. W. 490, 47 Am. St. Rep. 58; *West. U. Tel. Co. v. Motley*, 87 Tex. 38, 27 S. W. 52; *West. U. Tel. Co. v.*

postponed; or, the reply message might not have been received in time to arrange for such postponement. The rule that such injury could and would have been prevented had the message been delivered in time cannot be evaded by such uncertain propositions. The rule might be different if it appears not only that he would have requested a postponement, but also that the request would have been granted.<sup>90</sup>

§ 600. Same continued—failure to transmit money—no cause.—It was stated in another place that, where a telegraph company contracts to transmit money, but fails to promptly do so, the measure of damages for such breach is the interest on the money from the time it ought to have been transmitted to the time it was sent, together with the price of the message.<sup>91</sup> It follows, therefore, that a failure to promptly deliver money is no ground upon which the addressee may recover damages for mental worry and anguish.<sup>92</sup>

Stone (Tex. Civ. App.) 27 S. W. 144; West. U. Tel. Co. v. White (Tex. Civ. App.) 149 S. W. 790.

<sup>90</sup> West. U. Tel. Co. v. Caldwell, 126 Ky. 42, 102 S. W. 840, 31 Ky. Law Rep. 497, 12 L. R. A. (N. S.) 748. See, also, West. U. Tel. Co. v. Swearingin, 97 Tex. 293, 78 S. W. 491, 104 Am. St. Rep. 876; West. U. Tel. Co. v. Simmons (Tex. Civ. App.) 93 S. W. 686; West. U. Tel. Co. v. Chambers, 34 Tex. Civ. App. 17, 77 S. W. 273; West. U. Tel. Co. v. Norris, 25 Tex. Civ. App. 43, 60 S. W. 982; West. U. Tel. Co. v. Vanway (Tex. Civ. App.) 54 S. W. 414; Roach v. Jones, 18 Tex. Civ. App. 231, 44 S. W. 677; West. U. Tel. Co. v. Carter (Tex. Civ. App.) 20 S. W. 834; West. U. Tel. Co. v. Parsons, 72 S. W. 800, 24 Ky. Law Rep. 2008; Sherrill v. West. U. Tel. Co., 155 N. C. 250, 71 S. E. 330; West. U. Tel. Co. v. Smith (Tex. Civ. App.) 33 S. W. 742.

*Duty to seek postponement.*—Some of the courts hold that a plaintiff is under no obligation to attempt to have the funeral postponed. See Postal Tel. Cable Co. v. Pratt, 27 Ky. Law Rep. 430, 85 S. W. 225; West. U. Tel. Co. v. Johnsey, 49 Tex. Civ. App. 487, 109 S. W. 251; West. U. Tel. Co. v. Cook, 45 Tex. Civ. App. 87, 99 S. W. 1131. A question for the jury as held by some. See West. U. Tel. Co. v. Hardison (Tex. Civ. App.) 101 S. W. 541; Cobb v. West. U. Tel. Co., 85 S. C. 430, 67 S. E. 549; West. U. Tel. Co. v. Glass (Tex. Civ. App.) 154 S. W. 604. Other cases seem to indicate that some effort should be exercised. See West. U. Tel. Co. v. Carter, *supra*; West. U. Tel. Co. v. Anderson (Tex. Civ. App.) 37 S. W. 619; West. U. Tel. Co. v. Cook, *supra*; West. U. Tel. Co. v. Hill (Tex. Civ. App.) 26 S. W. 252. If the request would have been unavailing the failure to make such will not bar a recovery. See West. U. Tel. Co. v. Kinsley, 8 Tex. Civ. App. 527, 28 S. W. 831; West. U. Tel. Co. v. Witt, 33 Ky. Law Rep. 686, 110 S. W. 889; West. U. Tel. Co. v. Crawford (Tex. Civ. App.) 75 S. W. 843.

*Failure of those in charge* to postpone the funeral is no defense. See West. U. Tel. Co. v. McDonald, 57 Tex. Civ. App. 472, 122 S. W. 618; Southwestern, etc., Tel. Co. v. Givens (Tex. Civ. App.) 139 S. W. 676; Mullinax v. West. U. Tel. Co., 156 N. C. 541, 72 S. E. 583; West. U. Tel. Co. v. Johnson, 16 Tex. Civ. App. 546, 41 S. W. 367; West. U. Tel. Co. v. Webb, 98 Ark. 87, 135 S. W. 366.

<sup>91</sup> See § 577.

<sup>92</sup> De Voegler v. West. U. Tel. Co., 10 Tex. Civ. App. 229, 30 S. W. 1107;

§ 601. **Evidence of mental suffering.**—The general rule of evidence is that, where the state of a person's mind, his sentiment or disposition at a certain time, is the subject of inquiry, his statements and declarations at that period are admissible.<sup>93</sup> So the declarations of a testator may be received to show that his mind was under undue influence at the time of making the will;<sup>94</sup> and so, as to the extent of a mental disease, the declarations of the person affected are admissible.<sup>95</sup> It has been held, from this general rule, as a basis, that where the action is brought to recover damages for distress of mind or for mental anguish and suffering in consequence of a negligent transmission or delay in the delivery of a message, the natural condition of the mind, with respect to such suffering, may be shown by evidence of his behavior and natural expressions and utterances at the time of such.<sup>96</sup> Thus, if his expression of

*Robinson v. West. U. Tel. Co.*, 68 S. W. 656, 24 Ky. Law Rep. 452, 57 L. R. A. 611; *Ricketts v. West. U. Tel. Co.*, 10 Tex. Civ. App. 226, 30 S. W. 1105. But see *Cumberland Tel., etc., Co. v. Quigley*, 129 Ky. 788, 112 S. W. 897, 19 L. R. A. (N. S.) 575; *West. U. Tel. Co. v. Wells*, 50 Fla. 474, 39 South. 838, 111 Am. St. Rep. 129, 2 L. R. A. (N. S.) 1072, 7 Ann. Cas. 531, in which it was held that, where the company willfully refused to pay the plaintiff money sent by the former, thereby causing the plaintiff and family to travel twenty-four hours without food or funds, he might recover damages for bodily pain and suffering and for mental pain and anguish attendant thereon. Compare *International Ocean Tel. Co. v. Saunders*, 32 Fla. 434, 14 South. 148, 21 L. R. A. 810; *Gooch v. West. U. Tel. Co.*, 90 S. W. 587, 28 Ky. Law Rep. 828, message asking for money.

<sup>93</sup> *Barthelemy v. People*, 2 Hill (N. Y.) 248; *Hester v. Com.*, 85 Pa. 139; *Wetmore v. Mell*, 1 Ohio St. 26, 59 Am. Dec. 607.

<sup>94</sup> *Milton v. Hunter*, 13 Bush (Ky.) 163; *Lucas v. Cannon*, 13 Bush (Ky.) 650; *Batton v. Watson*, 13 Ga. 63, 58 Am. Dec. 504.

<sup>95</sup> *Rex v. Johnson*, 3 Car. & K. 354; *Howe v. Howe*, 99 Mass. 88; *State v. Kring*, 64 Mo. 591.

<sup>96</sup> *West. U. Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844; *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; *West. U. Tel. Co. v. Campbell*, 41 Tex. Civ. App. 204, 91 S. W. 312; *West. U. Tel. Co. v. Davis*, 24 Tex. Civ. App. 427, 59 S. W. 46; *West. U. Tel. Co. v. Carter* (Tex. Civ. App.) 20 S. W. 834; *Lay v. Postal Tel. Cable Co.*, 171 Ala. 172, 54 South. 529; *West. U. Tel. Co. v. Manker*, 145 Ala. 418, 41 South. 850, testimony that witness saw plaintiff crying is admissible as tending to show mental anguish. See, also, § 522.

*As to competency and sufficiency of evidence in general*, see *Markley v. West. U. Tel. Co.*, 159 Iowa, 557, 141 N. W. 443, affection of mother month prior to her death not too remote; *Rosser v. West. U. Tel. Co.*, 130 N. C. 251, 41 S. E. 378, four years too remote; *Battle v. West. U. Tel. Co.*, 151 N. C. 629, 66 S. E. 661, affection for a boy seventeen months old; *Bowen v. West. U. Tel. Co.*, 77 S. C. 122, 57 S. E. 674, prevented from reaching daughter's bedside; *West. U. Tel. Co. v. Blair*, 51 Tex. Civ. App. 427, 113 S. W. 164, mother not at daughter's funeral not conclusive that she did not suffer mental anguish in not being present before death; *Cordell v. West. U. Tel. Co.*, 149 N. C. 402, 63 S. E. 71, 22 L. R. A. (N. S.) 540; *Tinsley v. West. U. Tel. Co.*, 72 S. C. 350, 51 S. E. 913; *West. U. Tel. Co. v. Crocker*, 135 Ala. 492, 33



feelings is such as to indicate a distress of mind, or if his behavior shows that his feelings are greatly injured as a result of the message not accomplishing its purpose, there is no better way to show this to a jury than by such facts. If a person is injured physically, it is natural for him to show suffering, resulting therefrom, by his behavior, by natural expression of countenance or by utterances of pain; the same rule is applicable when the mind is that part of the body which suffers, and the best way to show such pain, or suffering is by these facts.<sup>97</sup> But the courts do not agree on the question whether the plaintiff may himself testify that he suffered mental anguish.<sup>98</sup>

South. 45, 59 L. R. A. 398; West. U. Tel. Co. v. Craven (Tex. Civ. App.) 95 S. W. 633; West. U. Tel. Co. v. Olivarri (Tex. Civ. App.) 110 S. W. 930; West. U. Tel. Co. v. Davis, *supra*; West. U. Tel. Co. v. Rabon, 60 Tex. Civ. App. 88, 127 S. W. 580; West. U. Tel. Co. v. Glenn (Tex. Civ. App.) 156 S. W. 1116; Mentzer v. West. U. Tel. Co., 93 Iowa, 752, 62 N. W. 1, 57 Am. St. Rep. 294, 28 L. R. A. 72; West. U. Tel. Co. v. Drake, 14 Tex. Civ. App. 601, 38 S. W. 632.

*Evidence of special affection* between members of a family is sometimes admissible. See West. U. Tel. Co. v. Campbell, *supra*; West. U. Tel. Co. v. Lydon, 82 Tex. 364, 18 S. W. 701; West. U. Tel. Co. v. Douglass (Tex. Civ. App.) 124 S. W. 488; West. U. Tel. Co. v. Bell (Tex. Civ. App.) 90 S. W. 714; West. U. Tel. Co. v. Rabon, *supra*; Kivett v. West. U. Tel. Co., 156 N. C. 296, 72 S. E. 388; Luckey v. West. U. Tel. Co., 151 N. C. 551, 66 S. E. 596. See, also, § 602. But see West. U. Tel. Co. v. Williams, 129 Ky. 515, 112 S. W. 651, 19 L. R. A. (N. S.) 409.

*Declarations of sick persons before death* have been held not to be admissible for the purpose of showing the extent of the mental anguish suffered. See West. U. Tel. Co. v. Waller, 96 Tex. 589, 74 S. W. 751, 97 Am. St. Rep. 936, reversing (Civ. App.) 72 S. W. 264; West. U. Tel. Co. v. Evans, 1 Tex. Civ. App. 297, 21 S. W. 266; West. U. Tel. Co. v. Stiles, 89 Tex. 314, 34 S. W. 438; West. U. Tel. Co. v. Jackson, 35 Tex. Civ. App. 419, 80 S. W. 649; West. U. Tel. Co. v. Williams, *supra*. But see Whitten v. West. U. Tel. Co., 141 N. C. 361, 54 S. E. 289; Potter v. West. U. Tel. Co., 138 Iowa, 406, 116 N. W. 130; Dowdy v. West. U. Tel. Co., 124 N. C. 522, 32 S. E. 802.

*The consciousness of the sick person presumed.*—See West. U. Tel. Co. v. Hughey, 55 Tex. Civ. App. 403, 118 S. W. 1130; West. U. Tel. Co. v. Robinson, 97 Tenn. 638, 37 S. W. 545, 34 L. R. A. 431.

<sup>97</sup> West. U. Tel. Co. v. Henderson, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; West. U. Tel. Co. v. Carter (Tex. Civ. App.) 20 S. W. 834; Mentzer v. West. U. Tel. Co., 93 Iowa, 752, 62 N. W. 1, 28 L. R. A. 72, 57 Am. St. Rep. 294. Compare West. U. Tel. Co. v. McLeod (Tex. Civ. App.) 22 S. W. 988; West. U. Tel. Co. v. Adams, 75 Tex. 535, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920.

<sup>98</sup> The rule in Alabama is that he cannot testify, as this infringes upon the province of the jury. Leland v. West. U. Tel. Co., 159 Ala. 245, 49 South. 252; West. U. Tel. Co. v. Northcutt, 158 Ala. 539, 48 South. 553, 132 Am. St. Rep. 38; West. U. Tel. Co. v. Cleveland, 169 Ala. 131, 53 South. 80, Ann. Cas. 1912B, 534; West. U. Tel. Co. v. Peagler, 163 Ala. 38, 50 South. 913; Lay v. Postal Tel. Cable Co., 171 Ala. 172, 54 South. 529; West. U. Tel. Co. v. Me-Morris, 158 Ala. 563, 48 South. 349, 132 Am. St. Rep. 46. But evidence of his action and expression is admissible. West. U. Tel. Co. v. Henderson, 89 Ala.

§ 602. Same continued—aggravation of suffering.—There may be circumstances which would have a tendency to aggravate mental suffering and anguish; and when this is the case, the facts tending to show it should be admitted. Thus, where the plaintiff was prevented from being present at the deathbed of his mother, by a delayed message announcing her serious illness, he may be allowed, in an action brought to recover damages for mental suffering in consequence of such delay, to show that he was her favorite son.<sup>99</sup> The great affection existing between the plaintiff and the person who died would naturally create a greater injury to the mind of the former, if he was prevented from being present during the latter's last moments in this world, and any facts which tend to show

510, 7 South. 419, 18 Am. St. Rep. 148; West. U. Tel. Co. v. Manker, 145 Ala. 418, 41 South. 850; West. U. Tel. Co. v. Rowell, 153 Ala. 295, 45 South. 73; Id., 166 Ala. 651, 51 South. 880. But this evidence is not necessary. West. U. Tel. Co. v. Benson, 159 Ala. 254, 48 South. 712. Such evidence was apparently admitted in at least in one Arkansas decision. West. U. Tel. Co. v. Sockwell, 91 Ark. 475, 121 S. W. 1046. Two Iowa cases proceeded upon the theory that direct proof of mental anguish is admissible. Mentzer v. West. U. Tel. Co., 93 Iowa, 752, 62 N. W. 1, 57 Am. St. Rep. 294, 28 L. R. A. 72; Markley v. West. U. Tel. Co., 151 Iowa, 612, 132 N. W. 37. The rule is denied in Kentucky. West. U. Tel. Co. v. Williams, 129 Ky. 515, 112 S. W. 651, 19 L. R. A. (N. S.) 409. Such evidence is admissible in North Carolina. Hunter v. West. U. Tel. Co., 135 N. C. 458, 47 S. E. 745; Bailey v. West. U. Tel. Co., 150 N. C. 316, 63 S. E. 1044; Shepard v. West. U. Tel. Co., 143 N. C. 244, 55 S. E. 704, 118 Am. St. Rep. 796; Kivett v. West. U. Tel. Co., 156 N. C. 296, 72 S. E. 388; Shaw v. West. U. Tel. Co., 151 N. C. 638, 66 S. E. 668; Dowdy v. West. U. Tel. Co., 124 N. C. 522, 32 S. E. 802; Sherrill v. West. U. Tel. Co., 117 N. C. 352, 23 S. E. 277. The rule prevails in South Carolina. Roberts v. West. U. Tel. Co., 73 S. C. 520, 53 S. E. 985, 114 Am. St. Rep. 100; Hamilton v. West. U. Tel. Co., 96 S. C. 598, 80 S. E. 706; Machen v. West. U. Tel. Co., 72 S. C. 256, 51 S. E. 697; Talbert v. West. U. Tel. Co., 83 S. C. 68, 64 S. E. 862, 916. But cannot state his own peculiar apprehension and conclusions when he learned of the company's negligence. Roberts v. West. U. Tel. Co., supra; Willis v. West. U. Tel. Co., 69 S. C. 531, 48 S. E. 538, 104 Am. St. Rep. 828, 2 Ann. Cas. 52; Ogilvie v. West. U. Tel. Co., 83 S. C. 8, 64 S. E. 860, 137 Am. St. Rep. 790; Doster v. West. U. Tel. Co., 77 S. C. 56, 57 S. E. 671; Graham v. West. U. Tel. Co., 93 S. C. 173, 76 S. E. 200. The law in the Texas courts is that such evidence is unnecessary, but the admission of such would not be reversible error. West. U. Tel. Co. v. Simmons, 32 Tex. Civ. App. 578, 75 S. W. 822; West. U. Tel. Co. v. Johnson, 9 Tex. Civ. App. 48, 28 S. W. 124; West. U. Tel. Co. v. McLeod (Civ. App.) 22 S. W. 988; West. U. Tel. Co. v. Porter (Civ. App.) 26 S. W. 866; West. U. Tel. Co. v. Jobe, 6 Tex. Civ. App. 403, 25 S. W. 168, 1036; West. U. Tel. Co. v. Adams, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844; West. U. Tel. Co. v. Mooney (Civ. App.) 160 S. W. 318; West. U. Tel. Co. v. Burrow, 10 Tex. Civ. App. 122, 30 S. W. 378; West. U. Tel. Co. v. Carter (Civ. App.) 20 S. W. 834; West. U. Tel. Co. v. Davis, 24 Tex. Civ. App. 427, 59 S. W. 46.

<sup>99</sup> West. U. Tel. Co. v. Lydon, 82 Tex. 364, 18 S. W. 701. See West. U. Tel. Co. v. Stiles, 89 Tex. 312, 34 S. W. 438; West. U. Tel. Co. v. Mellon, 96 Tenn. 66, 33 S. W. 725; West. U. Tel. Co. v. Jackson, 35 Tex. Civ. App. 419, 80 S. W. 649.

this relationship should be brought before the jury.<sup>100</sup> The court, in rendering an opinion on this point, said: "While juries in the absence of any evidence on the subject may act upon their own knowledge of the affection existing between a mother and son, still the admission of evidence upon the subject may be proper, and we cannot say that proof of a special regard felt and shown by a mother for one of her children may not be properly considered by the jury, in connection with other circumstances, in estimating the feelings of the child for the parent."<sup>101</sup> But, in such cases, it is not proper to admit evidence in which it is attempted to be shown that the mother was making frequent inquiries of the son's whereabouts and entreating that he be brought to her bedside.<sup>102</sup> While this may be a means of showing the affection of the mother for the son, yet if such facts are not imparted to the latter until after the mother's death the suffering endured by the son by being prevented from being with her before death would not be any greater, and "a deathbed scene is reproduced of such peculiar pathos that its influence would be almost sure, under a ruling admitting it as proper subject for consideration, to usurp the attention of the jury to the exclusion of those considerations which alone should control their action."<sup>103</sup>

§ 603. **Same continued—sickness as a result—admissible.**—In those jurisdictions where a person is allowed to recover damages for mental suffering in consequence of a message not being properly delivered announcing the serious illness of a relative, or where he is prevented from being at the burial by such delay, he may show as a result of such suffering that he became ill and was com-

<sup>100</sup> *Buchanan v. West. U. Tel. Co.* (Tex. Civ. App.) 100 S. W. 974; *Doster v. West. U. Tel. Co.*, 77 S. C. 56, 57 S. E. 671; *West. U. Tel. Co. v. Campbell*, 41 Tex. Civ. App. 204, 91 S. W. 312; *Kivett v. West. U. Tel. Co.*, 156 N. C. 296, 72 S. E. 388; *Markley v. West. U. Tel. Co.*, 159 Iowa, 557, 141 N. W. 443. See other cases in note 96.

<sup>101</sup> *West. U. Tel. Co. v. Lydon*, 82 Tex. 364, 18 S. W. 701.

<sup>102</sup> *West. U. Tel. Co. v. Stiles*, 89 Tex. 312, 34 S. W. 438. Compare *West. U. Tel. Co. v. Evans*, 1 Tex. Civ. App. 297, 21 S. W. 266; *West. U. Tel. Co. v. Mellon*, 96 Tenn. 66, 33 S. W. 725; *West. U. Tel. Co. v. Waller*, 96 Tex. 589, 74 S. W. 751, 97 Am. St. Rep. 936, reversing (Civ. App.) 72 S. W. 264; *West. U. Tel. Co. v. Jackson*, 35 Tex. Civ. App. 419, 80 S. W. 649; *West. U. Tel. Co. v. Williams*, 129 Ky. 515, 112 S. W. 651, 19 L. R. A. (N. S.) 409. But see *Potter v. West. U. Tel. Co.*, 138 Iowa, 406, 116 N. W. 130; *Whitten v. West. U. Tel. Co.*, 141 N. C. 361, 54 S. E. 289; *Dowdy v. West. U. Tel. Co.*, 124 N. C. 522, 32 S. E. 802.

<sup>103</sup> *West. U. Tel. Co. v. Waller*, 96 Tex. 589, 74 S. W. 751, 97 Am. St. Rep. 936, reversing (Civ. App.) 72 S. W. 264; *West. U. Tel. Co. v. Stiles*, 89 Tex. 312, 34 S. W. 438.



pelled to take his bed and incurred medical expenses.<sup>104</sup> This is merely a means of showing the extent of his suffering; and, of course, the greater the suffering, the greater should be the compensation therefor. If there were other causes intervening which produced this result, of course this could not be considered in determining the amount of damages to be recovered; yet it may be admitted to show that the intervening cause, and not the delay of the message, was the proximate cause of the suffering. The mental suffering and anguish must be the natural and proximate result of the negligence of the company and such as was contemplated by the parties at the time the contract was made as would be the most natural and probable result of such breach.<sup>105</sup> In such cases, there can be no recovery for "physical suffering" resulting from plaintiff's mental anguish.<sup>106</sup>

§ 604. Same continued—matters of defense—want of affection. Telegraph companies, where actions are brought against them to recover damages for mental suffering, may use any defense which tends to show that the mind was not injured or impaired or that such could have been avoided.<sup>107</sup> The greatest among any defenses

<sup>104</sup> *Simmons v. West. U. Tel. Co.*, 63 S. C. 425, 41 S. E. 521, 57 L. R. A. 607; *West. U. Tel. Co. v. Sweetman*, 19 Tex. Civ. App. 435, 47 S. W. 676. See §§ 612, 613. See *Maley v. West. U. Tel. Co.*, 151 Iowa, 228, 130 N. W. 1086, 49 L. R. A. (N. S.) 327.

<sup>105</sup> See § 592.

<sup>106</sup> *West. U. Tel. Co. v. Thompson*, 18 Tex. Civ. App. 609, 45 S. W. 429; *West. U. Tel. Co. v. Foy*, 32 Okl. 801, 124 Pac. 305, 49 L. R. A. (N. S.) 343; *Kline v. West. U. Tel. Co.*, 3 Ohio N. P. 143; *Kagy v. West. U. Tel. Co.*, 37 Ind. App. 73, 76 N. E. 792, 117 Am. St. Rep. 278; *Tyler v. West. U. Tel. Co.* (C. C.) 54 Fed. 634; *Curtin v. West. U. Tel. Co.*, 13 App. Div. 253, 42 N. Y. Supp. 1109; *Hadden v. Southern Messenger Service*, 135 Ga. 372, 69 S. E. 480.

<sup>107</sup> *Contributory negligence is a good defense.*—*Hocutt v. West. U. Tel. Co.*, 147 N. C. 186, 60 S. E. 980; *West. U. Tel. Co. v. Gullledge*, 84 Ark. 501, 106 S. W. 957; *Edwards v. West. U. Tel. Co.*, 147 N. C. 126, 60 S. E. 900; *West. U. Tel. Co. v. Jeanes*, 88 Tex. 230, 31 S. W. 186; *Mullinax v. West. U. Tel. Co.*, 156 N. C. 541, 72 S. E. 583; *Southwestern, etc., Tel. Co. v. Givens* (Tex. Civ. App.) 139 S. W. 676; *West. U. Tel. Co. v. Reynolds* (Tex. Civ. App.) 140 S. W. 121. As where plaintiff failed to send a message requesting the postponement of a funeral, *West. U. Tel. Co. v. Jeanes*, supra; but see *Southwestern, etc., Tel. Co., v. Jarrell* (Tex. Civ. App.) 138 S. W. 1165; *West. U. Tel. Co. v. Witt*, 110 S. W. 889, 33 Ky. Law Rep. 685; *Postal Tel. Cable Co. v. Pratt*, 85 S. W. 225, 27 Ky. Law Rep. 430; *West. U. Tel. Co. v. Crawford* (Tex. Civ. App.) 75 S. W. 843; *West. U. Tel. Co. v. Anderson* (Tex. Civ. App.) 37 S. W. 619; or to take an earlier train, *West. U. Tel. Co. v. Johnsey*, 49 Tex. Civ. App. 487, 109 S. W. 251; *Mullinax v. West. U. Tel. Co.*, supra; *Southwestern, etc., Tel. Co. v. Gehring* (Tex. Civ. App.) 137 S. W. 754; *West. U. Tel. Co. v. Porterfield* (Tex. Civ. App.) 84 S. W. 850; or to stop off at an intermediate point, *West. U. Tel. Co. v. Birchfield*, 14 Tex. Civ. App. 664, 38 S. W. 635; or where the injury was caused by his voluntary and deliberate act, *Mitchiner v. West. U. Tel. Co.*, 75 S. C. 182, 55 S. E. 222; *West. U. Tel. Co. v. Ivy*, 102 Ark. 246, 143 S. W. 1078;

in this respect is that there was no affectionate feelings entertained by the plaintiff for the person about whom the message which is delayed concerns. It seems that the grief of a loss of one, or a failure to see such person in his last moments, or to be present to tender the last respect to the dead, affects more directly the mind than

Higdon v. West. U. Tel. Co., 132 N. C. 726, 44 S. E. 558; Jones v. West. U. Tel. Co., 75 S. C. 208, 55 S. E. 318; Cloy v. West. U. Tel. Co., 78 S. C. 109, 58 S. E. 972; or where the addressee fails to act promptly on the information of delayed telegram, West. U. Tel. Co. v. Matthews, 113 Ky. 188, 67 S. W. 849; Mullinax v. West. U. Tel. Co., supra; Phillips v. West. U. Tel. Co. (Tex. Civ. App.) 69 S. W. 997; West. U. Tel. Co. v. Baker, 140 Fed. 315, 72 C. C. A. 87; West. U. Tel. Co. v. Mellon, 96 Tenn. 66, 33 S. W. 725; West. U. Tel. Co. v. Terrell, 10 Tex. Civ. App. 60, 30 S. W. 70; West. U. Tel. Co. v. Gullledge, 84 Ark. 501, 106 S. W. 957, whether he acted promptly or was justified in acting as he did, question for the jury; West. U. Tel. Co. v. Porterfield, supra; West. U. Tel. Co. v. Daniels (Tex. Civ. App.) 152 S. W. 1116; West. U. Tel. Co. v. Bryson, 25 Tex. Civ. App. 74, 61 S. W. 548; West. U. Tel. Co. v. Matthews, supra; Ebird v. West. U. Tel. Co., 132 N. C. 267, 43 S. E. 825; or where there is a failure to act upon the first information of sickness, Southwestern, etc., Tel. Co. v. Gehring, supra; West. U. Tel. Co. v. Lydon, 82 Tex. 364, 18 S. W. 701; West. U. Tel. Co. v. Reynolds (Tex. Civ. App.) 140 S. W. 121; West. U. Tel. Co. v. Hardison (Tex. Civ. App.) 101 S. W. 541; West. U. Tel. Co. v. Glass (Tex. Civ. App.) 154 S. W. 604; West. U. Tel. Co. v. Hill (Tex. Civ. App.) 26 S. W. 252; West. U. Tel. Co. v. Drake, 14 Tex. Civ. App. 601, 38 S. W. 632; or where the plaintiff has failed to use other means of communication to minimize or to prevent entirely his damages, Willis v. West. U. Tel. Co., 69 S. C. 531, 48 S. E. 538, 104 Am. St. Rep. 828, 2 Ann. Cas. 52; West. U. Tel. Co. v. Taylor (Ky.) 112 S. W. 844; West. U. Tel. Co. v. Wisdom, 85 Tex. 261, 20 S. W. 56, 34 Am. St. Rep. 805, not contributory negligence; Walker v. West. U. Tel. Co., 75 S. C. 512, 56 S. E. 38, where plaintiff tried to reach place; where plaintiff was misled by the company's agent into believing that any attempt of using any other means of communication would be unnecessary is admissible as tending to negative contributory negligence, West. U. Tel. Co. v. Lydon, supra; West. U. Tel. Co. v. Guinn (Tex. Civ. App.) 130 S. W. 616; Southwestern, etc., Tel. Co. v. Owens (Tex. Civ. App.) 116 S. W. 89; Southwestern, etc., Tel. Co. v. Jarrell, supra; or whether the plaintiff did or should have taken other means of conveyance other than the regular train which he would ordinarily and naturally have taken, but usually a question for the jury, Cobb v. West. U. Tel. Co., 85 S. C. 430, 67 S. E. 549; West. U. Tel. Co. v. Evans, 108 Ark. 39, 156 S. W. 424; West. U. Tel. Co. v. Sorsby, 29 Tex. Civ. App. 345, 69 S. W. 122; Poe v. West. U. Tel. Co., 160 N. C. 315, 76 S. E. 81; Southwestern, etc., Tel. Co. v. Taylor, 26 Tex. Civ. App. 79, 63 S. W. 1076; West. U. Tel. Co. v. Lavender (Tex. Civ. App.) 40 S. W. 1035; Bailey v. West. U. Tel. Co., 150 N. C. 316, 63 S. E. 1044; Pierson v. West. U. Tel. Co., 150 N. C. 559, 64 S. E. 577; West. U. Tel. Co. v. Johnson, 16 Tex. Civ. App. 546, 41 S. W. 367. As to effect of ignorance of ability to attend funeral, see West. U. Tel. Co. v. North, 177 Ala. 319, 58 South. 299; West. U. Tel. Co. v. Rabon, 60 Tex. Civ. App. 88, 127 S. W. 580; Roberts v. West. U. Tel. Co., 73 S. C. 520, 53 S. E. 985, 114 Am. St. Rep. 100.

*Evidence to explain delay* in going in response to a message is admissible. West. U. Tel. Co. v. Lydon, supra; West. U. Tel. Co. v. Johnsey, supra. Plaintiff may testify that his employer owed him money with which his expenses on the trip could have been met. West. U. Tel. Co. v. Waller (Tex. Civ. App.) 47 S. W. 396.

*As to other special defenses unavoidably interposed by defendant*, see West.

any other part of the body; and so, if there is no affectionate feelings for such person, the mind cannot become impaired or injured by being deprived of any of these pleasures.<sup>108</sup> So it has been held that the company may show, as a defense in an action brought by the father for damages for mental suffering, in consequence of a delayed message announcing the serious illness of his daughter, that he had abandoned his family and was living apart from them.<sup>109</sup> We think that, where such damages are allowed, if there is any affectionate feelings entertained by the father for the daughter, he should, on proof of such fact, be compensated for the injured feelings which were endured. In one case, the company attempted to prove that the plaintiff, a grandmother of the child about whom the message concerned, had a number of grandchildren—among whom her affection was divided—but the court held that the evidence was irrelevant.<sup>110</sup>

§ 605. **Relationship material.**—It was shown in another part of this work that in order to hold a telegraph company liable in damages for mental suffering, caused by a message announcing the dangerous illness, or the time set for the funeral services of a certain person, being delayed and thereby preventing the addressee from being present with said person before death, or at the burial, the company must have had some information of the fact that there was a close relationship between these two persons.<sup>111</sup> It neces-

U. Tel. Co. v. Rosentrefer, 80 Tex. 406, 16 S. W. 25; Cumberland, etc., Tel. Co. v. Quigley, 129 Ky. 788, 112 S. W. 897, 19 L. R. A. (N. S.) 575, no defense of company as a delay which might have happened as the result of a third party; Cobb v. West. U. Tel. Co., supra, company not excused although plaintiff did not know he could not take next train; West. U. Tel. Co. v. Hamilton, 36 Tex. Civ. App. 300, 81 S. W. 1052, no defense where decomposition sets in earlier than company anticipated; West. U. Tel. Co. v. Ward, 4 Willson, Civ. Cas. Ct. App. § 317, p. 553, 19 S. W. 898; Woods v. West. U. Tel. Co., 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581; West. U. Tel. Co. v. Cain (Tex. Civ. App.) 40 S. W. 624; West. U. Tel. Co. v. Simmons (Tex. Civ. App.) 93 S. W. 686; Green v. West. U. Tel. Co., 136 N. C. 506, 49 S. E. 171, 1 Ann. Cas. 358; Lay v. Postal Tel. Cable Co., 171 Ala. 172, 54 South. 529; West. U. Tel. Co. v. Shaw, 40 Tex. Civ. App. 277, 90 S. W. 58; Ward v. West. U. Tel. Co. (Tex. Civ. App.) 51 S. W. 259; Gerock v. West. U. Tel. Co., 147 N. C. 1, 60 S. E. 637; West. U. Tel. Co. v. Saunders, 164 Ala. 234, 51 South. 176, 137 Am. St. Rep. 35.

<sup>108</sup> West. U. Tel. Co. v. Terrell, 10 Tex. Civ. App. 60, 30 S. W. 70; West. U. Tel. Co. v. Simmons, 32 Tex. Civ. App. 578, 75 S. W. 822; Buchanan v. West. U. Tel. Co. (Tex. Civ. App.) 100 S. W. 974; West. U. Tel. Co. v. Campbell, 41 Tex. Civ. App. 204, 91 S. W. 312; Markley v. West. U. Tel. Co., 151 Iowa, 612, 132 N. W. 37. See, also, §§ 545, 546.

<sup>109</sup> West. U. Tel. Co. v. Terrell, 10 Tex. Civ. App. 60, 30 S. W. 70.

<sup>110</sup> West. U. Tel. Co. v. Crocker, 135 Ala. 492, 33 South. 45, 59 L. R. A. 398.

<sup>111</sup> §§ 545, 546. See, also, West. U. Tel. Co. v. Coffin, 88 Tex. 94, 30 S. W. 896; West. U. Tel. Co. v. McMillan (Tex. Civ. App.) 30 S. W. 298; West. U. Tel. Co. v. Gibson (Tex. Civ. App.) 39 S. W. 198. But see West. U. Tel. Co. v.



sarily follows, therefore, that there must be a relationship existing between the parties to or concerning a telegram before damages for mental suffering can be recovered.<sup>112</sup> Whenever a message announcing the serious illness, death or time of funeral of a person related in consanguinity to the addressee is delayed, mental anguish and suffering will be presumed, when, through the fault of the company, he is prevented from being present at the bedside or funeral of such relative; and it is not necessary for him to prove such injury.<sup>113</sup> While we perhaps cannot detect with the eye any change or difference, it is a natural result that the whole tree is affected when it loses one of its branches. It is according to nature that such shall be the result. The same rule applies to man. If one of his limbs are lost, the whole body becomes more or less affected. It is a presumption and one not necessary to be proven. This illustration may be far-fetched, but it is a fact, nevertheless, that, when one member of a family suffers, or of whom we are deprived, we suffer as a natural consequence; and when the relation is close, the fact does not have to be proven. It follows, therefore, that if there is not a relationship, especially by blood, or it is remote, the presumption of mental suffering cannot be maintained,<sup>114</sup> but same

Samuels (Tex. Civ. App.) 141 S. W. 802; *Amos v. West. U. Tel. Co.*, 79 S. C. 259, 60 S. E. 660, 128 Am. St. Rep. 845; *Lewis v. West. U. Tel. Co.*, 84 S. C. 54, 65 S. E. 941. See *Foreman v. West. U. Tel. Co.*, 141 Iowa, 32, 116 N. W. 724, 19 L. R. A. (N. S.) 374.

<sup>112</sup> *West. U. Tel. Co. v. Ayers*, 131 Ala. 391, 31 South. 78, 90 Am. St. Rep. 92; *West. U. Tel. Co. v. McMorris*, 158 Ala. 563, 48 South. 349, 132 Am. St. Rep. 46; *Lee v. West. U. Tel. Co.*, 130 Ky. 202, 113 S. W. 55; *West. U. Tel. Co. v. Steenbergen*, 107 Ky. 469, 54 S. W. 829, 21 Ky. Law Rep. 1289; *Butler v. West. U. Tel. Co.*, 77 S. C. 148, 57 S. E. 757; *West. U. Tel. Co. v. Coffin*, 88 Tex. 91, 30 S. W. 896; *Denham v. West. U. Tel. Co.*, 27 Ky. Law Rep. 999, 87 S. W. 788; *Davidson v. West. U. Tel. Co.*, 21 Ky. Law Rep. 1292, 54 S. W. 830; *Randall v. West. U. Tel. Co.*, 139 Ky. 373, 107 S. W. 235, 15 L. R. A. (N. S.) 277, 139 Am. St. Rep. 477; *West. U. Tel. Co. v. Long*, 148 Ala. 202, 41 South. 965; *West. U. Tel. Co. v. Kirkpatrick*, 2 Tenn. Civ. App. 41; plaintiff and the person concerning whom message relates, *Davidson v. West. U. Tel. Co.*, supra; *Denham v. West. U. Tel. Co.*, supra; *West. U. Tel. Co. v. Wilson*, 97 Tex. 22, 75 S. W. 482; *West. U. Tel. Co. v. Porterfield* (Tex. Civ. App.) 84 S. W. 850; plaintiff and addressee, *West. U. Tel. Co. v. Steenbergen*, supra; *West. U. Tel. Co. v. Ayers*, supra; plaintiff and deceased, as to the arrival of the body or funeral preparations, *West. U. Tel. Co. v. McMorris*, supra.

<sup>113</sup> *West. U. Tel. Co. v. Coffin*, 88 Tex. 91, 30 S. W. 896; *West. U. Tel. Co. v. Randles* (Tex. Civ. App.) 34 S. W. 447; *West. U. Tel. Co. v. Porter* (Tex. Civ. App.) 26 S. W. 866; *West. U. Tel. Co. v. McLeod* (Tex. Civ. App.) 22 S. W. 988; *West. U. Tel. Co. v. Thompson*, 18 Tex. Civ. App. 609, 45 S. W. 429; *West. U. Tel. Co. v. Crocker*, 135 Ala. 492, 33 South. 45, 59 L. R. A. 398. See § 608.

<sup>114</sup> *Harrison v. West. U. Tel. Co.*, 136 N. C. 381, 48 S. E. 772; *Foreman v. West. U. Tel. Co.*, 141 Iowa, 32, 116 N. W. 724, 19 L. R. A. (N. S.) 374; *Cashion v. West. U. Tel. Co.*, 123 N. C. 267, 31 S. E. 493; *West. U. Tel. Co. v. Ayers*,

must be shown.<sup>115</sup> It seems, however, that if there is an affectionate feeling existing between the parties, although they may not be related by blood, proof may be admitted showing this fact, but it will never be presumed that mental suffering and anguish has been sustained.<sup>116</sup>

§ 606. **Nature of damages.**—As will be seen from a perusal of the preceding sections, actions brought to recover damages for mental suffering relate to messages announcing the serious illness, death or time of funeral services of some relative of the addressee, and are intended to bring him to the bedside or funeral of such person, or to comply with the information in other ways to his interest.<sup>117</sup> But even in such cases it is not every matter incidental

131 Ala. 391, 31 South. 78, 90 Am. St. Rep. 92; *Robinson v. West. U. Tel. Co.*, 68 S. W. 656, 24 Ky. Law Rep. 452, 57 L. R. A. 611. See, also, *West. U. Tel. Co. v. Steenbergen*, 107 Ky. 469, 54 S. W. 829; *Morrow v. West. U. Tel. Co.*, 107 Ky. 517, 54 S. W. 853; *Davidson v. West. U. Tel. Co. (Ky.)* 54 S. W. 830. See *West. U. Tel. Co. v. Crocker*, 135 Ala. 492, 33 South. 45, 59 L. R. A. 398; *Randall v. West. U. Tel. Co.*, 139 Ky. 373, 107 S. W. 235, 15 L. R. A. (N. S.) 277, 139 Am. St. Rep. 477; *West. U. Tel. Co. v. Bennett*, 3 Ala. App. 275, 57 South. 87; *Sherrill v. West. U. Tel. Co.*, 155 N. C. 250, 71 S. E. 330; *Seddon v. West. U. Tel. Co.*, 146 Iowa, 743, 126 N. W. 969; *West. U. Tel. Co. v. Young (Tex. Civ. App.)* 130 S. W. 257; *West. U. Tel. Co. v. Kanause (Tex. Civ. App.)* 143 S. W. 189.

<sup>115</sup> *Foreman v. West. U. Tel. Co.*, 141 Iowa, 32, 116 S. W. 724, 19 L. R. A. (N. S.) 374, plaintiff son-in-law of addressee; *West. U. Tel. Co. v. Moxley*, 80 Ark. 554, 98 S. W. 112, plaintiff son-in-law of person who was sick; *Hunter v. West. U. Tel. Co.*, 135 N. C. 458, 47 S. E. 745, second cousin; *Bright v. West. U. Tel. Co.*, 132 N. C. 317, 43 S. E. 841, husband's uncle; *Bennett v. West. U. Tel. Co.*, 128 N. C. 103, 38 S. E. 294, father-in-law; *Bush v. West. U. Tel. Co.*, 93 S. C. 176, 76 S. E. 197; *West. U. Tel. Co. v. Steenbergen*, 107 Ky. 469, 54 S. W. 829, father-in-law and son-in-law; *Lee v. West. U. Tel. Co.*, 130 Ky. 202, 113 S. W. 55, aunt and nephew; *Denham v. West. U. Tel. Co.*, 87 S. W. 788, 27 Ky. Law Rep. 999, aunt and nephew; *Randall v. West. U. Tel. Co.*, 107 S. W. 235, 32 Ky. Law Rep. 859, 15 L. R. A. (N. S.) 277, engaged couple.

<sup>116</sup> *West. U. Tel. Co. v. Moxley*, 80 Ark. 554, 98 S. W. 112; *West. U. Tel. Co. v. Griffin*, 92 Ark. 219, 122 S. W. 489; *Seddon v. West. U. Tel. Co.*, 146 Iowa, 743, 126 N. W. 969; *Dayvis v. West. U. Tel. Co.*, 139 N. C. 79, 51 S. E. 898; *Hunter v. West. U. Tel. Co.*, 135 N. C. 458, 47 S. E. 745; *Ellison v. West. U. Tel. Co.*, 163 N. C. 5, 79 S. E. 277; *Harrison v. West. U. Tel. Co.*, 163 N. C. 18, 79 S. E. 281; *West. U. Tel. Co. v. Cline*, 8 Ind. App. 364, 35 N. E. 564; *West. U. Tel. Co. v. Ayers*, 131 Ala. 391, 31 South. 78, 90 Am. St. Rep. 92; *Lee v. West. U. Tel. Co.*, 130 Ky. 202, 113 S. W. 55; *West. U. Tel. Co. v. Steenbergen*, 107 Ky. 469, 54 S. W. 829, 21 Ky. Law Rep. 1289. But see *Randall v. West. U. Tel. Co.*, 107 S. W. 235, 32 Ky. Law Rep. 859, 15 L. R. A. (N. S.) 277.

<sup>117</sup> So damages may be recovered for being prevented from being present at the deathbed or funeral of a near relative where it is result of the negligence of the company. See *West. U. Tel. Co. v. Crumpton*, 138 Ala. 632, 36 South. 517; *West. U. Tel. Co. v. Arant*, 88 Ark. 499, 115 S. W. 136; *West. U. Tel. Co. v. Benson*, 159 Ala. 254, 48 South. 712; *Ark., etc., R. Co. v. Stroude*, 82 Ark. 117, 100 S. W. 760; *Bailey v. West. U. Tel. Co.*, 150 N. C. 316, 63 S. E. 1044; *Postal Tel. Cable Co. v. Pratt*, 85 S. W. 225, 27 Ky. Law Rep. 430; *Lyne v. West. U. Tel. Co.*, 123 N. C. 129, 31 S. E. 350; *Hughes v. West. U. Tel. Co.*

thereto which may be considered as an element of such damages.<sup>118</sup> The anxiety to be present on such occasion is greater than any that can ever befall a man, as during these short moments we experience that which can never be witnessed again while on earth; for this reason, cases of this nature most always come upon the ground of failure to deliver such messages in time. Cases, however, have been brought to recover damages for a failure to deliver other kinds of messages where they are of information, and not calculated or intended to affect the movement of the addressee.<sup>119</sup> Thus, where a father is prevented from stopping the marriage of his

72 S. C. 516, 52 S. E. 107; West. U. Tel. Co. v. O'Fiel, 47 Tex. Civ. App. 40, 104 S. W. 406; West. U. Tel. Co. v. Beringer, 84 Tex. 38, 19 S. W. 336; Buchanan v. West. U. Tel. Co. (Tex. Civ. App.) 100 S. W. 974; Roach v. Jones, 18 Tex. Civ. App. 231, 44 S. W. 677; West. U. Tel. Co. v. Hill, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058; West. U. Tel. Co. v. Peagler, 163 Ala. 38, 50 South. 913; West. U. Tel. Co. v. Fuel, 165 Ala. 391, 51 South. 571; West. U. Tel. Co. v. Cleveland, 169 Ala. 131, 53 South. 80, Ann. Cas. 1912B, 534; West. U. Tel. Co. v. Bickerstaff, 100 Ark. 1, 138 S. W. 997, Ann. Cas. 1913B, 242; Mullinax v. West. U. Tel. Co., 156 N. C. 541, 72 S. E. 583; Southwestern, etc., Tel. Co. v. Gehring (Tex. Civ. App.) 137 S. W. 754; West. U. Tel. Co. v. Sisson, 155 Ky. 624, 160 S. W. 168; West. U. Tel. Co. v. Kirkpatrick, 2 Tenn. Civ. App. 41.

<sup>118</sup> West. U. Tel. Co. v. McCaul, 115 Tenn. 99, 90 S. W. 856; Arkansas, etc., R. Co. v. Stroude, 82 Ark. 117, 100 S. W. 760; Buchanan v. West. U. Tel. Co. (Tex. Civ. App.) 100 S. W. 974; West. U. Tel. Co. v. Birchfield, 14 Tex. Civ. App. 664, 38 S. W. 635; prevented from being present with other members of family, West. U. Tel. Co. v. Butler, 45 Tex. Civ. App. 28, 99 S. W. 704; Buchanan v. West. U. Tel. Co., supra; Machen v. West. U. Tel. Co., 72 S. C. 256, 51 S. E. 697; from offering them his assistance and consolation, West. U. Tel. Co. v. Wilson, 97 Tex. 22, 75 S. W. 482; Ark., etc., R. Co. v. Stroude, supra; West. U. Tel. Co. v. Butler, supra; buried at an unsatisfactory place, West. U. Tel. Co. v. Carter, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826; West. U. Tel. Co. v. McCaul, supra; West. U. Tel. Co. v. McNairy, 34 Tex. Civ. App. 389, 78 S. W. 969; West. U. Tel. Co. v. Arant, 88 Ark. 499, 115 S. W. 136, in unsuitable clothes, West. U. Tel. Co. v. Carter, supra, or at the expense of strangers, West. U. Tel. Co. v. McNairy, supra; particular clergyman did not conduct the funeral, West. U. Tel. Co. v. Arnold, 96 Tex. 493, 73 S. W. 1043; West. U. Tel. Co. v. Robinson, 97 Tenn. 638, 37 S. W. 545, 34 L. R. A. 431; deprived of another member of family while on the way, West. U. Tel. Co. v. Birchfield, supra; compelled to leave relative's bedside frequently to meet train, Arial v. West. U. Tel. Co., 70 S. C. 418, 50 S. E. 6; uncertainty as to whether the funeral would be postponed, West. U. Tel. Co. v. Reed, 37 Tex. Civ. App. 445, 84 S. W. 296. But see Hamrick v. West. U. Tel. Co., 140 N. C. 151, 52 S. E. 232; Meadows v. West. U. Tel. Co., 132 N. C. 40, 43 S. E. 512; West. U. Tel. Co. v. De Andrea, 45 Tex. Civ. App. 395, 100 S. W. 977; West. U. Tel. Co. v. Adams (Tex. Civ. App.) 80 S. W. 93; West. U. Tel. Co. v. Stacy (Tex. Civ. App.) 41 S. W. 100; West. U. Tel. Co. v. Piner, 9 Tex. Civ. App. 152, 29 S. W. 66; West. U. Tel. Co. v. Hamilton, 36 Tex. Civ. App. 300, 81 S. W. 1052; West. U. Tel. Co. v. DeJarles, 8 Tex. Civ. App. 109, 27 S. W. 792.

<sup>119</sup> West. U. Tel. Co. v. Odom, 21 Tex. Civ. App. 537, 52 S. W. 632; West. U. Tel. Co. v. Hines, 22 Tex. Civ. App. 315, 54 S. W. 627. See, also, § 589, and cases cited in notes thereunder.



daughter by a delay in delivering a message to that effect, he was allowed to recover damages for mental suffering resulting from an undesirable marriage,<sup>120</sup> although he could not recover for the mental suffering of his wife, unless it appeared to the company that he had a wife.

§ 607. **Actions do not survive—limitation.**—Actions against telegraph companies for damages for mental suffering are for “an injury to the person,” within the rule that such actions do not survive, and the right of the action dies with the person.<sup>121</sup> His injuries are such as none other can suffer, or, if they suffer same, the injury is too remote for damages to be recovered. The sufferer himself is the only person who can maintain a suit thereon. There are statutes, however, which confer the right to the husband for the benefit of the wife, or the parent for the child; but this is the case only when the injured person still lives. These actions also fall within the statutes of limitation, as “actions for the injuries to the person.”<sup>122</sup>

§ 608. **Burden of proof—presumption.**—In these cases, the burden of proof is upon the plaintiff to make out his case,<sup>123</sup> and that, as the proximate result of the company's negligence or default, mental anguish has been suffered.<sup>124</sup> So, where the message requests that the sender be met at a station or that preparations be made for a burial, it must affirmatively be shown that, if the message had been duly delivered, the request would have been complied with or the burial arrangements would have been made.<sup>125</sup> So also, where the message announces the death or illness of a relative, it must be shown that, if the message had been duly delivered, the addressee would have gone.<sup>126</sup> In none of these instances will

<sup>120</sup> *West. U. Tel. Co. v. Procter*, 6 Tex. Civ. App. 300, 25 S. W. 811. And as will be seen, it has been applied to other causes. § 577.

<sup>121</sup> *Morton v. West. U. Tel. Co.*, 130 N. C. 299, 41 S. E. 484; *Fitzgerald v. West. U. Tel. Co.*, 15 Tex. Civ. App. 143, 40 S. W. 421.

<sup>122</sup> *Kelly v. West. U. Tel. Co.*, 17 Tex. Civ. App. 344, 43 S. W. 532; *Martin v. West. U. Tel. Co.*, 6 Tex. Civ. App. 619, 26 S. W. 136.

<sup>123</sup> *Hauser v. West. U. Tel. Co.*, 150 N. C. 557, 64 S. E. 503; *West. U. Tel. Co. v. Long*, 90 Ark. 203, 118 S. W. 405; *West. U. Tel. Co. v. Smith*, 88 Tex. 9, 28 S. W. 931, 30 S. W. 549. See, also, *Heathcoat v. West. U. Tel. Co.*, 156 Ala. 339, 47 South. 139.

<sup>124</sup> *Hauser v. West. U. Tel. Co.*, 150 N. C. 557, 64 S. E. 503; *Lanning v. West. U. Tel. Co.*, 155 N. C. 344, 71 S. E. 309.

<sup>125</sup> *Hancock v. West. U. Tel. Co.*, 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403; *West. U. Tel. Co. v. McMorris*, 158 Ala. 563, 48 South. 349, 132 Am. St. Rep. 46; *Johnson v. West. U. Tel. Co.*, 81 S. C. 235, 62 S. E. 244, 128 Am. St. Rep. 905, 17 L. R. A. (N. S.) 1002.

<sup>126</sup> *West. U. Tel. Co. v. Adams* (Tex. Civ. App.) 80 S. W. 93; *West. U. Tel. Co. v. Robbins*, 3 Ala. App. 234, 56 South. 879. Compare *West. U. Tel. Co. v.*

the presumption arise in the plaintiff's favor, but it must be shown that the party would have been met,<sup>127</sup> or the funeral arrangements made,<sup>128</sup> or that the addressee could and would have gone,<sup>129</sup> and arrived in time.<sup>130</sup> Where, however, the relationship between the parties is near, mental suffering will be presumed<sup>131</sup> without affirmative proof<sup>132</sup> of the existence of such suffering<sup>133</sup> or of the amount of damages to be recovered,<sup>134</sup> provided there is proof of the existence of a sufficiently close relationship.<sup>135</sup> So, where the relationship is remote or is merely by marriage, mental anguish

Snell, 3 Ala. App. 263, 56 South. 854, when addressee would have gone at little expense.

<sup>127</sup> Hancock v. West. U. Tel. Co., 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403; West. U. Tel. Co. v. McMorris, 158 Ala. 563, 48 South. 349, 132 Am. St. Rep. 46.

<sup>128</sup> Id.

<sup>129</sup> West. U. Tel. Co. v. Adams (Tex. Civ. App.) 80 S. W. 93; Cumberland Tel. Co. v. Brown, 104 Tenn. 56, 55 S. W. 155, 78 Am. St. Rep. 906, 50 L. R. A. 277; Cobb v. West. U. Tel. Co., 85 S. C. 430, 67 S. E. 549.

<sup>130</sup> Cumberland Tel. Co. v. Brown, 104 Tenn. 56, 55 S. W. 155, 78 Am. St. Rep. 906, 50 L. R. A. 277; Howard v. West. U. Tel. Co., 119 Ky. 625, 84 S. W. 764, 86 S. W. 982, 7 Ann. Cas. 1065, 27 Ky. Law Rep. 244, 858; West. U. Tel. Co. v. Smith, 88 Tex. 9, 28 S. W. 931, 30 S. W. 549; West. U. Tel. Co. v. Shofner, 87 Ark. 303, 112 S. W. 751, plaintiff need not negative the contingencies of wrecks, washouts, or other accidents which might have delayed her arrival, but a *prima facie* case is made out if evidence is submitted showing that, according to train schedule, she should have reached the place of the funeral in time if the message had not been delayed; Kivett v. West. U. Tel. Co., 156 N. C. 296, 72 S. E. 388.

<sup>131</sup> West. U. Tel. Co. v. Thompson, 18 Tex. Civ. App. 609, 45 S. W. 429; West. U. Tel. Co. v. Blair, 51 Tex. Civ. App. 427, 113 S. W. 164, the presumption may be rebutted; Kivett v. West. U. Tel. Co., 156 N. C. 296, 72 S. E. 388. See, also, West. U. Tel. Co. v. Coffin, 88 Tex. 94, 30 S. W. 896; West. U. Tel. Co. v. Simmons, 32 Tex. Civ. App. 578, 75 S. W. 822; Sherrill v. West. U. Tel. Co., 155 N. C. 250, 71 S. E. 330; West. U. Tel. Co. v. Fuel, 165 Ala. 391, 51 South. 571; West. U. Tel. Co. v. Randles (Tex. Civ. App.) 34 S. W. 447; West. U. Tel. Co. v. Porterfield (Tex. Civ. App.) 84 S. W. 850; West. U. Tel. Co. v. Hankins (Tex. Civ. App.) 110 S. W. 543; West. U. Tel. Co. v. Wilson, 97 Ark. 198, 133 S. W. 845; West. U. Tel. Co. v. McMorris, 158 Ala. 563, 48 South. 349, 132 Am. St. Rep. 46; West. U. Tel. Co. v. Benson, 159 Ala. 254, 48 South. 712; West. U. Tel. Co. v. Campbell, 41 Tex. Civ. App. 204, 91 S. W. 312, may be rebutted; West. U. Tel. Co. v. Terrell, 10 Tex. Civ. App. 60, 30 S. W. 70, as where plaintiff had abandoned his daughter before her death.

<sup>132</sup> West. U. Tel. Co. v. Thompson, 18 Tex. Civ. App. 609, 45 S. W. 429; West. U. Tel. Co. v. Blair, 51 Tex. Civ. App. 427, 113 S. W. 164; West. U. Tel. Co. v. Randles (Tex. Civ. App.) 34 S. W. 447; West. U. Tel. Co. v. McLeod (Tex. Civ. App.) 22 S. W. 988.

<sup>133</sup> West. U. Tel. Co. v. Randles (Tex. Civ. App.) 34 S. W. 447.

<sup>134</sup> West. U. Tel. Co. v. Adams, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844; West. U. Tel. Co. v. Benson, 159 Ala. 254, 48 South. 712; West. U. Tel. Co. v. McLeod (Tex. Civ. App.) 22 S. W. 988.

<sup>135</sup> Harrison v. West. U. Tel. Co., 136 N. C. 381, 48 S. E. 772.

will not be presumed, but must be affirmatively shown.<sup>136</sup> Furthermore, where mental anguish is presumed from the relationship between the parties, if the action is brought to recover damages on other grounds, as for physical suffering, such other damages must be shown and not presumed.<sup>137</sup>

§ 609. **Damages for mental suffering—doctrine denied.**—While it is held, in some few states, that damages may be recovered for mental suffering unaccompanied by a pecuniary loss or physical injury, yet the weight of authority holds a contrary view.<sup>138</sup> With

<sup>136</sup> *Alexander v. West. U. Tel. Co.*, 141 N. C. 75, 53 S. E. 657; *Foreman v. West. U. Tel. Co.*, 141 Iowa, 32, 116 N. W. 724, 19 L. R. A. (N. S.) 374; *Cashion v. West. U. Tel. Co.*, 123 N. C. 267, 31 S. E. 493; *Johnson v. West. U. Tel. Co.*, 81 S. C. 325, 62 S. E. 244, 128 Am. St. Rep. 905, 17 L. R. A. (N. S.) 1002; *West. U. Tel. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896; *West. U. Tel. Co. v. Samuels* (Tex. Civ. App.) 141 S. W. 802; *West. U. Tel. Co. v. Wilson*, 97 Tex. 22, 75 S. W. 482; *Harrison v. West. U. Tel. Co.*, 143 N. C. 147, 55 S. E. 435, 10 Ann. Cas. 476; *West. U. Tel. Co. v. Kanause* (Tex. Civ. App.) 143 S. W. 189, stepfather and stepson; *Rich v. West. U. Tel. Co.* (Tex. Civ. App.) 110 S. W. 93; *West. U. Tel. Co. v. Crow*, 106 Ark. 117, 152 S. W. 1015. But see *West. U. Tel. Co. v. Saunders*, 164 Ala. 234, 51 South. 176, 137 Am. St. Rep. 35.

*As to sufficiency of proof of affection where relationship is not close*, see *Alexander v. West. U. Tel. Co.*, supra; *Bright v. West. U. Tel. Co.*, 132 N. C. 317, 43 S. E. 841; *Harrison v. West. U. Tel. Co.*, supra; *Pierson v. West. U. Tel. Co.*, 150 N. C. 559, 64 S. E. 577; *Busbee v. West. U. Tel. Co.*, 89 S. C. 567, 72 S. E. 499; *Doster v. West. U. Tel. Co.*, 77 S. C. 56, 57 S. E. 671.

*Notice to company of affection between distant relations.*—Some courts hold that there must not only be proof of tender and affectionate relations where the parties are not closely connected, but the company must have notice of such fact at the time message was given to it for transmission. *West. U. Tel. Co. v. Coffin*, supra; *West. U. Tel. Co. v. McMillan* (Tex. Civ. App.) 30 S. W. 298; *West. U. Tel. Co. v. Gibson* (Tex. Civ. App.) 39 S. W. 198; *Amos v. West. U. Tel. Co.*, 79 S. C. 259, 60 S. E. 660, 128 Am. St. Rep. 845; *Lewis v. West. U. Tel. Co.*, 84 S. C. 54, 65 S. E. 941; *West. U. Tel. Co. v. Samuels*, supra. But see *Foreman v. West. U. Tel. Co.*, supra; *Cameron v. West. U. Tel. Co.*, 90 S. C. 503, 74 S. E. 929; *Bush v. West. U. Tel. Co.*, 93 S. C. 176, 76 S. E. 197. See §§ 545, 546.

<sup>137</sup> *West. U. Tel. Co. v. Thompson*, 18 Tex. Civ. App. 609, 45 S. W. 429.

<sup>138</sup> *Arkansas.*—*Peay v. West. U. Tel. Co.*, 64 Ark. 538, 43 S. W. 965, 39 L. R. A. 463. But the rule has been changed in this state by statute. See § 615.

*Dakota.*—*Russell v. West. U. Tel. Co.*, 3 Dak. 315, 19 N. W. 408.

*Florida.*—*International Ocean Tel. Co. v. Saunders*, 32 Fla. 434, 14 South. 148, 21 L. R. A. 810.

*Georgia.*—*Chapman v. West. U. Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 30 Am. St. Rep. 183, 17 L. R. A. 430; *Seifert v. West. U. Tel. Co.*, 129 Ga. 181, 58 S. E. 699, 121 Am. St. Rep. 210, 11 L. R. A. (N. S.) 1149; *Glenn v. West. U. Tel. Co.*, 1 Ga. App. 821, 58 S. E. 83.

*Illinois.*—*West. U. Tel. Co. v. Haltom*, 71 Ill. App. 63.

*Indiana.*—*West. U. Tel. Co. v. Adams*, 28 Ind. App. 420, 63 N. E. 125; *West. U. Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846, overruling *Reese v. West. U. Tel. Co.*, 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583; *Kagy v. West. U. Tel. Co.*, 37 Ind. App. 73, 76 N. E. 792, 117 Am. St. Rep. 278.



all due respect to the courts holding that damages for such injuries may be recovered, we are clearly convinced that the ground upon which they base their opinion is not of very firm foundation. We do not deny the fact that the mind is injured to a certain extent as a result of the breach of almost any contract, but it is of such peculiar nature that we cannot begin to estimate the degree of suffering in order to make sufficient compensation therefor. The anxiety of the mind is too refined and vague in its nature to be taken as a sub-

*Kansas*.—*West v. West*. U. Tel. Co., 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530.

*Minnesota*.—*Francis v. West*. U. Tel. Co., 58 Minn. 252, 59 N. W. 1078, 49 Am. St. Rep. 507, 25 L. R. A. 406.

*Mississippi*.—*West, U. Tel. Co. v. Rogers*, 68 Miss. 748, 9 South. 823, 24 Am. St. Rep. 300, 13 L. R. A. 859; *Duncan v. West, U. Tel. Co.*, 93 Miss. 500, 47 South. 552; *West, U. Tel. Co. v. Watson*, 82 Miss. 101, 33 South. 76.

*Missouri*.—*Newman v. West, U. Tel. Co.*, 54 Mo. App. 434; *Connell v. West, U. Tel. Co.*, 116 Mo. 34, 22 S. W. 345, 38 Am. St. Rep. 575, 20 L. R. A. 172; *Burnett v. West, U. Tel. Co.*, 39 Mo. App. 599.

*New York*.—*Curtin v. West, U. Tel. Co.*, 13 App. Div. 253, 42 N. Y. Supp. 1109, 3 N. Y. Ann. Cas. 286.

*Ohio*.—*Kester v. West, U. Tel. Co.*, 8 Ohio Cir. Ct. R. 236, 4 O. C. D. 410; *Morton v. West, U. Tel. Co.*, 53 Ohio St. 431, 41 N. E. 689, 53 Am. St. Rep. 648, 32 L. R. A. 735; *Kline v. West, U. Tel. Co.*, 4 Ohio S. & C. P. Dec. 224, 3 Ohio N. P. 143.

*Oklahoma*.—*Butner v. West, U. Tel. Co.*, 2 Okl. 234, 37 Pac. 1087; *West, U. Tel. Co. v. Chouteau*, 28 Okl. 664, 115 Pac. 879, Ann. Cas. 1912D, 824, 49 L. R. A. (N. S.) 207; *Thomas v. West, U. Tel. Co.*, 30 Okl. 63, 118 Pac. 370; *West, U. Tel. Co. v. Foy*, 32 Okl. 801, 124 Pac. 305, 49 L. R. A. (N. S.) 343; *West, U. Tel. Co. v. Reeves*, 34 Okl. 468, 126 Pac. 216.

*Pennsylvania*.—*Huston v. Freemansburg Borough*, 212 Pa. 548, 61 Atl. 1022, 3 L. R. A. (N. S.) 49; *Kightlinger v. West, U. Tel. Co.*, 20 Pa. Co. Ct. R. 630.

*South Carolina*.—*Lewis v. West, U. Tel. Co.*, 57 S. C. 325, 35 S. E. 556. Rule changed by statute in this state. See § 615.

*Virginia*.—*Connolly v. West, U. Tel. Co.*, 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919, 56 L. R. A. 663.

*Washington*.—*Corcoran v. Postal Tel. Cable Co.*, 80 Wash. 570, 142 Pac. 29, L. R. A. 1915B, 552.

*West Virginia*.—*Davis v. West, U. Tel. Co.*, 46 W. Va. 48, 32 S. E. 1026.

*Wisconsin*.—*Summerfield v. West, U. Tel. Co.*, 87 Wis. 1, 57 N. W. 973, 41 Am. St. Rep. 17. Rule changed by statute in this state. See § 615.

*United States*.—*Alexander v. West, U. Tel. Co. (C. C.)* 126 Fed. 445; *Rowan v. West, U. Tel. Co. (C. C.)* 149 Fed. 550; *West, U. Tel. Co. v. Sklar*, 126 Fed. 295, 61 C. C. A. 281; *Stansell v. West, U. Tel. Co. (C. C.)* 107 Fed. 668; *McBride v. Sunset Tel. Co. (C. C.)* 96 Fed. 81; *Gahan v. West, U. Tel. Co. (C. C.)* 59 Fed. 433; *West, U. Tel. Co. v. Wood*, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706; *Crawson v. West, U. Tel. Co. (C. C.)* 47 Fed. 544; *Tyler v. West, U. Tel. Co. (C. C.)* 54 Fed. 634; *Chase v. West, U. Tel. Co. (C. C.)* 44 Fed. 554, 10 L. R. A. 464.

In *Alabama* the question is complicated by the fact that the courts preserve the old common-law distinction between actions *ex contractu* and *ex delicto*. So there can be a recovery in an action on the contract, although the only other damage was the loss of the toll or the nominal damage of breach of

ject for pecuniary consideration.<sup>139</sup> It deals too much with the science of psychopathy and is a matter that appeals to the imaginative powers of man to such an extent that it becomes dangerous to tamper with when the rights of others are involved.

§ 610. When may be basis of action—malicious or willful wrong.—There are instances where damages may be recovered for mental suffering disconnected from other losses; and yet this is in the nature of punitive damages, or a punishment imposed on the wrongdoer. Thus, if the company's operator is guilty of such gross negligence in the discharge of his duties as amounts to a willful wrong, whereby another suffers agony or a distress of mind, the company would be liable in damages for such wrong.<sup>140</sup> It is exacted of the company more to deter others from committing other and similar offenses than as a compensation for the mental suffering endured.<sup>141</sup> If an agent of a telegraph company should be guilty of such gross negligence as to indicate a wanton or malicious purpose in failing to transmit and deliver a message, the person injured thereby would be entitled to exemplary damages, although he might not have sustained any loss except a worry and distress of mind.<sup>142</sup> So, in actions for libel and slander, they will be liable

contract. *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23; *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; *West. U. Tel. Co. v. Crumpton*, 138 Ala. 632, 36 South. 517; *West. U. Tel. Co. v. Northcutt*, 158 Ala. 539, 48 South. 553, 132 Am. St. Rep. 38; *West. U. Tel. Co. v. Manker*, 145 Ala. 418, 41 South. 850; *West. U. Tel. Co. v. Saunders*, 164 Ala. 234, 51 South. 176, 137 Am. St. Rep. 35; *West. U. Tel. Co. v. Young* (Tex. Civ. App.) 133 S. W. 512, case arose in Alabama. But, where the action is *ex delicto*, there can be no recovery. *West. U. Tel. Co. v. Krichbaum*, 132 Ala. 535, 31 South. 607; *Blount v. West. U. Tel. Co.*, 126 Ala. 105, 27 South. 779; *West. U. Tel. Co. v. Blocker*, 138 Ala. 484, 35 South. 468; *West. U. Tel. Co. v. Waters*, 139 Ala. 652, 36 South. 773; *West. U. Tel. Co. v. Wright*, 169 Ala. 108, 53 South. 95; *West. U. Tel. Co. v. Brown*, 6 Ala. App. 339, 59 South. 329. But if the plaintiff can show a loss of the toll he may recover whether the action be in tort or in contract. *West. U. Tel. Co. v. Burns*, 164 Ala. 252, 51 South. 573; *West. U. Tel. Co. v. Westmoreland*, 150 Ala. 654, 43 South. 790; *West. U. Tel. Co. v. Krichbaum*, *supra*. See, also, *West. U. Tel. Co. v. Jackson*, 163 Ala. 9, 50 South. 316; *West. U. Tel. Co. v. McMorris*, 158 Ala. 563, 48 South. 349, 132 Am. St. Rep. 46.

<sup>139</sup> *Davis v. West. U. Tel. Co.*, 46 W. Va. 48, 32 S. E. 1026. See, also, note 147, *post*.

<sup>140</sup> *West. U. Tel. Co. v. Rogers*, 68 Miss. 748, 9 South. 823, 24 Am. St. Rep. 300, 13 L. R. A. 859, note; *Dunn v. West. U. Tel. Co.*, 2 Ga. App. 845, 59 S. E. 189, where plaintiff entered company's office to deliver a message for transmission, and without provocation the agent ordered him out and insulted and humiliated him by profane and abusive language. See, also, *Jeffries v. West. U. Tel. Co.*, 2 Ga. App. 853, 59 S. E. 192.

<sup>141</sup> *Scott & Jarnagin on Tel.* §§ 417, 418; *Southern Kansas R. Co. v. Rice*, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766.

<sup>142</sup> *West v. West. U. Tel. Co.*, 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530.

in damages to the injured person, since in such cases malice is an essential element. When, however, the words are not actionable *per se*, there must be proof of special damages. If, on the other hand, they are actionable *per se*, they have a sure tendency to degrade the citizen in the estimation of his fellows, which results in damages to his social influence and business efficiency.<sup>143</sup> When this is the case, it does not devolve upon him to prove other injuries except that endured by the mind. The wrongful act complained of may have been done in good faith, but if the subsequent acts of the company indicate a total disregard of the rights of others, it would still be liable. It would be liable in damages for mental suffering in cases of assault or assault and battery. It was formerly held that a corporation could not be guilty of a wrong, where the element of criminal intent was necessary to constitute the wrong, but this doctrine has long since been refuted.

§ 611. **Reasons for not allowing such damages.**—The general rule, under the common law, and that followed by the preponderance of authority is that mental suffering, unaccompanied by other losses or injuries,<sup>144</sup> and not resulting from the willful or malicious wrong of the company,<sup>145</sup> is not sufficient grounds upon which to maintain an action against a telegraph company for the recovery of damages therefor, in consequence of a negligent transmission or delivery of a message, although it was informed at the time the message was accepted for transmission that mental anguish and suffering would be the result.<sup>146</sup> The best reasons found in our research on this subject were given by Judge Lurton in a dissenting opinion, and as they are so clearly and satisfactorily stated, we take

<sup>143</sup> *Chapman v. West. U. Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 186; *West. U. Tel. Co. v. Rogers*, 68 Miss. 748, 9 South. 823, 24 Am. St. Rep. 300, 13 L. R. A. 859n.

<sup>144</sup> *West. U. Tel. Co. v. Rogers*, 68 Miss. 748, 9 South. 823, 24 Am. St. Rep. 300, 13 L. R. A. 859; *Francis v. West. U. Tel. Co.*, 58 Minn. 252, 59 N. W. 1078, 49 Am. St. Rep. 507, 25 L. R. A. 406; *Connelly v. West. U. Tel. Co.*, 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919, 56 L. R. A. 663; *West. U. Tel. Co. v. Sklar*, 126 Fed. 295, 61 C. C. A. 281; *West. U. Tel. Co. v. Chouteau*, 28 Okl. 664, 115 Pac. 879, Ann. Cas. 1912D, 824, 49 L. R. A. (N. S.) 206.

<sup>145</sup> See *West. U. Tel. Co. v. Rogers*, 68 Miss. 748, 9 South. 823, 24 Am. St. Rep. 300, 13 L. R. A. 859.

<sup>146</sup> *West. U. Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846; *Chapman v. West. U. Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 30 Am. St. Rep. 183, 17 L. R. A. 430; *West. U. Tel. Co. v. Rogers*, 68 Miss. 748, 9 South. 823, 24 Am. St. Rep. 300, 13 L. R. A. 859; *Francis v. West. U. Tel. Co.*, 58 Minn. 252, 59 N. W. 1078, 49 Am. St. Rep. 507, 25 L. R. A. 406; *Connelly v. West. U. Tel. Co.*, 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919, 56 L. R. A. 663; *West. U. Tel. Co. v. Sklar*, 126 Fed. 295, 61 C. C. A. 281; *West. U. Tel. Co. v. Ford*, 8 Ga. App. 514, 70 S. E. 65.



pleasure in quoting them at this place: "The reason an independent action for such damages cannot and ought not to be sustained is found in the remoteness of such damages, and in the metaphysical character of such an injury considered apart from physical pain. Such injuries are generally more sentimental than substantial. Depending largely upon physical and nervous condition, the suffering of one under precisely the same circumstances would be no test of the sufferings of another. Vague and shadowy, there is no possible standard by which an injury can be justly compensated or even approximately measured. Easily simulated and impossible to disprove, it falls within all the objections to speculative damages, which are universally excluded because of their uncertain character. That damages so imaginary, so metaphysical, so sentimental, shall be ascertained and assessed by a jury with justness, not by way of punishment to the defendant, but as a mere compensation to the plaintiff, is not to be expected. That the grief natural to the death of a loved relative shall be separated from the added grief and anguish resulting from delayed information of such mortal illness or death, and compensation given for the latter only, is the task imposed by the law, as determined by the majority. \* \* \*

It is legitimate to consider the evils to which such a precedent logically leads. Upon what sound legal considerations can this court refuse to award damages for injuries to the feelings, mental distress and humiliation where such injury results from the breach of any contract? Take the case of a debtor who agrees to return the money borrowed on a certain day, who breaches his agreement willfully with knowledge that such breach on his part will probably result in the financial ruin and dishonor of his disappointed creditor. Why shall not such a debtor, in addition to the debt and the interest, also compensate his creditor for this ruin, or at least for his mental suffering? \* \* \*

Upon what principle can we longer refuse to entertain an action for injured feelings consequent upon the use of abusive and defamatory language not charging a crime or resulting in special pecuniary damages? Mental distress is or may be in some cases as real as bodily pain, and it as certainly results from language not amounting to an imputation of crime, yet such actions have always been dismissed as not authorized by the law as it has come down to us, and as it has been for all times administered." <sup>147</sup>

<sup>147</sup> *Wadsworth v. West. U. Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 875.

*Other reasons.*—*There are other reasons advanced for denying the doctrine: First, that the doctrine is unknown to the common law.*—*West. U. Tel. Co.*

§ 612. Same continued—other reasons—nominal damages—incidental to other injury.—Some of the courts which hold the first view commented upon—that damages may be recovered for mental anguish—claim that there must be nominal damages, in order to recover damages for mental anguish, but this fact cannot be entertained, since nominal damages necessarily deny any further recovery. The inconsistency of such a palpable reason is too great to be considered. If damages for mental suffering may be recovered where there is no other loss, then there is no need of the injured person having to suffer nominal damages; but if it is necessary that he should have sustained nominal damages, however slight they may be, then damages cannot be recovered for mental suffer-

v. Ferguson, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846; Russell v. West. U. Tel. Co., 3 Dak. 315, 19 N. W. 408; Wadsworth v. West. U. Tel. Co., 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864; Rowan v. West. U. Tel. Co. (C. C.) 149 Fed. 550; West. U. Tel. Co. v. Chouteau, 28 Okl. 664, 115 Pac. 879, Ann. Cas. 1912D, 824, 49 L. R. A. (N. S.) 206; Chapman v. West. U. Tel. Co., 88 Ga. 763, 15 S. E. 901, 30 Am. St. Rep. 183, 17 L. R. A. 430; Francis v. West. U. Tel. Co., 58 Minn. 252, 59 N. W. 1078, 49 Am. St. Rep. 507, 25 L. R. A. 406; Connell v. West. U. Tel. Co., 116 Mo. 34, 22 S. W. 345, 38 Am. St. Rep. 575, 20 L. R. A. 172; Curtin v. West. U. Tel. Co., 13 App. Div. 253, 42 N. Y. Supp. 1109. But see the following cases upon this point by those upholding the doctrine: Cates v. West. U. Tel. Co., 151 N. C. 497, 66 S. E. 592, 24 L. R. A. (N. S.) 1286; Wadsworth v. West. U. Tel. Co., supra; International Ocean Tel. Co. v. Saunders, 32 Fla. 434, 14 South. 148, 21 L. R. A. 810.

*Second, that it would be difficult in determining the measure of damages.*—Wadsworth v. West. U. Tel. Co., supra; McBride v. Sunset Tel. Co. (C. C.) 96 Fed. 81; Francis v. West. U. Tel. Co., supra; Chapman v. West. U. Tel. Co., supra; Kester v. West. U. Tel. Co. (C. C.) 55 Fed. 603; Peay v. West. U. Tel. Co., 64 Ark. 538, 43 S. W. 965, 39 L. R. A. 463. But this objection is met by those upholding the doctrine in the following cases: Barnes v. West. U. Tel. Co., 27 Nev. 438, 76 Pac. 931, 103 Am. St. Rep. 776, 1 Ann. Cas. 346, 65 L. R. A. 666; Harrison v. West. U. Tel. Co., 143 N. C. 147, 55 S. E. 435, 10 Ann. Cas. 476; Young v. West. U. Tel. Co., 107 N. C. 384, 11 S. E. 1044, 22 Am. St. Rep. 883, 9 L. R. A. 669; West. U. Tel. Co. v. Adair, 115 Ala. 441, 22 South. 73; Graham v. West. U. Tel. Co., 109 La. 1069, 34 South. 91; West. U. Tel. Co. v. Van Cleave, 107 Ky. 464, 54 S. W. 827, 92 Am. St. Rep. 366; Wadsworth v. West. U. Tel. Co., supra; Stuart v. West. U. Tel. Co., 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623; Davis v. West. U. Tel. Co., 46 W. Va. 48, 32 S. E. 1026; Connell v. West. U. Tel. Co., supra; West. U. Tel. Co. v. Stratemeier, 6 Ind. App. 125, 32 N. E. 871; Curtin v. West. U. Tel. Co., supra.

*Third, that there is no analogy between the actions of this nature and those for a breach of promise or seduction, libel, etc., cases.*—West. U. Tel. Co. v. Rogers, 68 Miss. 748, 9 South. 823, 24 Am. St. Rep. 300, 13 L. R. A. 859; Butler v. West. U. Tel. Co., 2 Okl. 234, 37 Pac. 1087; Chapman v. West. U. Tel. Co., supra; Francis v. West. U. Tel. Co., supra; West. U. Tel. Co. v. Ferguson, supra; Connell v. West. U. Tel. Co., supra; International Ocean Tel. Co. v. Saunders, supra. But see Bryan v. West. U. Tel. Co., 133 N. C. 603, 45 S. E. 938, where this objection is answered.

*Fourth, that it would open the doors to unlimited and "intolerable" litigation.*—West. U. Tel. Co. v. Chouteau, supra; Chapman v. West. U. Tel. Co., supra; Francis v. West. U. Tel. Co., supra; West. U. Tel. Co. v. Rogers, supra;

ing unaccompanied by other loss.<sup>148</sup> But there must be a greater loss than mere nominal damages in order to recover for the worry or distress of the mind. If pecuniary loss has been sustained, damages over and above this loss should in some instances be awarded in the nature of punitive damages. In fact and in truth there are but one class of cases—in the absence of malice and willful

Kester v. West. U. Tel. Co., *supra*; Wadsworth v. West. U. Tel. Co., *supra*. See, also, § 590. But see the following cases where this objection is met: Sherrill v. West. U. Tel. Co., 155 N. C. 250, 71 S. E. 330; Bowers v. West. U. Tel. Co., 135 N. C. 504, 47 S. E. 597; Wadsworth v. West. U. Tel. Co., *supra*; West. U. Tel. Co. v. Adair, 115 Ala. 441, 22 South. 73. See, also, Cowan v. West. U. Tel. Co., 122 Iowa, 379, 98 N. W. 281, 101 Am. St. Rep. 268, 64 L. R. A. 545; Green v. West. U. Tel. Co., 136 N. C. 489, 49 S. E. 165, 103 Am. St. Rep. 955, 1 Ann. Cas. 349, 67 L. R. A. 985.

*Fifth, that it would be difficult in applying the doctrine consistently.*—Cashion v. West. U. Tel. Co., 123 N. C. 267, 31 S. E. 493; West. U. Tel. Co. v. Ferguson, *supra*; West. U. Tel. Co. v. Chouteau, *supra*; Butner v. West. U. Tel. Co., *supra*.

*Sixth, that it would be difficult to secure evidence of mental anguish.*—West. U. Tel. Co. v. Ferguson, *supra*; Kester v. West. U. Tel. Co., *supra*.

*Seventh, that it would be a discrimination against telegraph companies, if it does not apply to all public service corporations as well.*—Connell v. West. U. Tel. Co., *supra*; West. U. Tel. Co. v. Ferguson, *supra*. But see Poteet v. West. U. Tel. Co., 74 S. C. 491, 55 S. E. 113; Wadsworth v. West. U. Tel. Co., *supra*.

<sup>148</sup> Chapman v. West. U. Tel. Co., 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 190. In this case the court said: "The case West. U. Tel. Co. v. Rogers, 68 Miss. 748, 9 South. 823, 13 L. R. A. 859, note, 24 Am. St. Rep. 300, suggests that the doctrine it opposes would open up a new field of litigation. This is worthy of remark. Except in Texas, suits like this have been infrequent in the past. If their foundation principle be sanctioned, they are likely to multiply indefinitely. Nowhere can be found any satisfactory suggestion of a principle to restrain such suits within reasonable limits. How much mental suffering shall be necessary to constitute a cause of action? Let some of the courts favoring recovery measure out the quantity. If they are unable to do this, then, on principle, any mental suffering would be actionable, the degree of it merely determining the quantum of damages. The cases do suggest as a restriction that the plaintiff must be entitled to damages on some other ground, or to nominal damages at least; in other words, there must be an infraction of some legal right for the plaintiff; then the damages may be increased for the mental suffering. If the plaintiff must be entitled to substantial damages on other grounds, then mental suffering alone is not the ground for damages, which is the very point contended for. To speak of the right to nominal damages as a condition for giving substantial damages is a palpable contradiction. To give nominal damages necessarily denies any further recovery. It is said there must be an infraction of some legal right, attended with mental suffering, for this kind of damages to be given. If this be true law, why is not mental distress always an item to be allowed for in the damages? We have seen that, though allowed in some, it is in many cases excluded. Every man knows that the violation of any material right is necessarily productive of more or less pain of mind. Then why not compensate it in every instance where a right has been violated? In no case whatever are damages recoverable, unless a legal duty has been broken. By the test proposed, it is first granted that mental suffering alone is not actionable; then a case arises in which there is no actionable damages, unless men-



wrong<sup>149</sup>—in which damages should be awarded for mental suffering and anguish. Where both the mind and body suffers from the same cause, damages, in a sense, should be awarded for both. "The mind is as much a part of the body as the bones and muscles, and an injury to the body includes the whole, and its effects are inseparable."<sup>150</sup> Where mental pain is therefore an element of physical pain, or is a necessary consequence of physical pain, or is the natural and proximate result of the physical injury, then damages for mental suffering may be recovered where the injury had been caused by the negligence of defendant.<sup>151</sup> Thus, where the message is a summons to a physician to attend a sick person, but on account of the company negligently delaying the message the physician failed to reach the patient, in consequence of which the patient suffers great physical and mental pain and anguish, in such cases damages should be awarded for the mental suffering.<sup>152</sup>

**§ 613. Same continued—mental suffering following physical pain.**—It seems, in those cases where damages may be recovered for mental suffering accompanying physical pain, that the former suffering must be an element of the latter and not the cause of it.<sup>153</sup> Thus, where fright caused by the negligence of the defendant was so great and sudden as to immediately produce physical sick-

tal suffering be such, when it is simply assumed that it is actual damages. Throwing away the lame pretense of basing recovery or mental suffering upon an otherwise harmless transgression, and stripping it of all false form and confusing technicality, it is manifest that to allow such a recovery, in real substance, is an effort to protect feeling by legal remedy." See *Corcoran v. Postal Tel. Cable Co.*, 80 Wash. 570, 142 Pac. 29, L. R. A. 1915B, 552.

<sup>149</sup> Where personal security or personal liberty is infringed, the mental suffering seems to be a necessary component in the injury. *Chapman v. West. U. Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 187. But mental suffering alone is not such an infringement of the rights as to justify damages therefor. *Id.*

<sup>150</sup> *Connell v. West. U. Tel. Co.*, 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 172, 38 Am. St. Rep. 584.

<sup>151</sup> *West v. West. U. Tel. Co.*, 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 533; *West. U. Tel. Co. v. Hanley*, 85 Ark. 263, 107 S. W. 1168; *Barnes v. West. U. Tel. Co.*, 27 Nev. 438, 76 Pac. 931, 103 Am. St. Rep. 776, 65 L. R. A. 666, 1 Ann. Cas. 346; *West. U. Tel. Co. v. Burgess* (Tex. Civ. App.) 56 S. W. 237; *West. U. Tel. Co. v. Procter*, 6 Tex. Civ. App. 300, 25 S. W. 811; *West. U. Tel. Co. v. Wells*, 50 Fla. 474, 39 South. 838, 111 Am. St. Rep. 129, 2 L. R. A. (N. S.) 1072, 7 Ann. Cas. 531; *West. U. Tel. Co. v. Burns*, 164 Ala. 252, 51 South. 373; *West. U. Tel. Co. v. Young* (Tex. Civ. App.) 133 S. W. 512; *West. U. Tel. Co. v. Ford*, 8 Ga. App. 514, 70 S. E. 65. See *Glawson v. Southern Bell, etc., Tel. Co.*, 9 Ga. App. 450, 71 S. E. 747; *Corcoran v. Postal Tel. Cable Co.*, 80 Wash. 570, 142 Pac. 29, L. R. A. 1915B, 552.

<sup>152</sup> See § 578.

<sup>153</sup> *Curtin v. West. U. Tel. Co.*, 13 App. Div. 253, 42 N. Y. Supp. 1109; *Kagy v. West. U. Tel. Co.*, 37 Ind. App. 73, 76 N. E. 792, 117 Am. St. Rep. 278. See *West. U. Tel. Co. v. Cordage Co.*, 6 Ala. App. 351, 59 South. 757.

ness and suffering, it was held that damages could not be recovered. The principle upon which this was held was that for the mere mental suffering there could be no recovery, and the physical injury was too remote, being unlikely to result from the wrongful act.<sup>154</sup> It was held in another case, however, that fright causing nervous convulsions and illness was a ground for damages. But even here the action was sustained on account of the physical injury as the proximate result of the negligent act and not on account of the intervening mental suffering, conceding that this alone would not warrant recovery.<sup>155</sup>

§ 614. **Conflict of law—with respect to mental damages.**—We have had an opportunity elsewhere<sup>156</sup> to discuss, in a general way, the law applicable to contracts made for the transmission and delivery of messages sent from one state to another, and where there was a conflict of the laws in respect to such transmission in the two states. So we shall at this place say something on the subject with respect to the recovery of damages for mental suffering, where such damages are allowed in one state and not in the other. It is very often the case that messages are sent from one state in which such damages are allowed, into another where such are not permitted to be recovered; and the question which presents itself under these circumstances is, By what laws should the contract of sending be enforced? The general rule on this subject is that the laws of the state in which the contract was made should control,<sup>157</sup> unless it is otherwise understood, and this regardless of where the breach of

<sup>154</sup> *Victorian R. Co. v. Coultas*, L. R. 13 App. C. 222; *Fox v. Borkey*, 126 Pa. 164, 17 Atl. 604; *Ewing v. Pittsburgh, etc., R. Co.*, 147 Pa. 40, 23 Atl. 340, 14 L. R. A. 666 n., 30 Am. St. Rep. 709; *Lehman v. Brooklyn, etc., R. Co.*, 47 Hun (N. Y.) 355; *Allsop v. Allsop*, 5 Hurl. & N. 534.

<sup>155</sup> *Purcell v. St. Paul City R. Co.*, 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203.

<sup>156</sup> See § 488 et seq.

<sup>157</sup> *Johnson v. West. U. Tel. Co.*, 144 N. C. 410, 57 S. E. 122, 10 L. R. A. (N. S.) 256, 119 Am. St. Rep. 961; *West. U. Tel. Co. v. Woodard*, 84 Ark. 323, 105 S. W. 579, 13 Ann. Cas. 354; *Hall v. West. U. Tel. Co.*, 139 N. C. 369, 52 S. E. 50; *West. U. Tel. Co. v. Waller*, 96 Tex. 589, 74 S. W. 751, 97 Am. St. Rep. 936, reversing (Civ. App.) 72 S. W. 264; *Bryan v. West. U. Tel. Co.*, 133 N. C. 603, 45 S. E. 938; *West. U. Tel. Co. v. Parsley*, 57 Tex. Civ. App. 8, 121 S. W. 226; *West. U. Tel. Co. v. Sloss*, 45 Tex. Civ. App. 153, 100 S. W. 354, disapproving *West. U. Tel. Co. v. Blake*, 29 Tex. Civ. App. 224, 68 S. W. 526; *Ligon v. West. U. Tel. Co.*, 46 Tex. Civ. App. 408, 102 S. W. 429; *West. U. Tel. Co. v. Cooper*, 29 Tex. Civ. App. 591, 69 S. W. 427; *Markley v. West. U. Tel. Co.*, 151 Iowa, 612, 132 N. W. 37; *Brown v. West. U. Tel. Co.*, 85 S. C. 495, 67 S. E. 146, 137 Am. St. Rep. 914; *West. U. Tel. Co. v. Turley*, 108 Ark. 92, 156 S. W. 836. See *West. U. Tel. Co. v. Young* (Tex. Civ. App.) 133 S. W. 512.

duty occurred,<sup>158</sup> or where the action is brought.<sup>159</sup> Under the rulings of the courts in those states which permit a recovery of damages for mental anguish or suffering, such damages may be recovered for the negligent transmission or delivery of a message, although the message was addressed to a point in a state where such damages are not recoverable,<sup>160</sup> and the breach of duty occurred in the latter state.<sup>161</sup> Conversely, such damages cannot be recovered if not allowed in the state in which the contract was entered into, although the message is addressed to a state where such damages are recoverable,<sup>162</sup> and the breach occurred in the latter state.<sup>163</sup> It will be presumed, however, that the law of the state where the contract was made is the same as that where the action is brought.<sup>164</sup> If both the states from and to which the message is sent refuse to allow damages for mental suffering, such cannot be recovered, although the suit is brought in a state which does allow such damages, and one through which the company has a

<sup>158</sup> *Johnson v. West. U. Tel. Co.*, 144 N. C. 410, 57 S. E. 122, 10 L. R. A. (N. S.) 256, 119 Am. St. Rep. 961; *West. U. Tel. Co. v. Cooper*, 29 Tex. Civ. App. 591, 69 S. W. 427.

<sup>159</sup> *Johnson v. West. U. Tel. Co.*, 144 N. C. 410, 57 S. E. 122, 10 L. R. A. (N. S.) 256, 119 Am. St. Rep. 961; *Thomas v. West. U. Tel. Co.*, 25 Tex. Civ. App. 398, 61 S. W. 501.

<sup>160</sup> *Bryan v. West. U. Tel. Co.*, 133 N. C. 603, 45 S. E. 938; *West. U. Tel. Co. v. Woodard*, 84 Ark. 323, 105 S. W. 579, 13 Ann. Cas. 354; *West. U. Tel. Co. v. Waller*, 96 Tex. 589, 74 S. W. 751, 97 Am. St. Rep. 936, reversing (Civ. App.) 72 S. W. 264; *West. U. Tel. Co. v. Parsley*, 57 Tex. Civ. App. 8, 121 S. W. 226; *West. U. Tel. Co. v. Anderson*, 34 Tex. Civ. App. 14, 78 S. W. 34; *Brown v. West. U. Tel. Co.*, 85 S. C. 495, 67 S. E. 146, 137 Am. St. Rep. 914.

<sup>161</sup> *West. U. Tel. Co. v. Lacer*, 122 Ky. 839, 93 S. W. 34, 29 Ky. Law Rep. 379, 121 Am. St. Rep. 502, 5 L. R. A. (N. S.) 751; *West. U. Tel. Co. v. Hill*, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058; *Howard v. West. U. Tel. Co.*, 119 Ky. 625, 84 S. W. 764, 86 S. W. 982, 7 Ann. Cas. 1065, 27 Ky. Law Rep. 244, 858.

<sup>162</sup> *Hancock v. West. U. Tel. Co.*, 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403; *Id.*, 142 N. C. 163, 55 S. E. 82; *Johnson v. West. U. Tel. Co.*, 144 N. C. 410, 57 S. E. 122, 10 L. R. A. (N. S.) 256, 119 Am. St. Rep. 961; *Ligon v. West. U. Tel. Co.*, 46 Tex. Civ. App. 408, 102 S. W. 429; *West. U. Tel. Co. v. Garrett*, 46 Tex. Civ. App. 430, 102 S. W. 456; *West. U. Tel. Co. v. Sloss*, 45 Tex. Civ. App. 153, 100 S. W. 354, disapproving *West. U. Tel. Co. v. Blake*, 29 Tex. Civ. App. 224, 68 S. W. 526; *West. U. Tel. Co. v. Buchanan*, 35 Tex. Civ. App. 437, 80 S. W. 561; *West. U. Tel. Co. v. Christensen* (Tex. Civ. App.) 78 S. W. 744; *West. U. Tel. Co. v. Moore* (Tex. Civ. App.) 139 S. W. 1020.

<sup>163</sup> *West. U. Tel. Co. v. Buchanan*, 35 Tex. Civ. App. 437, 80 S. W. 561; *Johnson v. West. U. Tel. Co.*, 144 N. C. 410, 57 S. E. 122, 10 L. R. A. (N. S.) 256, 119 Am. St. Rep. 961; *West. U. Tel. Co. v. Christensen* (Tex. Civ. App.) 78 S. W. 744.

<sup>164</sup> *West. U. Tel. Co. v. Parsley*, 57 Tex. Civ. App. 8, 121 S. W. 226; *Woods v. West. U. Tel. Co.*, 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581; *West. U. Tel. Co. v. McNairy*, 34 Tex. Civ. App. 389, 78 S. W. 969.



line.<sup>165</sup> On the other hand, if such damages are recoverable both where the contract was made and where it was to be performed, it is of course immaterial as to which law should be considered as governing,<sup>166</sup> and in such cases damages of this nature may be recovered,<sup>167</sup> although the action is instituted in another jurisdiction where the mental anguish doctrine is not recognized at common law, but has been introduced by statute.<sup>168</sup> Under the rulings of some of the courts, the law of the state where the contract is to be performed governs,<sup>169</sup> some regarding the performance as being entirely in the state where the delivery is to be made,<sup>170</sup> while others regard it as being done in each state and making the right to maintain the action dependent upon the laws of the state in which the breach occurred.<sup>171</sup> Others draw a distinction between cases based upon contract or upon tort or upon statutory liabilities,<sup>172</sup> it being held that the laws of the state in which the breach of duty occurred should govern,<sup>173</sup> and this, too, notwithstanding the fact that the laws of the states from or to which the message is sent denies a recovery of damages for mental anguish.<sup>174</sup> If, how-

<sup>165</sup> *Thomas v. West. U. Tel. Co.*, 25 Tex. Civ. App. 398, 61 S. W. 501.

<sup>166</sup> *West. U. Tel. Co. v. Woodard*, 84 Ark. 323, 105 S. W. 579, 13 Ann. Cas. 354.

<sup>167</sup> *West. U. Tel. Co. v. Woodard*, 84 Ark. 323, 105 S. W. 579, 13 Ann. Cas. 354; *West. U. Tel. Co. v. Hanley*, 85 Ark. 263, 107 S. W. 1168.

<sup>168</sup> *West. U. Tel. Co. v. Hanley*, 85 Ark. 263, 107 S. W. 1168.

<sup>169</sup> *West. U. Tel. Co. v. Lacer*, 122 Ky. 839, 93 S. W. 34, 29 Ky. Law Rep. 379, 121 Am. St. Rep. 502, 5 L. R. A. (N. S.) 751; *West. U. Tel. Co. v. Hill*, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058; *Howard v. West. U. Tel. Co.*, 119 Ky. 625, 84 S. W. 764, 86 S. W. 982, 7 Ann. Cas. 1065, 27 Ky. Law Rep. 244, 858; *West. U. Tel. Co. v. Burris*, 179 Fed. 92, 102 C. C. A. 386.

<sup>170</sup> *West. U. Tel. Co. v. Lacer*, 122 Ky. 839, 92 S. W. 34, 29 Ky. Law Rep. 379, 121 Am. St. Rep. 502, 5 L. R. A. (N. S.) 751; *West. U. Tel. Co. v. Burris*, 179 Fed. 92, 102 C. C. A. 386.

<sup>171</sup> *West. U. Tel. Co. v. Hill*, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058; *Howard v. West. U. Tel. Co.*, 119 Ky. 625, 84 S. W. 764, 86 S. W. 982, 7 Ann. Cas. 1065, 27 Ky. Law Rep. 244, 858.

<sup>172</sup> *West. U. Tel. Co. v. Ford*, 77 Ark. 531, 92 S. W. 528, statute; *West. U. Tel. Co. v. Hill*, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058, tort; *Balderston v. West. U. Tel. Co.*, 79 S. C. 160, 60 S. E. 435, tort; *Gray v. West. U. Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301, statute.

<sup>173</sup> *Gray v. West. U. Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301; *West. U. Tel. Co. v. Ford*, 77 Ark. 531, 92 S. W. 528; *Balderston v. West. U. Tel. Co.*, 79 S. C. 160, 60 S. E. 435; *West. U. Tel. Co. v. See*, 94 Ark. 86, 126 S. W. 78; *West. U. Tel. Co. v. Crenshaw*, 93 Ark. 415, 125 S. W. 420; *West. U. Tel. Co. v. Burris*, 179 Fed. 92, 102 C. C. A. 386. Compare *Heath v. Postal Tel. Cable Co.*, 87 S. C. 219, 69 S. E. 283; *Hughes v. West. U. Tel. Co.*, 72 S. C. 519, 52 S. E. 107; *Harrison v. West. U. Tel. Co.*, 71 S. C. 386, 51 S. E. 119.

<sup>174</sup> *Gentle v. West. U. Tel. Co.*, 82 Ark. 96, 100 S. W. 742; *Arkansas, etc., R. Co. v. Lee*, 79 Ark. 448, 96 S. W. 148; *West. U. Tel. Co. v. Ford*, 77 Ark.

ever, the message is sent from a state denying such damages to a state where the same may be recovered by virtue of a statute, it must be shown that the breach occurred in the latter state to which the message had actually reached.<sup>175</sup> Where the action is brought for a nondelivery of the message, the breach of duty occurred, according to some, in the state where it should have been delivered, although this was due to negligence at a relay station in a different state.<sup>176</sup> When the question arises as to the nature of action to be brought, that is, whether the action should be in contract or in tort, it becomes immaterial if both the breaches occurred in the same state;<sup>177</sup> and where the action is in tort, it will be presumed that the law of the state where the breach of duty occurred is the same as that where the action is brought.<sup>178</sup> A telegram transmitted between points within the state does not constitute interstate commerce, although the message in transmission passes through points in another state, and so the rule as to intrastate messages is applicable.<sup>179</sup>

§ 615. Under statutes—constitutionality of.—Statutes expressly allowing a recovery for mental anguish have been passed in a few of the states,<sup>180</sup> in each of which states the courts had previ-

531, 92 S. W. 528; *Fail v. West. U. Tel. Co.*, 80 S. C. 207, 60 S. E. 697, 61 S. E. 258; *Walker v. West. U. Tel. Co.*, 75 S. C. 512, 56 S. E. 38; *Balderston v. West. U. Tel. Co.*, 79 S. C. 160, 60 S. E. 435; *Hughes v. West. U. Tel. Co.*, 72 S. C. 516, 52 S. E. 107; *Harrison v. West. U. Tel. Co.*, 71 S. C. 386, 51 S. E. 119; *Gray v. West. U. Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301; *West. U. Tel. Co. v. Hill*, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058; *West. U. Tel. Co. v. Chilton*, 100 Ark. 296, 140 S. W. 26. See *Boyd v. West. U. Tel. Co.*, 88 S. C. 518, 71 S. E. 28; *Heath v. Postal Tel. Cable Co.*, 87 S. C. 219, 69 S. E. 283.

<sup>175</sup> *West. U. Tel. Co. v. See*, 94 Ark. 86, 126 S. W. 78; *West. U. Tel. Co. v. Crenshaw*, 93 Ark. 415, 125 S. W. 420; *West. U. Tel. Co. v. Burris*, 179 Fed. 92, 102 C. C. A. 386.

<sup>176</sup> *Balderston v. West. U. Tel. Co.*, 79 S. C. 160, 60 S. E. 435. See *Brown v. West. U. Tel. Co.*, 85 S. C. 495, 67 S. E. 146, 137 Am. St. Rep. 914.

<sup>177</sup> *West. U. Tel. Co. v. Woodard*, 84 Ark. 323, 105 S. W. 579, 13 Ann. Cas. 354; *Thomas v. West. U. Tel. Co.*, 25 Tex. Civ. App. 398, 61 S. W. 501. See, also, *Fail v. West. U. Tel. Co.*, 80 S. C. 207, 60 S. E. 697, 61 S. E. 258.

<sup>178</sup> *West. U. Tel. Co. v. Parsley*, 57 Tex. Civ. App. 8, 121 S. W. 226.

<sup>179</sup> *West. U. Tel. Co. v. Sharp* (Ark.) 180 S. W. 504.

<sup>180</sup> Arkansas, South Carolina, and Wisconsin.

*Statute does not embrace telephone.*—It has been held that a telephone company is not liable under a statute which provides that telegraph companies shall be liable for mental anguish for negligence "in receiving, transmitting or delivering messages," as a telephone company does not "receive," "transmit" and "deliver" a message in the ordinary acceptance of the words. *Southern Telephone Co. v. King*, 103 Ark. 160, 146 S. W. 489, 39 L. R. A. (N. S.) 402, Ann. Cas. 1914B, 780, citing author.

ously repudiated the doctrine. As a general rule, the statutes go no further than to state that a recovery may be allowed for mental anguish alone, and consequently the statutes have been applied in these jurisdictions in practically the same manner as they had been applied in states which recognized a recovery for mental anguish permissible under the common-law principles.<sup>181</sup> As this right is expressly created by statutes in these states, statutes imposing penalties upon these companies for negligently transmitting and delivering messages have for the most part been held inadequate to sustain a recovery for mental anguish.<sup>182</sup> The validity of these statutes has been upheld against attacks on various grounds. Thus it has been held that they did not deprive telegraph companies of their property without due process of law;<sup>183</sup> nor did they unlawfully discriminate against such companies;<sup>184</sup> nor did they impair the obligation of any contract, even as to a foreign telegraph company which, prior to the enactment of the statute, complied with the provisions of the state laws relating to their doing business therein;<sup>185</sup> nor are they invalid as to a telegraph company which has complied with the act of Congress authorizing telegraph com-

<sup>181</sup> *West. U. Tel. Co. v. Hogue*, 79 Ark. 33, 94 S. W. 924; *West. U. Tel. Co. v. Shenep*, 83 Ark. 476, 104 S. W. 154, 12 L. R. A. (N. S.) 886, 119 Am. St. Rep. 145; *West. U. Tel. Co. v. Raines*, 78 Ark. 545, 94 S. W. 700; *Capers v. West. U. Tel. Co.*, 71 S. C. 29, 50 S. E. 537; *Arial v. West. U. Tel. Co.*, 70 S. C. 418, 50 S. E. 6; *West. U. Tel. Co. v. Hollingsworth*, 83 Ark. 39, 102 S. W. 681, 11 L. R. A. (N. S.) 497, 119 Am. St. Rep. 105, 13 Ann. Cas. 397.

<sup>182</sup> *Russell v. West. U. Tel. Co.*, 3 Dak. 315, 19 N. W. 408; *Chapman v. West. U. Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 30 Am. St. Rep. 183, 17 L. R. A. 430; *Rowan v. West. U. Tel. Co. (C. C.)* 149 Fed. 550; *Francis v. West. U. Tel. Co.*, 58 Minn. 252, 59 N. W. 1078, 49 Am. St. Rep. 507, 25 L. R. A. 406; *Gahan v. West. U. Tel. Co. (C. C.)* 59 Fed. 433; *Connelly v. West. U. Tel. Co.*, 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919, 56 L. R. A. 663; *Alexander v. West. U. Tel. Co. (C. C.)* 126 Fed. 445; *Tyler v. West. U. Tel. Co. (C. C.)* 54 Fed. 634; *Summerfield v. West. U. Tel. Co.*, 87 Wis. 1, 57 N. W. 973, 41 Am. St. Rep. 17. But see *Wadsworth v. West. U. Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864; *Stafford v. West. U. Tel. Co. (C. C.)* 73 Fed. 273; *Graham v. West. U. Tel. Co.*, 109 La. 1069, 34 South. 91.

<sup>183</sup> *Simmons v. West. U. Tel. Co.*, 63 S. C. 429, 41 S. E. 521, 57 L. R. A. 607; *Nitka v. West. U. Tel. Co.*, 149 Wis. 106, 135 N. W. 492, Ann. Cas. 1913C, 863, 49 L. R. A. (N. S.) 337.

<sup>184</sup> *Ivy v. West. U. Tel. Co. (C. C.)* 165 Fed. 375, reversed on other grounds in 177 Fed. 63, 100 C. C. A. 481; *Simmons v. West. U. Tel. Co.*, 63 S. C. 432, 41 S. E. 521, 57 L. R. A. 607; *Capers v. West. U. Tel. Co.*, 71 S. C. 34, 50 S. E. 537. See *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; *West. U. Tel. Co. v. Ferguson*, 157 Ind. 72, 60 N. E. 674, 1080, 54 L. R. A. 846; *Connelly v. West. U. Tel. Co.*, 100 Va. 67, 40 S. E. 618, 93 Am. St. Rep. 919, 56 L. R. A. 663; *Nitka v. West. U. Tel. Co.*, 149 Wis. 106, 135 N. W. 492, Ann. Cas. 1913C, 863, 49 L. R. A. (N. S.) 337.

<sup>185</sup> *Ivy v. West. U. Tel. Co. (C. C.)* 165 Fed. 377, reversed on other grounds in 177 Fed. 63, 100 C. C. A. 481.



panies to construct and operate lines over the public domain and over the federal military and post roads, and over, under and across the navigable waters of the United States.<sup>186</sup> And since, in the absence of any legislation by Congress to the contrary, a penalty imposed by statute upon these companies for negligently transmitting and delivering a message may be recovered, if the negligence complained of occurs in the state imposing such penalty, even though the message may be an interstate message,<sup>187</sup> it seems that a recovery of damages allowed by statute for mental anguish under the same circumstances is permissible.<sup>188</sup> But a recovery in an action of tort in the courts of one state of damages for mental anguish arising out of the negligent failure of a telegraph company to deliver at a place in another state a telegram forwarded without delay to the latter place from the company's office in the former state, where it was received, cannot be authorized under a state statute expressly allowing a recovery of damages for mental anguish, without violating the commerce clause of the federal Constitution.<sup>189</sup>

<sup>186</sup> *Ivy v. West. U. Tel. Co. (C. C.)* 165 Fed. 371, reversed on other grounds in 177 Fed. 61, 100 C. C. A. 481, holding that such statute was not unconstitutional on the ground that it interfered with or placed burdens on interstate commerce.

<sup>187</sup> *West. U. Tel. Co. v. Crovo*, 220 U. S. 364, 31 Sup. Ct. 399, 55 L. Ed. 498.

<sup>188</sup> See *West. U. Tel. Co. v. Crovo*, 220 U. S. 364, 31 Sup. Ct. 399, 55 L. Ed. 498.

<sup>189</sup> *West. U. Tel. Co. v. Brown*, 234 U. S. 542, 34 Sup. Ct. 955, 58 L. Ed. 1457, reversing 92 S. C. 354, 75 S. E. 542, and *Ivy v. West. U. Tel. Co. (C. C.)* 165 Fed. 371, reversed on other grounds in 177 Fed. 63, 100 C. C. A. 481. See, also, *West. U. Tel. Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187.

## CHAPTER XXIV

DAMAGES CONTINUED—EXEMPLARY OR PUNITIVE—EXCESSIVE  
AND NOMINAL

- § 616. In general—meaning of term.
- 617. Same as applied to telegraph, etc., companies.
- 618. Exemplary damages done by agents and employes—malice.
- 619. Whether a question of fact or law.
- 620. The purpose of such damages.
- 621. Assault and battery.
- 622. Libel.
- 623. Malicious prosecution.
- 624. Trespass—accompanied with malice.
- 625. Negligence—question for jury.
- 626. Same continued—actual damages.
- 627. Excessive damages.
- 628. Nominal damages.

§ 616. In general—meaning of term.—Having discussed at some length in the preceding chapters the measure of damages arising in different cases brought against telegraph and telephone companies, we shall now say something further in regard to the same subject, but more particularly with respect to the kinds and amount of damages; and, first, we shall discuss such as are exemplary or punitive, or such as are imposed on these companies by way of punishment. Punitive, vindictive and exemplary damages are synonymous terms in legal contemplation.<sup>1</sup> Exemplary damages apply to those wrongs which, beside the violation of a right or the actual damages sustained, import insult, fraud or oppression, and are injuries inflicted in the spirit of wanton disregard, and not merely injuries.<sup>2</sup> While there has been some discussion between law writers as to whether this kind of damages was intended as a personal punishment to the offender, or as a lesson to the public,<sup>3</sup> the better doctrine is that such damages are given as a punishment to the offender, for the benefit of the public and as a restraint to the transgres-

<sup>1</sup> See *Herfurth v. Washington*, 6 D. C. 288; *Lowry v. Coster*, 91 Ill. 182; *Koerner v. Oberly*, 56 Ind. 284, 26 Am. Rep. 34; *Chiles v. Drake*, 2 Metc. (Ky.) 146, 74 Am. Dec. 406; *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475.

<sup>2</sup> See *New Orleans, etc., R. Co. v. Statham*, 42 Miss. 607, 97 Am. Dec. 478; *Zimmerman v. Bonzar* (Pa.) 16 Atl. 71; *Chicago, etc., R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373; *South. R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332.

<sup>3</sup> See *Wright v. Donnell*, 34 Tex. 291. See, also, *South. R. Co. v. Barr*, 55 S. W. 900, 21 Ky. Law Rep. 1615.

sor.<sup>4</sup> Actions for the recovery of such damages can only be sustained where there is malice, fraud or gross negligence engendered in the commission of the act, and, in order to warrant a recovery of such, there must enter into the injury some element of aggravation, or some coloring of insult or malice that will take the case out of the ordinary rule of compensation;<sup>5</sup> if there is a want of any of these elements, the measure of damages is the measure of compensation for the loss sustained and nothing more.<sup>6</sup> The question as to whether an act was willful, wanton or malicious relates only to damages and not to the right of recovery; and if the act complained of can be so classified, the jury is authorized by law to award such damages.<sup>7</sup> It must be understood that this rule applies only when the action is brought in tort, for only actual damages can be recovered for a breach of a contract, although the defendant willfully disregarded compliance with such contract.<sup>8</sup> There is one exception, however, to this latter rule; that is, where the action is brought for the breach of promise of marriage.<sup>9</sup>

<sup>4</sup> See *Burns v. Campbell*, 71 Ala. 271; *St. Louis Consol. Coal Co. v. Haenni*, 146 Ill. 614, 35 N. E. 162; *Ward v. Ward*, 41 Iowa, 686; *Kansas City, etc., R. Co. v. Kier*, 41 Kan. 661, 21 Pac. 770, 13 Am. St. Rep. 311; *Edwards v. Ricks*, 30 La. Ann. 926; *Millard v. Brown*, 35 N. Y. 297; *Ripley v. Miller*, 33 N. C. 247; *Cole v. Tucker*, 6 Tex. 266; *Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152; *Mayer v. Frobe*, 40 W. Va. 246, 22 S. E. 58; *Press Pub. Co. v. Monroe*, 73 Fed. 196, 19 C. C. A. 429, 51 L. R. A. 353.

<sup>5</sup> *West. U. Tel. Co. v. Westmoreland*, 151 Ala. 319, 44 South. 382; *Cumberland, etc., Tel. Co. v. Paine*, 94 Miss. 883, 48 South. 229; *West. U. Tel. Co. v. Spratley*, 84 Miss. 86, 36 South. 188; *McAllen v. West. U. Tel. Co.*, 70 Tex. 243, 7 S. W. 715; *Kopperl v. West. U. Tel. Co. (Tex. Civ. App.)* 85 S. W. 1018; *Sledge v. West. U. Tel. Co.*, 163 Ala. 4, 50 South. 886; *West. U. Tel. Co. v. Miller*, 97 Miss. 225, 52 South. 701; *Telephone v. King*, 103 Ark. 160, 146 S. W. 489, 39 L. R. A. (N. S.) 402, Ann. Cas. 1914B, 780; *Carmichael v. Telephone, etc., Co.*, 157 N. C. 21, 72 S. E. 619, 39 L. R. A. (N. S.) 65, Ann. Cas. 1913B, 1117. See *Telephone Co. v. Reeves*, 34 Okl. 468, 126 Pac. 216; *Cordell v. West. U. Tel. Co.*, 149 N. C. 402, 63 S. E. 71, 22 L. R. A. (N. S.) 540. See § 618 et seq.

<sup>6</sup> See *Kelly v. McDonald*, 39 Ark. 387; *Selden v. Cashman*, 20 Cal. 56, 81 Am. Dec. 93; *Biloxi City R. Co. v. Maloney*, 74 Miss. 738, 21 South. 561; *Chicago, etc., R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373; *Chicago, etc., R. Co. v. Jackson*, 55 Ill. 492, 8 Am. Rep. 661.

<sup>7</sup> See *Kirtan v. North Chicago St. R. Co.*, 91 Ill. App. 554.

<sup>8</sup> *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844; *Haber, etc., Hat Co. v. Southern Bell Tel. Co.*, 118 Ga. 874, 45 S. E. 696; *Stuart v. West. U. Tel. Co.*, 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623; *West. U. Tel. Co. v. Brown*, 58 Tex. 170, 44 Am. Rep. 610; *McAllen v. West. U. Tel. Co.*, 70 Tex. 243, 7 S. W. 715; *Davis v. West. U. Tel. Co.*, 46 W. Va. 48, 32 S. E. 1026; *West. U. Tel. Co. v. Benson*, 159 Ala. 254, 48 South. 712; *West. U. Tel. Co. v. Rowell*, 153 Ala. 295, 45 South. 73; *Cumberland Tel., etc., Co. v. Cartwright Creek Tel. Co.*, 128 Ky. 395, 108 S. W. 875, 32 Ky. Law Rep. 1357; *Telephone Co. v. Reeves*, 34 Okl. 468, 126 Pac. 216.

<sup>9</sup> See *Kurtz v. Frank*, 76 Ind. 594, 40 Am. Rep. 275.



§ 617. Same as applied to telegraph, etc., companies.—At one time, on account of the inability of corporations to entertain an evil intent, it was held that punitive or exemplary damages could not be imposed upon them. In fact they were not held liable for a tort. But “the law of remedies against corporations originated when those artificial bodies were few, and those few were, in the main, such as were created for municipal purposes. As corporations multiplied, created chiefly for purposes of trade, the obstacle in the way of the attainment of justice, which arose out of principles applicable only to municipal corporations, have gradually been removed” and swept away.<sup>10</sup> So a telegraph, telephone, or electric company is held just as liable for an act, when committed either with or without an evil intent, so far as it may have been done while acting within the scope of its authority, as if the act had been committed by an individual.<sup>11</sup> Thus they may be liable for all their torts, and this liability may be enforced in the same manner and way as if the wrong complained of had been committed by a natural person.<sup>12</sup> It has sometimes been questionable whether damages for punishment could be given in civil cases.<sup>13</sup> In the state of Washington it has been adjudged that the principle for allowing such damages was unfair and unsound, and they are not, therefore, allowed in that state, although the corporation may have been guilty of gross negligence.<sup>14</sup> It has been held that damages by way of punishment merely cannot be recovered in any case.<sup>15</sup> In Colorado punitive damages cannot be recovered against a corporation in a civil action, although the wrong complained of was willfully committed.<sup>16</sup> The weight of authority is, however, that

<sup>10</sup> See *Dock v. Elizabethtown Steam Mfg. Co.*, 34 N. J. Law, 312; *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30. See, also, the monographic note to *Orr v. Bank of the United States*, 13 Am. Dec. 596; *Hussey v. Norfolk South. R. Co.*, 98 N. C. 34, 3 S. E. 923, 2 Am. St. Rep. 312 and note.

<sup>11</sup> See *Atlantic, etc., R. Co. v. Dunn*, 19 Ohio St. 162, 2 Am. Rep. 382; *International, etc., R. Co. v. Tel., etc., Co.*, 69 Tex. 277, 5 S. W. 517, 5 Am. St. Rep. 45; *Spellman v. Richmond, etc., R. Co.*, 35 S. C. 475, 14 S. E. 947, 28 Am. St. Rep. 558; *Samuels v. Richmond, etc., R. Co.*, 35 S. C. 493, 14 S. E. 943, 28 Am. St. Rep. 883.

<sup>12</sup> See *Cooley on Torts*, 120; *Peebles v. Patapsco Guano Co.*, 77 N. C. 233, 24 Am. Rep. 447; *Hayes v. Houston R. Co.*, 46 Tex. 272; *Lee v. Village of Sandy Hill*, 40 N. Y. 442; *Orr v. Bank of the United States*, 1 Ohio, 36, 13 Am. Dec. 588, and note; *Hussey v. Norfolk So. R. Co.*, 98 N. C. 34, 3 S. E. 923, 2 Am. St. Rep. 312, and note.

<sup>13</sup> See *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270.

<sup>14</sup> See *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 25 Pac. 1072, 11 L. R. A. 689, 26 Am. St. Rep. 842.

<sup>15</sup> *Stuyvesant v. Wilcox*, 92 Mich. 233, 52 N. W. 465, 31 Am. St. Rep. 580.

<sup>16</sup> *Greely, etc., R. Co. v. Yeager*, 11 Colo. 345, 18 Pac. 211.

such damages may be recovered against a corporation in civil actions, and the remedy is just as enforceable against them as if the same act was that of a natural person.<sup>17</sup> It is further held that the right to recover such damages is not confined to one kind of actions, but that they may be recovered in case, as well as in trespass.<sup>18</sup>

§ 618. **Exemplary damages done by agents and employés—malice.**—In many jurisdictions telegraph, telephone, and electrical companies are liable in exemplary or punitive damages for such acts done by their agents or employés while acting within the scope of their employment, as if the same act was done by an individual acting for himself;<sup>19</sup> and when such damages are allowed, they should be proportioned to the actual damages sustained.<sup>20</sup> As said,

<sup>17</sup> *Spellman v. Richmond, etc., R. Co.*, 35 S. C. 475, 14 S. E. 947, 28 Am. St. Rep. 858, and note; *Hoboken Printing Co. v. Kahn*, 59 N. J. Law, 218, 35 Atl. 1053, 59 Am. St. Rep. 590, and note.

<sup>18</sup> *Hopkins v. Atlantic, etc., R. Co.*, 36 N. H. 9, 72 Am. Dec. 287.

<sup>19</sup> *Magouirk v. West. U. Tel. Co.*, 79 Miss. 632, 31 South. 206, 89 Am. St. Rep. 663; *Atlantic Great Western R. Co. v. Dunn*, 19 Ohio St. 162, 2 Am. Rep. 382; *West. U. Tel. Co. v. Crowley*, 158 Ala. 583, 48 South. 381; *West. U. Tel. Co. v. Seed*, 115 Ala. 670, 22 South. 479; *West. U. Tel. Co. v. Gilstrap*, 77 Kan. 191, 94 Pac. 122; *West. U. Tel. Co. v. Lawson*, 66 Kan. 660, 72 Pac. 283; *West v. West. U. Tel. Co.*, 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530; *West. U. Tel. Co. v. Hiller*, 93 Miss. 658, 47 South. 377; *West. U. Tel. Co. v. Watson*, 82 Miss. 101, 33 South. 76; *Glover v. West. U. Tel. Co.*, 78 S. C. 502, 59 S. E. 526; *Doster v. West. U. Tel. Co.*, 77 S. C. 56, 57 S. E. 671; *Bowen v. West. U. Tel. Co.*, 77 S. C. 122, 57 S. E. 674; *Toale v. West. U. Tel. Co.*, 76 S. C. 248, 57 S. E. 117; *Poulnot v. West. U. Tel. Co.*, 69 S. C. 545, 48 S. E. 622; *Machen v. West. U. Tel. Co.*, 72 S. C. 256, 51 S. E. 697; *Butler v. West. U. Tel. Co.*, 65 S. C. 510, 44 S. E. 91; *Marsh v. West. U. Tel. Co.*, 65 S. C. 430, 43 S. E. 953; *Young v. West. U. Tel. Co.*, 65 S. C. 93, 43 S. E. 448; *West. U. Tel. Co. v. Frith*, 105 Tenn. 167, 58 S. W. 118; *Telephone Co. v. Stokes*, 171 Ala. 168, 54 South. 181; *Telephone Co. v. Robbins*, 3 Ala. App. 234, 56 South. 879; *Steinberger v. Telephone Co.*, 97 Miss. 260, 52 South. 691; *Brown v. Telephone Co.*, 85 S. C. 495, 67 S. E. 146, 137 Am. St. Rep. 914; *Wilhelm v. Telephone Co.*, 90 S. C. 536, 73 S. E. 865; *Arkansas, etc., Co. v. Stroude*, 77 Ark. 109, 91 S. W. 18, 113 Am. St. Rep. 130; *West. U. Tel. Co. v. Bodkin*, 79 Kan. 792, 101 Pac. 655; *McInturf v. West. U. Tel. Co.*, 81 Kan. 476, 106 Pac. 282; *Lewis v. West. U. Tel. Co.*, 57 S. C. 325, 35 S. E. 556; *Butler v. West. U. Tel. Co.*, 62 S. C. 223, 40 S. E. 165, 89 Am. St. Rep. 893; *Mathews v. West. U. Tel. Co.*, 3 Willson, Civ. Cas. Ct. App. (Tex.) 378; *Beasley v. West. U. Tel. Co. (C. C.)* 39 Fed. 181. Compare *Hartzog v. West. U. Tel. Co. (Miss.)* 34 South. 361. In *Gulf, etc., R. Co. v. Levy*, 59 Tex. 563, 46 Am. Rep. 278, it is held that unless some actual damage is sustained there can be no recovery for exemplary damages.

*Authorization or ratification.*—Company not liable unless authorized or ratified, *West. U. Tel. Co. v. Brown*, 58 Tex. 170, 44 Am. Rep. 610; *West. U. Tel. Co. v. Landry* (Tex. Civ. App.) 108 S. W. 461, reversed *Id.*, on other grounds in 102 Tex. 67, 113 S. W. 10; or unless negligent in the selection of servants, *West. U. Tel. Co. v. Brown*, *supra*. See *West. U. Tel. Co. v. Karr*, 5 Tex. Civ. App. 60, 24 S. W. 302.

<sup>20</sup> *International, etc., R. Co. v. Tel., etc., Co.*, 69 Tex. 277, 5 S. W. 517, 5

there must be some element of malice in order to recover these damages,<sup>21</sup> but it is not necessary that there be actual malice.<sup>22</sup> Malice of a telegraph, telephone, or electrical company may be shown by proving the motives of its directors, in the same way that the motives of other associated or conspiring bodies are proved.<sup>23</sup> Malice, in its legal sense, means a wrongful act, done intentionally, without just cause or excuse; and the malice of the agent or employé of one of these companies, in this sense, is the malice of that company.<sup>24</sup> The act of an officer, agent or servant of a company, when committed within the scope of his authority and employment, is the act of the company, and his negligence is its negligence.<sup>25</sup> Corporations only act through their agents and employés, and if the latter entertained no evil intent, the former could not be liable for a criminal act; for, without this, the criminal intent could not be entertained by the corporation. In a sense, the servant of the corporation is the life, or that which creates life in the latter. Therefore, there must be an element of fraud, violence, outrage, wanton recklessness, malice, evil intent or oppression forming part of the wrongful act of the agent or employé;<sup>26</sup> and if there is not shown any circumstance of aggravation, and no evil motive is imputed in the agent as forming a part of his actual or apparent duties, vindictive or punitive damages should not be awarded against the company.<sup>27</sup>

§ 619. **Whether a question of fact or law.**—In cases brought against telegraph, telephone, or electric companies to recover exemplary or punitive damages, it is sometimes difficult to determine

Am. St. Rep. 45. See *Ramey v. West. U. Tel. Co.*, 94 Kan. 196, 146 Pac. 421, where no actual damages shown, not recoverable.

<sup>21</sup> See §§ 617, 624, 625.

<sup>22</sup> *Spellman v. Richmond, etc.*, R. Co., 35 S. C. 475, 14 S. E. 947, 28 Am. St. Rep. 858, and note.

<sup>23</sup> See *Goodspeed v. East Haddam Bank*, 22 Conn. 530, 58 Am. Dec. 439; *Souther v. Northwestern Tel. Exch. Co.*, 118 Minn. 102, 136 N. W. 571, 45 L. R. A. (N. S.) 601, evidence of wanton negligence.

<sup>24</sup> See *Maynard v. Firemen's Fund Ins. Co.*, 34 Cal. 48, 91 Am. Dec. 872.

<sup>25</sup> See *Hopkins v. Atlantic, etc.*, R., 36 N. H. 9, 72 Am. Dec. 287; *Souther v. Northwestern Tel. Exch.*, 118 Minn. 102, 136 N. W. 571, 45 L. R. A. (N. S.) 601, Ann. Cas. 1913E, 472.

<sup>26</sup> See § 617. See *Souther v. Northwestern Tel. Exch.*, 118 Minn. 102, 136 N. W. 571, 45 L. R. A. (N. S.) 601, Ann. Cas. 1913E, 472. See, also, *Painter v. West. U. Tel. Co.*, 100 S. C. 65, 84 S. E. 293, want of information.

<sup>27</sup> See *New Orleans, etc.*, R. Co. v. *Statham*, 42 Miss. 607, 97 Am. Dec. 478; *McKeon v. Citizens' R. Co.*, 42 Mo. 79; *Philadelphia, etc.*, R. Co. v. *Hoeflich*, 62 Md. 300, 50 Am. Rep. 223; *Chicago v. Martin*, 49 Ill. 241, 95 Am. Dec. 590; *Toledo, etc.*, R. Co. v. *Patterson*, 63 Ill. 304; *McFee v. Vicksburg, etc.*, R. Co., 42 La. Ann. 790, 7 South. 720; *Webb v. West. U. Tel. Co.*, 167 N. C. 483, 83 S. E. 568. See, also, § 625.



whether the facts involved are such as should be left to the consideration of the court, or should be given to the jury under proper instructions. It is generally held that whether there is or is not evidence in any particular case which would warrant exemplary or vindictive damages is a question for the court to determine; but its sufficiency to establish such fact, is a matter for the consideration of the jury.<sup>28</sup> In such actions as these, it is the privilege and the duty of the court to determine whether there is sufficient evidence to support the allegations,<sup>29</sup> but it cannot go further and announce to the jury in its instructions that there is or is not enough evidence adduced to support the issue.<sup>30</sup> In the trial of the case, if it is shown by the proper evidence that the act complained of "was wantonly and willfully inflicted, or with such a gross want of care and regard for the rights of others as to justify the presumption of willfulness or wantonness, the court will instruct the jury that they are at liberty to find for the plaintiff, in addition to a compensation for the injury actually sustained, such a sum as the circumstances justify."<sup>31</sup> But if, on the other hand, there is not sufficient evidence to impute willfulness, wantonness or a disregard for the rights of others, the court on proper request may instruct the jury that the evidence is not sufficient to warrant them in assessing exemplary damages.<sup>32</sup> Some courts have held that the jury should not be instructed on the question of vindictive damages in cases clearly not warranting its application, on account of the great abuses to which this doctrine may be used.<sup>33</sup>

§ 620. **The purpose of such damages.**—The purpose in awarding exemplary damages is to compensate the plaintiff for the wrong done him, and at the same time to punish the company for committing such wrong, and to deter it and others from repeating such acts.<sup>34</sup> On account of the nature of corporations, the manner in which they must be punished for the wrongful acts is different from that generally imposed on individuals or natural persons for the same act. It is not necessary to furnish a jury with the data from which they can ascertain with reasonable certainty the extent of the damages to be awarded, but the amount of such is at the discretion of the jury within reasonable limits. If there is sufficient evi-

<sup>28</sup> See § 520 et seq.

<sup>29</sup> See § 519. •

<sup>30</sup> See § 521.

<sup>31</sup> *Samuels v. Richmond, etc.*, R. Co., 35 S. C. 493, 14 S. E. 943, 28 Am. St. Rep. 883. See, also, §§ 520, 521.

<sup>32</sup> *Pittsburg, etc., R. Co. v. Slusser*, 19 Ohio St. 157; *Toledo, etc., R. Co. v. Patterson*, 63 Ill. 304. See, also, § 521.

<sup>33</sup> *Samuels v. Richmond, etc.*, R. Co., 35 S. C. 493, 14 S. E. 943, 28 Am. St. Rep. 883.

<sup>34</sup> *Cumberland, etc., Tel. Co. v. Poston*, 94 Tenn. 696, 30 S. W. 1040.

dence adduced to warrant a verdict for exemplary damages, the pecuniary condition of the company may be shown, since by this means the extent of the punishment to be inflicted in every particular case can only be ascertained.<sup>35</sup> Exemplary damages inflicted on a corporation as a means of punishment for its wrongful acts may be excessively great on account of its small wealth, but at the same time the same amount of damages would, on another corporation which represents much greater capital be considered a small punishment. But the fact must not be lost sight of that, in all cases of this kind, the jury is to be governed wholly by the malice or wantonness of the corporation as shown by its conduct,<sup>36</sup> and they may take into consideration the injury to the plaintiff's feelings and the loss of his credit in estimating exemplary damages.<sup>37</sup>

§ 621. **Assault and battery.**—The general rule of common carriers is that they are answerable for the malicious and wanton acts of their servants to a passenger, whether done in the line of their employment or service or not, provided the same is done during the discharge of their duty to the master which relates to the passenger. They, as common carriers, owe the duty toward their passengers to protect them against the insults of their servants.<sup>38</sup> Telegraph companies are made common carriers by statutes in many states, but there is a distinction to be drawn between these two kinds of carriers with respect to the present issue; however, we do not think that the distinction is material in the present discussion. One is a common carrier of passengers, and is intrusted with the person of the individual to whom it owes the duty of protection; the other is only intrusted with the property of the person. While the carrier owes this duty to the passenger only when he is a passenger, yet it is not necessary for him to be in actual transit or on board the vehicle furnished for his transportation in order to constitute him a passenger. If he has made arrangements for passage and is within the premises of the company in readiness of departure, as where he is in the depot or waiting room, he is nevertheless a passenger within the meaning of the terms. We have been unable to find a case against a telegraph company touching on

<sup>35</sup> See § 513.

<sup>36</sup> *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200.

<sup>37</sup> Note to *Burnham v. Cornwell*, 63 Am. Dec. 545; *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547.

<sup>38</sup> *Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 2 Am. Rep. 39; *Hoboken Print., etc., Co. v. Kahn*, 59 N. J. Law, 218, 35 Atl. 1053, 59 Am. St. Rep. 592; *Richmond, etc., R. Co. v. Jefferson*, 89 Ga. 554, 16 S. E. 69, 17 L. R. A. 571, 32 Am. St. Rep. 87, and note.

this particular point, but we can easily imagine instances where such cases could occur. For instance, if a person is within the office or exchange of a telegraph or telephone company, transacting or for the purpose of transacting business with respect to the transmission of news, or engaging its employment, and while there the agent or servant of the company commits an assault and battery upon such person, which is done while acting within the apparent discharge of his duty to the company relative to the services of employment, the company would be liable for such act.<sup>39</sup> We shall presume to go further in the discussion of this subject by saying that we do not think it necessary that such person should be within the premises of the company; but if he is accompanying one of the servants of the company to the office or exchange for the purpose of answering a call, and is in the apparent protection of the servant as such, an assault by such servant will be considered that of the company.<sup>40</sup> For instance, suppose that the servants of the telephone company conspire to commit an assault on a strange lady in a small town, and in order to accomplish their purpose they put in a false call at night for her. To answer said call, it becomes necessary for the latter to go to the exchange, and, according to the plans of the conspiracy, one of the servants offers to and does accompany her to the exchange. On reaching the exchange the supposed person calling her cannot be found and she then returns, in the company of the servant to her stopping place. If while enroute an assault is committed on her by said servant, the company would undoubtedly be liable.

§ 622. **Libel.**—While all corporations may be civilly liable for a libel,<sup>41</sup> yet the opportunities more often present themselves for such acts to be committed by telegraph companies than by most any other kind of corporation, unless it be a publishing company. Their express purpose is to transmit news, and most often such as is libelous is made public by means of these companies.<sup>42</sup> As is

<sup>39</sup> *Galehouse v. Minneapolis, etc., R. Co.*, 22 N. D. 615, 135 N. W. 189, 47 L. R. A. (N. S.) 965. See, also, *Souther v. Northwestern Tel. Exch. Co.*, 118 Minn. 102, 136 N. W. 571, 45 L. R. A. (N. S.) 601, Ann. Cas. 1913E, 472. But see *Crelly v. Missouri, etc., Tel. Co.*, 84 Kan. 19, 113 Pac. 386, 33 L. R. A. (N. S.) 328, not within scope of authority.

<sup>40</sup> See *Galehouse v. Minneapolis, etc., R. Co.*, 22 N. D. 615, 135 N. W. 189, 47 L. R. A. (N. S.) 965, outside of authority, but resulting from operator's duties.

<sup>41</sup> *Belo v. Fuller*, 84 Tex. 450, 19 S. W. 616, 31 Am. St. Rep. 75; *Fogg v. Boston, etc., R. Corp.*, 148 Mass. 513, 20 N. E. 109, 12 Am. St. Rep. 583; *Evening Journal Ass'n v. McDermott*, 44 N. J. Law, 430, 43 Am. Rep. 392; *Johnson v. St. Louis Dispatch Co.*, 65 Mo. 539, 27 Am. Rep. 293.

<sup>42</sup> *Peterson v. West. U. Tel. Co.*, 72 Minn. 41, 74 N. W. 1022, 71 Am. St.



known, the publishers of a libel are as guilty as the author himself, and whenever one or more persons, other than he on whom the calumny is cast, sees the libelous words, this is sufficient publication. It seems that it is not necessary that some third person, disconnected from the company, should have seen the libelous words in order to make a publication, but if the servants of the company see them, this is sufficient.<sup>43</sup> So, in an action against a telegraph company for libel, the jury would be authorized to give such exemplary damages as the circumstances required, if the evidence shows that the publication was the result of that reckless indifference to the rights of others which is equivalent to the intentional violation of them.<sup>44</sup> When malice on the part of the company is established as a fact in such cases, either actually or by presumption or inference of facts from the libelous character of the publication, exemplary damages may be recovered.<sup>45</sup> If, however, there is no evidence that the company published the libel carelessly, maliciously or wantonly, exemplary or punitive damages cannot be recovered.<sup>46</sup> The damages sustained must be more than merely nominal, and if the jury should find that this is the only loss suffered, they would not be justified in awarding punitive damages;<sup>47</sup> but, if it is shown that the publication was maliciously made to bring reproach upon the plaintiff's business or domestic relations, damages other than nomi-

Rep. 461, 40 L. R. A. 661. See, also, *Peterson v. West. U. Tel. Co.*, 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302; *Telephone Co. v. Silver*, 10 Can. S. Ct. 238.

<sup>43</sup> *Peterson v. West. U. Tel. Co.*, 75 Minn. 368, 77 N. W. 985, 74 Am. St. Rep. 502, 43 L. R. A. 581; *Peterson v. West. U. Tel. Co.*, 72 Minn. 41, 74 N. W. 1022, 71 Am. St. Rep. 461, 40 L. R. A. 661; *Peterson v. West. U. Tel. Co.*, 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302; *Telephone Co. v. Cashman*, 149 Fed. 367, 81 C. C. A. 5, 9 L. R. A. (N. S.) 140; *Telephone Co. v. Silver*, 10 Can. S. Ct. 238. See, also, *Whitfield v. Southeastern R. Co.*, E. B. & E. 115, 4 Jur. (N. S.) 688, 27 L. J. Q. B. 229, 6 Wkly. Rep. 545, 96 E. C. L. 115.

No publication where the message is transmitted by a person who is not an agent of the company and the message is merely received by an agent of the company at the point of destination and delivered in an envelope. *Telephone v. Cashman*, *supra*.

<sup>44</sup> See *Morning Journal Ass'n v. Rutherford*, 51 Fed. 513, 2 C. C. A. 354, 16 L. R. A. 803; *Cooper v. Sun Print., etc., Ass'n* (C. C.) 57 Fed. 566.

<sup>45</sup> See *Childers v. San Jose, etc., Pub. Co.*, 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40.

<sup>46</sup> See *Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 16 L. Ed. 73; *Missouri Pac. R. Co. v. Richmond*, 73 Tex. 568, 11 S. W. 555, 15 Am. St. Rep. 794, 4 L. R. A. 280.

<sup>47</sup> See *Schippel v. Norton*, 38 Kan. 567, 16 Pac. 804; *West. U. Tel. Co. v. Cross*, 116 Ky. 5, 74 S. W. 1093, 76 S. W. 162.

When plaintiff makes out a case entitling him to recover the price paid for transmission, that is a showing of actual damages which will warrant allowance of exemplary damages if a willful injury or gross negligence is shown. *West. U. Tel. Co. v. Lawson*, 66 Kan. 660, 72 Pac. 283.

nal will be presumed and exemplary damages may be recovered.<sup>48</sup> It is not necessary that the publication be made by means of transmission of news, but if it is done carelessly, recklessly, or maliciously in any other way by its servants while acting within the scope of their authority, it will be liable. For instance, if a telephone company negligently prints the name of one of its subscribers in the directory, so as to indicate that he is a different person from that which he really is, and these are afterwards published or distributed—against the said person's consent—to the other subscribers by the servants in a malicious manner and in utter disregard of consequences, the company will be liable.

§ 623. **Malicious prosecution.**—A telegraph company may be held liable for a malicious prosecution conducted by its agents and officers, just as if it were a natural person, and, in such cases, where it is shown that the case was maliciously prosecuted, exemplary or punitive damages may be recovered. "The old doctrine was," said Judge Campbell, "that a corporation was not so liable, because malice is the gist of the action, and it was said that malice could not be imputed to a mere legal entity, which having no mind could have no motive and therefore no malice, and this narrow view still prevails to some extent. But the steady process of judicial evolution has led to the establishment in some of the courts of the just doctrine of the civil responsibility of a corporation for the acts of the sentient persons who represent it, and through whom it acts, and of the liability of a corporation for the acts of its agents, under the conditions that attach to individuals."<sup>49</sup>

§ 624. **Trespass—accompanied with malice.**—It is necessary that bad motives be involved in order that exemplary damages may always be recovered in actions of tort against a corporation. They are not recoverable for every trespass made by a corporation on other's lands, but only where it is committed through malice, or is accompanied by threats, oppression or rudeness to the owner or occupant, can they be recovered.<sup>50</sup> Punitive damages are not allowed where the trespass has been made in good faith or by mistake as to authority, otherwise they will be.<sup>51</sup> Thus in one case the employes of a telephone company went to the owner of a tree which

<sup>48</sup> See *West. U. Tel. Co. v. Rogers*, 68 Miss. 748, 9 South. 823, 24 Am. St. Rep. 300, 13 L. R. A. 859.

<sup>49</sup> *Williams v. Planters' Ins. Co.*, 57 Miss. 759, 34 Am. Rep. 494, and note.

<sup>50</sup> *Johns v. Cumberland Tel., etc., Co.*, 80 S. W. 165, 25 Ky. Law Rep. 2074.

<sup>51</sup> *Southwestern Tel., etc., Co. v. Whiteman*, 36 Tex. Civ. App. 163, 81 S. W. 76; *West. U. Tel. Co. v. Eyser*, 91 U. S. 495, 23 L. Ed. 377, reversing *Id.*, 2 Colo. 141; *Erie Tel., etc., Co. v. Kennedy*, 80 Tex. 71, 15 S. W. 704; *Campbell v. Telephone, etc., Co.*, 108 Ark. 569, 158 S. W. 1085.

was standing in front of his house to get permission to trim it, so as to stretch a line of wire along the street. On refusal of the owner to grant such permission, if they wait until he leaves home and then trim the tree, the company will be liable, and in addition to the actual damages sustained, to punitive damages; or, if they wait until night to take advantage of such right, the company will be liable to exemplary or punitive damages.<sup>52</sup> Should the company's servants trespass upon the land of another, against his consent in the construction of a line of wires, and in doing so destroy his crops adjoining the right of way, the company will be liable in punitive damages. In other words, the company will be liable for the unlawful trespass of its servants committed while in the discharge of their duty toward the company, just the same as the servants would be if they were acting for themselves.<sup>53</sup>

§ 625. **Negligence—question for jury.**—Exemplary or punitive damages cannot be recovered from a telegraph, telephone, or electric company for injuries to the person caused by the mere negligence of its servants or employés;<sup>54</sup> so a jury would be unwarranted in awarding such damages, where it is shown that the injury is the result of nothing more than negligence on the part of the servants.<sup>55</sup> Thus a mere refusal by a telephone company to furnish a long distance connection will not justify the allowance of exemplary damages.<sup>56</sup> Such damages are only allowed for per-

<sup>52</sup> *Cumberland Tel., etc., Co. v. Poston*, 94 Tenn. 696, 30 S. W. 1040; *Cumberland Tel., etc., Co. v. Cassidy*, 78 Miss. 666, 29 South. 762; *Cumberland Tel., etc., Co. v. Shaw*, 102 Tenn. 313, 52 S. W. 163.

<sup>53</sup> See § 126 et seq.

<sup>54</sup> *West. U. Tel. Co. v. Westmoreland*, 151 Ala. 319, 44 South. 382; mere mistake, *Cumberland Tel., etc., Co. v. Henbon*, 114 Ky. 501, 71 S. W. 435, 24 Ky. Law Rep. 1271, 102 Am. St. Rep. 290, 60 L. R. A. 849; *Cumberland Tel., etc., Co. v. Paine*, 94 Miss. 883, 48 South. 229; *Gwynn v. Citizens' Tel. Co.*, 69 S. C. 434, 48 S. E. 460, 104 Am. St. Rep. 819, 67 L. R. A. 111; thoughtlessness, *Cocke v. West. U. Tel. Co.*, 84 Miss. 380, 36 South. 392; some honest effort to perform its duty, *West. U. Tel. Co. v. Cross*, 116 Ky. 5, 74 S. W. 1098, 25 Ky. Law Rep. 268, 76 S. W. 162, 25 Ky. Law Rep. 646; *West. U. Tel. Co. v. Spratley*, 84 Miss. 86, 36 South. 188; *Cloy v. West. U. Tel. Co.*, 78 S. C. 109, 58 S. E. 972; *Butler v. West. U. Tel. Co.*, 77 S. C. 148, 57 S. E. 757; *Key v. West. U. Tel. Co.*, 76 S. C. 301, 56 S. E. 962; *Lewis v. West. U. Tel. Co.*, 57 S. C. 325, 35 S. E. 556. *Todd v. West. U. Tel. Co.*, 77 S. C. 522, 58 S. E. 433, where the evidence is uncontradicted; *Foster v. West. U. Tel. Co.*, 77 S. C. 155, 57 S. E. 760.

<sup>55</sup> *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844; *Haber, etc., Hat Co. v. Southern Bell Tel., etc., Co.*, 118 Ga. 874, 45 S. E. 696; *Stuart v. West. U. Tel. Co.*, 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623; *West. U. Tel. Co. v. Brown*, 58 Tex. 170, 44 Am. Rep. 610; *McAllen v. West. U. Tel. Co.*, 70 Tex. 243, 7 S. W. 715; *Davis v. West. U. Tel. Co.*, 46 W. Va. 48, 32 S. E. 1026.

<sup>56</sup> *Magouirk v. West. U. Tel. Co.*, 79 Miss. 632, 31 South. 206, 89 Am. St. Rep. 663.



sonal injuries, when the wrong is wantonly and willfully inflicted, or with such gross want of care and regard for the rights of others as to justify the presumption of wantonness or willfulness.<sup>57</sup> In other words, the injury must be the direct result of the act of the agents, where they have been guilty, not only for want of ordinary care, but of that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them.<sup>58</sup> Thus, it has been held, that punitive damages can be recovered where a messenger boy intentionally fails to deliver a message.<sup>59</sup> Whether there is or is not sufficient evidence adduced to disclose wanton and gross negligence, it is not only a privilege but the duty of the court, by proper request, to instruct the jury that they may<sup>60</sup> or may not award punitive damages as the case may be.<sup>61</sup> It is a question for the jury on being properly instructed to determine whether, from the evidence, the degree of care exercised amounts to the degree of gross negligence to constitute the act as willfully or wantonly committed.<sup>62</sup> Thus exemplary, punitive or vindictive damages may be recovered against a telegraph company for a failure to transmit and deliver a message, where there is such gross negligence on the part of the agents or employés of the company as to indicate wantonness or a malicious purpose in failing to transmit and deliver it.<sup>63</sup> So also, if the agent of the company who

<sup>57</sup> *Magouirk v. West. U. Tel. Co.*, 79 Miss. 632, 31 South. 206, 89 Am. St. Rep. 663; *Lewis v. West. U. Tel. Co.*, 57 S. C. 325, 35 S. E. 556. See, also, *Butler v. West. U. Tel. Co.*, 65 S. C. 510, 44 S. E. 91.

<sup>58</sup> *West. U. Tel. Co. v. Seed*, 115 Ala. 670, 22 South. 474; *West. U. Tel. Co. v. Cunningham*, 99 Ala. 314, 14 South. 579; *West v. West. U. Tel. Co.*, 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530; *Southern Kan. R. Co. v. Rice*, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766; *West. U. Tel. Co. v. Lawson*, 66 Kan. 660, 72 Pac. 283; *West. U. Tel. Co. v. Watson*, 82 Miss. 101, 33 South. 76; *Young v. West. U. Tel. Co.*, 65 S. C. 93, 43 S. E. 448; *West. U. Tel. Co. v. Frith*, 105 Tenn. 167, 58 S. W. 118; *West. U. Tel. Co. v. Morris*, 77 Tex. 173, 13 S. W. 888; *Gulf, etc., R. Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269. Where the gross negligence is the employment of an incompetent agent, and it appears that the agent referred to had never been negligent before, exemplary damages are not recoverable. *West. U. Tel. Co. v. Karr*, 5 Tex. Civ. App. 60, 24 S. W. 302.

<sup>59</sup> *Butler v. West. U. Tel. Co.*, 65 S. C. 510, 44 S. E. 91.

<sup>60</sup> See *Kansas Pac. R. Co. v. Kessler*, 18 Kan. 523.

<sup>61</sup> See *Chicago R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373.

<sup>62</sup> See *Southern, etc., R. Co. v. McLendon*, 63 Ala. 266; *Western U. Tel. Co. v. Cunningham*, 99 Ala. 314, 14 South. 579; *Bannon v. Baltimore, etc., R. Co.*, 24 Md. 108.

<sup>63</sup> See note 45.

receives a reply message for transmission knows the urgent necessity for promptness in forwarding it, but delays sending it off until the next morning, it is a question for the jury to decide whether this was not such gross negligence as evinced an utter disregard of plaintiff's feelings and rights, and if they so determine, punitive damages may be awarded.<sup>64</sup> If the employes of the company negligently allow the wires to fall on the wires of an electric light company, and to remain there hanging down, the company will be liable in exemplary damages to one injured by accidentally coming in contact with the wires, if the employes acted in a spirit of mischief or criminal indifference, and it was known to the company's managers; or, if the managers did not exercise proper care in selecting the employes, or if they knew, or had means of knowing, that they were not skillful, prudent or careful, it would still be liable.<sup>65</sup> A telegraph company cannot, however, be held answerable in exemplary damages for an injury occasioned by its servants or employes, in the absence of willful or malicious conduct or intentional wrong.<sup>66</sup> So, a telegraph company is not answerable in exemplary damages on account of the mere failure of its agents to find the addressee of a message, where it is not shown that the company had knowledge of the incompetency of its agents when they were employed, or that they were retained after it was known.<sup>67</sup>

§ 626. **Same continued—actual damages.**—In cases brought against telegraph, telephone, or electrical companies to recover punitive damages for injuries resulting from the willful acts of their servants or employes, it is necessary to show that actual damages have been sustained.<sup>68</sup> While this is the rule, yet the amount of damages sustained may be very small. Thus it was held that, when the plaintiff makes out a case entitling him to recover the price paid for transmission,<sup>69</sup> this is a sufficient showing of actual damages to warrant the allowance of exemplary damages, if a willful injury or gross negligence is shown.<sup>70</sup> If, however, mental suffering has been the result of injury to the character or reputation of one of the parties to a forged telegram sent by the com-

<sup>64</sup> West. U. Tel. Co. v. Cunningham, 99 Ala. 314, 14 South. 579; Butler v. West. U. Tel. Co., 62 S. C. 222, 40 S. E. 162, 89 Am. St. Rep. 893.

<sup>65</sup> Henning v. West. U. Tel. Co. (C. C.) 41 Fed. 864.

<sup>66</sup> West. U. Tel. Co. v. Eyser, 91 U. S. 495, 23 L. Ed. 377, note reversing *Id.*, 2 Colo. 141; Erie Tel. Co. v. Kennedy, 80 Tex. 71, 15 S. W. 704.

<sup>67</sup> West. U. Tel. Co. v. Karr, 5 Tex. Civ. App. 60, 24 S. W. 302.

<sup>68</sup> Gulf, etc., R. Co. v. Levy, 59 Tex. 563, 46 Am. Rep. 278.

<sup>69</sup> See § 525.

<sup>70</sup> West. U. Tel. Co. v. Lawson, 66 Kan. 660, 72 Pac. 283.

pany's agent, while acting within the scope of his authority or employment, it is not necessary that actual damages be sustained.<sup>71</sup>

§ 627. **Excessive damages.**—We shall not comment to any great extent upon the subject of excessive damages, since there is no difference in the application of the rules of law on this subject as regards actions brought against telegraph, telephone, and electric companies and those brought for the same causes against other corporations and individuals;<sup>72</sup> and to treat the subject as it should be would necessarily consume much valuable time and encumber the pages of this work with matter foreign to the object for which it was prepared. Damages, as has been said elsewhere, are regarded as a compensation for infringement of the rights of others;<sup>73</sup> and when not connected with matters of aggravation or malice, they are considered as matter within the discretion of the jury, under proper instructions by the court,<sup>74</sup> and an appellate court will seldom interfere with the verdict when rendered.<sup>75</sup> The general rule on this point as expressed by Judge Story is "that a verdict will not be set aside in a case of tort for excessive damages,"<sup>76</sup> unless the court can clearly see that the jury has committed

<sup>71</sup> *Magouirk v. West. U. Tel. Co.*, 79 Miss. 632, 31 South. 206, 89 Am. St. Rep. 663.

<sup>72</sup> *West. U. Tel. Co. v. McCall*, 9 Kan. App. 886, 58 Pac. 797; *Peterson v. West. U. Tel. Co.*, 75 Minn. 368, 77 N. W. 985, 74 Am. St. Rep. 502, 43 L. R. A. 581.

<sup>73</sup> See § 525.

<sup>74</sup> *Birmingham R., etc., Co. v. Baird*, 130 Ala. 334, 30 South. 456, 89 Am. St. Rep. 43, 54 L. R. A. 752; *Wynne v. Atlantic Ave. R. Co.*, 156 N. Y. 702, 51 N. E. 1094; *New Orleans, etc., R. Co. v. Schneider*, 60 Fed. 210, 8 C. C. A. 571; *Missouri Pac. R. Co. v. Texas, etc., R. Co. (C. C.)* 33 Fed. 803; *Montreal Gas Co. v. St. Lawrence*, 26 Can. Supreme Ct. 176; *West. U. Tel. Co. v. Crawford*, 29 Okl. 143, 116 Pac. 925, 35 L. R. A. (N. S.) 930.

<sup>75</sup> Whether the damages are excessive will not be considered on appeal where the question was not raised by a motion for a new trial in the court below. *West. U. Tel. Co. v. Hopkins*, 49 Ind. 223.

<sup>76</sup> *For mental anguish suffered as result of the inability to reach parent before death, not excessive.*—*West. U. Tel. Co. v. Blackmer*, 82 Ark. 526, 102 S. W. 336, daughter prevented from reaching dying mother, \$1,000.00 recovered; *West. U. Tel. Co. v. Newhouse*, 6 Ind. App. 422, 33 N. E. 800, son prevented from reaching mother before her death, \$400.00 recovered; *Potter v. West. U. Tel. Co.*, 138 Iowa, 406, 116 N. W. 130, same; *West. U. Tel. Co. v. Cunningham*, 99 Ala. 314, 14 South. 579, same, \$500.00 recovered; *Erie Telephone, etc., Co. v. Grimes*, 82 Tex. 89, 17 S. W. 831, same, \$667.56 recovered; *West. U. Tel. Co. v. Gilstrap*, 77 Kan. 191, 94 Pac. 122, son prevented from reaching father, \$750.00 recovered.

*Inability to reach a son or daughter before death, not excessive.*—*West. U. Tel. Co. v. Houghton* (Tex. Civ. App.) 26 S. W. 448, father prevented from reaching son, \$2,000.00 recovered; *West. U. Tel. Co. v. Evans*, 5 Tex. Civ. App. 55, 23 S. W. 998, mother, son, \$2,500.00 recovered; *West. U. Tel. Co. v.*



some very gross and palpable error, or has acted under some improper bias, influence or prejudice, or has totally mistaken the rules

Sloss, 45 Tex. Civ. App. 153, 100 S. W. 354, father, son, \$1,995.00 recovered; West. U. Tel. Co. v. James, 31 Tex. Civ. App. 503, 73 S. W. 79, mother, son, \$1,995.25 recovered; West. U. Tel. Co. v. Cobb (Tex. Civ. App.) 118 S. W. 717, father, son, \$1,200.00 recovered; West. U. Tel. Co. v. Fisher, 107 Ky. 513, 54 S. W. 830, father, daughter, \$300.00 recovered; West. U. Tel. Co. v. O'Keefe (Tex. Civ. App.) 29 S. W. 1137, father, daughter, \$1,000.00 recovered.

*Inability to reach a brother or sister before death, not excessive.*—West. U. Tel. Co. v. Porter (Tex. Civ. App.) 26 S. W. 866, sister, half-sister, no great degree of affection shown, \$1,000.00 recovered; West. U. Tel. Co. v. Zane, 6 Tex. Civ. App. 585, 25 S. W. 722, brother, brother \$1,950.00 recovered; West. U. Tel. Co. v. Trice (Tex. Civ. App.) 48 S. W. 770, sister, brother, \$1,000.00 recovered.

*Inability of one's spouse to reach the other before death, not excessive.*—Ark., etc., R. Co. v. Stroude, 82 Ark. 117, 100 S. W. 760, husband, wife, \$500.00 recovered; Louisiana, etc., R. Co. v. Reeves, 95 Ark. 214, 128 S. W. 1051, wife, husband, \$750.00 recovered.

*Inability to reach dying relative before final unconsciousness.*—West. U. Tel. Co. v. Price, 137 Ky. 758, 126 S. W. 1100, 29 L. R. A. (N. S.) 836, wife, husband, \$955.50 recovered; West. U. Tel. Co. v. Piner, 9 Tex. Civ. App. 152, 29 S. W. 66, son, father, \$2,150.00 recovered; West. U. Tel. Co. v. Bennett, 58 Tex. Civ. App. 60, 124 S. W. 151, son, mother, \$1,150.00 recovered; West. U. Tel. Co. v. Cleveland, 169 Ala. 131, 53 South. 81, Ann. Cas. 1912B, 534, son, mother, \$500.00 recovered; West. U. Tel. Co. v. Gillis, 97 Ark. 226, 133 S. W. 833, daughter, mother, \$300.00 recovered.

*Inability to be present at the funeral of a parent, not excessive.*—Nitka v. West. U. Tel. Co., 149 Wis. 106, 135 N. W. 492, 49 L. R. A. (N. S.) 337, Ann. Cas. 1913C, 863, son, father, \$350.00 recovered; West. U. Tel. Co. v. Hardison (Tex. Civ. App.) 101 S. W. 541, daughter, mother, \$2,000.00 recovered; West. U. Tel. Co. v. Seed, 115 Ala. 670, 22 South. 474, son, mother, \$1,500.00 recovered; West. U. Tel. Co. v. McDavid (Tex. Civ. App.) 121 S. W. 893, daughter, father, \$1,350.00 recovered.

*Inability to be present at the funeral of a son or daughter, not excessive.*—West. U. Tel. Co. v. Guest (Tex. Civ. App.) 33 S. W. 281, father, child, \$450.00 recovered; West. U. Tel. Co. v. Shaw, 40 Tex. Civ. App. 277, 90 S. W. 58, mother, son, \$1,100.00 recovered; West. U. Tel. Co. v. Rice (Tex. Civ. App.) 61 S. W. 327, father, daughter, \$750.00 recovered; West. U. Tel. Co. v. Frith, 105 Tenn. 167, 58 S. W. 118, father, only son, \$1,000.00 recovered.

*Inability to be present at the funeral of a brother or sister, not excessive.*—West. U. Tel. Co. v. Johnson, 16 Tex. Civ. App. 546, 41 S. W. 367, brother, brother, \$400.00 recovered; West. U. Tel. Co. v. Hill (Tex. Civ. App.) 26 S. W. 252, brother, brother, \$500.00 recovered; West. U. Tel. Co. v. Thompson, 18 Tex. Civ. App. 279, 44 S. W. 402, brother, brother, \$700.00 recovered; West. U. Tel. Co. v. Caldwell, 126 Ky. 42, 102 S. W. 840, 12 L. R. A. (N. S.) 748, sister, brother, \$1,000.00 recovered; West. U. Tel. Co. v. Rosentreter, 80 Tex. 406, 16 S. W. 25, brother, sister, \$1,000.00 recovered; West. U. Tel. Co. v. Rabon, 60 Tex. Civ. App. 88, 127 S. W. 580, sister, brother, \$5,000.00 recovered.

*Inability to make arrangements for and attend the funeral of a relative, not excessive.*—West. U. Tel. Co. v. Fuel, 165 Ala. 391, 51 South. 571, husband, wife, \$1,000.00 recovered; West. U. Tel. Co. v. Norris, 25 Tex. Civ. App. 43, 60 S. W. 982, parents, child, \$1,000.00 recovered; West. U. Tel. Co. v. Hill, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058, father, child, \$1,100.40 recovered.

*Inability to see the remains of relative before burial, not excessive.*—West.

of law, by which the damages are to be regulated.”<sup>77</sup> In such cases the court should consider all the circumstances surrounding the case and consider therefrom whether the verdict is fair and reasonable; and it will be presumed that the verdict is fair and reasonable, unless it is clearly so excessive or outrageous with reference to those circumstances as to demonstrate that the jury have acted against the rules of law or have allowed their passions and prejudices to overcome their better judgment.<sup>78</sup> So, if the jury has awarded damages which are clearly or grossly excessive,<sup>79</sup> or

U. Tel. Co. v. Porterfield (Tex. Civ. App.) 84 S. W. 850, grandmother, grandson, \$500.00 recovered; West. U. Tel. Co. v. Hamilton, 36 Tex. Civ. App. 300, 81 S. W. 1052, husband, wife, \$1,316.00 recovered.

*Where friends were prevented from meeting train bearing the plaintiff and the corpse of a relative and from arranging for the funeral, not excessive.*—West. U. Tel. Co. v. Giffin, 27 Tex. Civ. App. 306, 65 S. W. 661, relative, \$750.00 recovered; West. U. Tel. Co. v. Broesche, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843, friends, corpse of plaintiff's wife, \$1,160.00 recovered; West. U. Tel. Co. v. Long, 148 Ala. 202, 41 South. 965, relative, plaintiff and dead child, \$500.00 recovered.

*Being deprived of the consolation of a relative at the death or funeral of another relative.*—West. U. Tel. Co. v. Crocker, 135 Ala. 492, 33 South. 45, 59 L. R. A. 398, plaintiff's mother-in-law, plaintiff's son, who was especially fond of his grandmother, \$225.00 recovered; West. U. Tel. Co. v. Stratemeier, 11 Ind. App. 601, 39 N. E. 527, plaintiff's daughter, funeral of her brother to comfort plaintiff and wife, \$400.00 recovered.

*Damages recovered for mental anguish for failing to promptly transmit telegram, not excessive.*—West. U. Tel. Co. v. Hines, 22 Tex. Civ. App. 315, 54 S. W. 627, erroneously announcing death of mother, \$780.00 recovered; West. U. Tel. Co. v. Russell, 12 Tex. Civ. App. 82, 33 S. W. 708, father failure of physician to reach sick child, \$1,500.25 recovered; West. U. Tel. Co. v. Robinson, 97 Tenn. 638, 37 S. W. 545, 34 L. R. A. 431, father, in consequence of nonarrival of minister to baptize dying daughter, \$500.00 recovered; West. U. Tel. Co. v. Bell, 48 Tex. Civ. App. 151, 106 S. W. 1147, suffering by daughter because compelled to allow public authorities to bury her mother, \$400.25 recovered; West. U. Tel. Co. v. Taylor (Ky.) 122 S. W. 131, telegram erroneously announcing death of both parents when only one was dead, \$450.00 recovered; Cumberland, etc., Co. v. Quigley, 129 Ky. 788, 112 S. W. 897, 19 L. R. A. (N. S.) 575, delay in shipping remains of child caused by failure to transmit money sent for expenses, \$200.00 recovered; West. U. Tel. Co. v. McIlvoy, 107 Ky. 633, 55 S. W. 428, brother, insane brother, who would take food and drink only from him, might have recovered if plaintiff had reached him in time, \$1,000.00 recovered; West. U. Tel. Co. v. Patton (Tex. Civ. App.) 55 S. W. 973, telegram erroneously stating wife “no better” instead of “much better,” \$1,000.00 recovered.

<sup>77</sup> Whipple v. Cumberland Mfg. Co., Fed. Cas. No. 17,516, 2 Story, 661.

<sup>78</sup> Ottawa v. Sweely, 65 Ill. 434; Harris v. Louisville, etc., R. Co. (C. C.) 35 Fed. 116; Walker v. Erie R. Co., 63 Barb. (N. Y.) 260.

<sup>79</sup> *For mental anguish suffered as result of inability to reach father before his death, excessive.*—West. U. Tel. Co. v. Bouchell, 28 Tex. Civ. App. 23, 67 S. W. 159, daughter, father, \$1,250.00 reduced to \$500.00.

*Inability to reach a son or daughter before death, excessive.*—West. U. Tel. Co. v. Houghton, 82 Tex. 561, 17 S. W. 846, 27 Am. St. Rep. 918, 15 L. R. A. 129, father, son, \$4,500.25; West. U. Tel. Co. v. Mellon, 96 Tenn. 66, 33 S. W.

which are the result of passion or prejudice as to the company<sup>80</sup> or sympathy for the plaintiff,<sup>81</sup> or which are due to the instructions of the court being disregarded,<sup>82</sup> or to the consideration of matters not properly attributable to the negligence of the company or which might have been avoided by the plaintiff,<sup>83</sup> or to erroneous inclu-

725, father, son, \$500.00; West. U. Tel. Co. v. Evans, 1 Tex. Civ. App. 297, 21 S. W. 266, following West. U. Tel. Co. v. Houghton, supra, mother, son, \$5,000.00.

*Inability to reach a brother before death, excessive.*—West. U. Tel. Co. v. Dodson, 98 Miss. 745, 54 South. 844, brother, \$1,500.00 reduced to \$1,000.00.

*Inability of a husband to reach his wife before death.*—West. U. Tel. Co. v. Bickerstaff, 100 Ark. 1, 138 S. W. 997, Ann. Cas. 1913B, 242, \$2,000.00 reduced to \$1,000.00.

*Inability to reach a dying relative before final unconsciousness, excessive.*—West. U. Tel. Co. v. Piner, 1 Tex. Civ. App. 301, 21 S. W. 315, son, father, \$4,750.00.

*Inability to be present at the funeral of a parent, excessive.*—West. U. Tel. Co. v. North, 177 Ala. 319, 58 South. 299, daughter, mother, \$1,500.00 reduced to \$500.00.

*Inability to be present at the funeral of a son, excessive.*—West. U. Tel. Co. v. Bowles (Tex. Civ. App.) 76 S. W. 456, father, \$1,000.00 reduced to \$500.00.

*Inability to be present at the funeral of a brother, excessive.*—West. U. Tel. Co. v. Weniski, 84 Ark. 457, 106 S. W. 486, sister, \$1,354.00.

*Inability to make arrangements for the funeral of a relative, excessive.*—Maley v. West. U. Tel. Co., 151 Iowa, 228, 130 N. W. 1086, 49 L. R. A. (N. S.) 327, husband, wife, \$600.00 reduced to \$300.00.

*Inability to see the remains of a relative before burial, excessive.*—West. U. Tel. Co. v. Rhine, 90 Ark. 57, 117 S. W. 1069, mother, son, \$750.00 reduced to \$400.00.

*Being deprived of the consolation of a relative at the death or funeral of another relative, excessive.*—West. U. Tel. Co. v. Garlington, 101 Ark. 487, 142 S. W. 854, 49 L. R. A. (N. S.) 300, plaintiff's son, funeral of another son to comfort mother, \$500.00 reduced to \$100.00.

*Other cases where damages held to be excessive for mental anguish suffered as the result of failure to promptly transmit telegrams.*—Newport News, etc., R. Co. v. Griffin, 92 Tenn. 694, 22 S. W. 737, son delayed in reaching dying father, although he did reach him before death, \$900.00; West. U. Tel. Co. v. Collins, 156 Ala. 333, 47 South. 61, the inconvenience and annoyance of hack ride of twenty miles, \$345.00; Cloy v. West. U. Tel. Co., 78 S. C. 109, 58 S. E. 972, suffering of husband because of wife's being compelled to drive alone at night several miles through forests to her father's home, \$850.00; West. U. Tel. Co. v. Berdine, 2 Tex. Civ. App. 517, 21 S. W. 982, suffering because of delay in securing physician for sick child, \$1,999.99.

<sup>80</sup> West. U. Tel. Co. v. Houghton, 82 Tex. 561, 17 S. W. 846, 27 Am. St. Rep. 918, 15 L. R. A. 129; West. U. Tel. Co. v. Frith, 105 Tenn. 167, 58 S. W. 118; West. U. Tel. Co. v. Evans, 1 Tex. Civ. App. 297, 21 S. W. 266.

<sup>81</sup> West. U. Tel. Co. v. Berdine, 2 Tex. Civ. App. 517, 21 S. W. 982.

<sup>82</sup> Barnes v. West. U. Tel. Co., 24 Nev. 125, 50 Pac. 438, 77 Am. St. Rep. 791.

<sup>83</sup> Newport News, etc., R. Co. v. Griffin, 92 Tenn. 694, 22 S. W. 737, \$900.00 held excessive; West. U. Tel. Co. v. Mellon, 96 Tenn. 66, 33 S. W. 725, \$500.00 held excessive; West. U. Tel. Co. v. Bowles (Tex. Civ. App.) 76 S. W. 456, \$1,000.00 reduced to \$500.00; West. U. Tel. Co. v. Berdine, 2 Tex. Civ. App. 517, 21 S. W. 982, \$1,999.99 for twelve hours delay in the arrival of a doctor, where plaintiff might have procured another doctor.



sion of punitive damages,<sup>84</sup> a new trial will be awarded,<sup>85</sup> unless a remittitur of the excessive part will be consented to.<sup>86</sup> On the other hand, the amount of damages awarded by the jury may be so obviously inadequate that a new trial should be granted.<sup>87</sup>

§ 628. **Nominal damages.**—Under the rule of the common law, only actual damages could be recovered where an actual loss had been sustained, but it is now well settled that, where there is an infringement of a legal right, nominal damages may be awarded, although there is no evidence of actual damages having been sustained.<sup>88</sup> Damages are not always merely pecuniary, but an injury imports damages where a person is thereby deprived of his rights.<sup>89</sup> Where the evidence shows that a person's legal rights have been violated, the claim to damages accrues; and the fact that the precise nature and extent of the damages is not capable of being exactly ascertained will not serve to divest him of his rights to recover,<sup>90</sup> nor will such rule be affected by the fact that the damages are so small that they cannot be readily estimated.<sup>91</sup> In such cases, if the plaintiff has suffered some loss, but it is so small that the jury cannot ascertain the amount, but nevertheless renders a verdict for the defendant, the court may permit the plaintiff to have a verdict for nominal damages.<sup>92</sup> The rule in these particulars will not be affected by the fact that the plaintiff has been benefited by the wrong;<sup>93</sup> nor by the fact that the loss has been subsequently re-

<sup>84</sup> *Cloy v. West. U. Tel. Co.*, 78 S. C. 109, 58 S. E. 972.

<sup>85</sup> *West. U. Tel. Co. v. Berdine*, 2 Tex. Civ. App. 517, 21 S. W. 982; *West. U. Tel. Co. v. Weniski*, 84 Ark. 457, 106 S. W. 486.

<sup>86</sup> *West. U. Tel. Co. v. Hiller*, 93 Miss. 658, 47 South. 377; *West. U. Tel. Co. v. Rhine*, 90 Ark. 57, 117 S. W. 1069; *West. U. Tel. Co. v. Frith*, 105 Tenn. 167, 58 S. W. 118; *West. U. Tel. Co. v. Bowles* (Tex. Civ. App.) 76 S. W. 456; *West. U. Tel. Co. v. Garlington*, 101 Ark. 487, 142 S. W. 854, 49 L. R. A. (N. S.) 300; *West. U. Tel. Co. v. Dodson*, 98 Miss. 745, 54 South. 844; *West. U. Tel. Co. v. Walter*, 106 Miss. 59, 63 South. 194; *West. U. Tel. Co. v. North*, 177 Ala. 319, 58 South. 299; *Maley v. West. U. Tel. Co.*, 151 Iowa, 228, 130 N. W. 1086, 49 L. R. A. (N. S.) 327.

<sup>87</sup> *Prewitt v. Southwestern Tel. Co.*, 46 Tex. Civ. App. 123, 101 S. W. 812.

<sup>88</sup> See §§ 225, 226. See *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453; *Thompson v. New Orleans, etc., R. Co.*, 50 Miss. 315, 19 Am. Rep. 12; *New York Rubber Co. v. Rothery*, 132 N. Y. 293, 30 N. E. 841, 28 Am. St. Rep. 575.

<sup>89</sup> *Ashby v. White*, 2 Ld. Raym. 938, 3 Ld. Raym. 320. See, also, § 525.

<sup>90</sup> *Seaboard Mfg. Co. v. Woodson*, 98 Ala. 378, 11 South. 733; *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415. See, also, § 525.

<sup>91</sup> *Glass v. Garber*, 55 Ind. 236; *Seneca Road Co. v. Auburn, etc., R. Co.*, 5 Hill. (N. Y.) 170. See, also, § 525.

<sup>92</sup> *Feize v. Thompson*, 1 Taunt. 121. See, also, § 525.

<sup>93</sup> *Watts v. Weston*, 62 Fed. 136, 10 C. C. A. 302; *Williams v. Brown*, 76 Iowa, 643, 41 N. W. 377.

paired;<sup>94</sup> nor that the action is brought in contract or in tort.<sup>95</sup> In actions against telegraph companies, the cost of sending the message, if it has been paid, is always recoverable, although no substantial damages are proven, provided a breach of the company's duty is shown, but not otherwise.<sup>96</sup> There cannot be an infringement of the sender's legal rights unless the company is guilty of a breach of some of its duties, and it is error for the court to instruct the jury that the plaintiff is, in any event, entitled to recover the cost of sending the message, since this fact depends upon the proof of the negligence of the company.<sup>97</sup>

<sup>94</sup> *Dow v. Humbert*, 91 U. S. 294, 23 L. Ed. 368.

<sup>95</sup> *Havens v. Hartford, etc., R. Co.*, 28 Conn. 69; *Wilde v. Orleans*, 12 La. Ann. 15.

<sup>96</sup> *West. U. Tel. Co. v. Lawson*, 66 Kan. 660, 72 Pac. 283; *Kennon v. West. U. Tel. Co.*, 126 N. C. 232, 35 S. E. 468; *Thompson v. West. U. Tel. Co.*, 106 N. C. 549, 11 S. E. 269. See § 525.

<sup>97</sup> *Thompson v. West. U. Tel. Co.*, 106 N. C. 549, 11 S. E. 269.

## CHAPTER XXV

## STATUTORY PENALTY.

- § 629. Penal statutes—object and purpose.
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§ 629. Penal statutes—object and purpose.—We have already made a somewhat lengthy discussion in regard to the rights to recover from a telegraph company damages actually sustained as a result of errors negligently made in the transmission or delivery of a message concerning business transactions, and the inability to recover any other damages in the absence of proof of some loss. We have also discussed the right to recover damages from these companies for mental suffering and anguish in consequence of a failure to promptly deliver messages containing announcements of certain affairs, and the unsoundness of the doctrine upon which actions brought for this purpose were maintained; and we have elsewhere commented somewhat upon the inadequacy of the common-



law remedies to recover damages for every wrong or failure of duty of these companies, on account of their peculiar nature, and also made some suggestions as to how this inadequacy could be and was to a certain extent overcome by statutes amending the common-law rule. So, we shall now discuss statutes of this nature which have been adopted in some of the states of the Union. On account of the inadequacy of the common-law remedy to enforce the duty of these companies, in every particular, with respect to the transmission and delivery of messages—particularly in cases in which, from their nature, substantial damages are not recoverable—statutes have been adopted in many states providing for the recovery of a fixed money penalty from telegraph companies,<sup>1</sup> and in some cases expressly including telephone companies also,<sup>2</sup> for a negligent failure to properly discharge their duty. The duty designed to be enforced by these statutes is threefold in its nature: First, to transmit messages tendered for that purpose with the charges established by the rules of the company; second, to receive and transmit such messages with impartiality as to the order of transmission; and, third, to transmit and deliver such messages in good faith and with due diligence.<sup>3</sup>

<sup>1</sup> *State v. West. U. Tel. Co.*, 76 Ark. 124, 88 S. W. 834; *Thurn v. Alta Tel. Co.*, 15 Cal. 472; *West. U. Tel. Co. v. Rountree*, 92 Ga. 611, 18 S. E. 979. 44 Am. St. Rep. 93; *West. U. Tel. Co. v. Braxtan*, 165 Ind. 165, 74 N. E. 985; *West. U. Tel. Co. v. Ferguson*, 157 Ind. 37, 60 N. E. 679; *Weaver v. Grand Rapids, etc., R. Co.*, 107 Mich. 300, 65 N. W. 225; *Connell v. West. U. Tel. Co.*, 168 Mo. 459, 18 S. W. 883; *Pollard v. Mo., etc., Tel. Co.*, 114 Mo. App. 533, 90 S. W. 121; *Gifford v. Glenn Tel. Co.*, 54 Misc. Rep. 468, 106 N. Y. Supp. 53; *Hearn v. West. U. Tel. Co.*, 36 Misc. Rep. 557, 73 N. Y. Supp. 1077; *Mayo v. West. U. Tel. Co.*, 112 N. C. 343, 16 S. E. 1006; *West. U. Tel. Co. v. Hughes*, 104 Va. 240, 51 S. E. 225; *West. U. Tel. Co. v. Powell*, 94 Va. 268, 26 S. E. 828; *Stafford v. West. U. Tel. Co. (C. C.)* 73 Fed. 273; *Osborne v. West. U. Tel. Co.*, 163 Mich. 545, 128 N. W. 745; *Tel. Co. v. Tel., etc., Co.* 125 Tenn. 270, 141 S. W. 845, 43 L. R. A. (N. S.) 550. See *Postal Tel. Cable Co. v. Shannon*, 91 Miss. 476, 44 South. 809; *West. U. Tel. Co. v. Morgan*, 92 Miss. 108, 45 South. 427. Statute of Mississippi re-enacted by Laws of 1908, c. 76, remedying the Act of 1906, c. 101, and considered by *Postal Tel. Cable Co. v. Shannon*, supra.

<sup>2</sup> *Phillips v. Southwestern Tel., etc., Co.*, 72 Ark. 478, 81 S. W. 605; *Cumberland Tel., etc., Co. v. Sanders*, 83 Miss. 357, 35 South. 653; *Pollard v. Mo. etc., R. Co.*, 114 Mo. App. 533, 90 S. W. 121; *Cumberland Tel. etc., Co. v. Kelly*, 160 Fed. 316, 87 C. C. A. 268, 15 Ann. Cas. 1210; *Central U. Tel. Co. v. Fehring*, 146 Ind. 189, 45 N. E. 64.

<sup>3</sup> *Burnett v. West. U. Tel. Co.*, 39 Mo. App. 607. The object of some is merely to prevent partiality or discrimination. *State v. West. U. Tel. Co.*, 76 Ark. 124, 88 S. W. 834; *Weaver v. Grand Rapids, etc., R. Co.*, 107 Mich. 300, 65 N. W. 225; *Hearn v. West. U. Tel. Co.*, 36 Misc. Rep. 557, 73 N. Y. Supp. 1077; *Wichelman v. West. U. Tel. Co.*, 30 Misc. Rep. 450, 62 N. Y. Supp. 491; *Tel., etc., Co. v. Murphy*, 100 Ark. 546, 140 S. W. 720; *Tel. Co. v. Tel., etc., Co.*, 125 Tenn. 270, 141 S. W. 845, 43 L. R. A. (N. S.) 550. Others apply only to willful or intentional acts. *State v. West. U. Tel. Co.*, 76 Ark. 124, 88 S. W. 834;

§ 630. **Construction of statutes—in general—penal.**—The object of these statutes is to fix a penalty upon telegraph and telephone companies for a breach of duty which they owe to the public generally, and not to assess a certain fixed amount of damages for the nonperformance of a contract to properly transmit a dispatch.<sup>4</sup> They, then, being in the nature of penal statutes, or enacted for the purpose of fixing a penalty on these companies for a breach of public duty, must be strictly construed.<sup>5</sup> The word “penalty” means a fine or punishment imposed upon any one for a violation of some duty which the wrongdoer is under obligations to perform, and all statutes which encroach upon the personal or property rights of any person operate in the nature of a punishment and must therefore be strictly construed. So each statute must be considered separately in its own light, and only that which is expressly stated therein can be enforced.<sup>6</sup> It is not our purpose, however, to be understood as saying that the cause of action is made out altogether by one statute, but that only such construction can be placed on each, separately, as is expressly stated in it. It is often the case that one statute makes out the cause of action, while another imposes the penalty for the violation of the first. To be more explicit in that which has been said, a statute which provides that, on fail-

*Frauenthal v. West. U. Tel. Co.*, 50 Ark. 78, 6 S. W. 236. See *State v. West. U. Tel. Co.*, 101 Ark. 600, 142 S. W. 1149; *West U. Tel. Co. v. Braxtan*, 165 Ind. 165, 74 N. E. 985; *West. U. Tel. Co. v. Ferguson*, 157 Ind. 37, 60 N. E. 679; *Burnett v. West. U. Tel. Co.*, 39 Mo. App. 599.

<sup>4</sup> *Frauenthal v. West. U. Tel. Co.*, 50 Ark. 78, 6 S. W. 236; *West. U. Tel. Co. v. Pendleton*, 95 Ind. 12, 48 Am. Rep. 692.

<sup>5</sup> *State v. West. U. Tel. Co.*, 76 Ark. 124, 88 S. W. 834; *Brooks v. West. U. Tel. Co.*, 56 Ark. 224, 19 S. W. 572; *Frauenthal v. West. U. Tel. Co.*, 50 Ark. 78, 6 S. W. 236; *West. U. Tel. Co. v. Mossler*, 95 Ind. 29; *West. U. Tel. Co. v. Rountree*, 92 Ga. 611, 18 S. E. 979, 44 Am. St. Rep. 93; *West. U. Tel. Co. v. Axtell*, 69 Ind. 199; *Cumberland Tel., etc., Co. v. Sanders*, 83 Miss. 357, 35 South. 653; *Weaver v. Grand Rapids, etc., Co.*, 107 Mich. 300, 65 N. W. 225; *Marshall v. West. U. Tel. Co.*, 79 Miss. 154, 21 South. 614, 89 Am. St. Rep. 585; *Ilearn v. West. U. Tel. Co.*, 36 Misc. Rep. 557, 73 N. Y. Supp. 1077; *Wichelman v. West. U. Tel. Co.*, 30 Misc. Rep. 450, 65 N. Y. Supp. 491; *Connell v. West. U. Tel. Co.*, 108 Mo. 459, 18 S. W. 883; *Dudley v. West. U. Tel. Co.*, 54 Mo. App. 391; *Butner v. West. U. Tel. Co.*, 2 Okl. 234, 37 Pac. 1087; *Bradshaw v. West. U. Tel. Co.*, 150 Mo. App. 711, 131 S. W. 912; *Wagner v. Tel. Co.*, 152 Mo. App. 369, 133 S. W. 91; *Grant v. Tel. Co.*, 154 Mo. App. 279, 133 S. W. 673; *Wilkinson v. Tel. Co.*, 163 Mo. App. 71, 145 S. W. 520; *Moore v. Tel. Co.*, 164 Mo. App. 165, 148 S. W. 157; *Elliott v. Tel. Co.*, 175 Mo. App. 213, 157 S. W. 670; *Adecox v. Tel. Co.*, 171 Mo. App. 331, 157 S. W. 989; *Meyers v. Tel. Co.*, 82 Misc. Rep. 266, 143 N. Y. Supp. 574; *Tel., etc., Co. v. Hartley*, 127 Tenn. 184, 154 S. W. 531; *Brown v. West., etc., Coal Co.*, 143 Iowa. 662, 120 N. W. 732, 28 L. R. A. (N. S.) 1260; *Herbert v. Lake Charles, etc., W. Co.*, 111 La. 522, 35 South. 731, 100 Am. St. Rep. 505, 64 L. R. A. 101. See chapter IX.

<sup>6</sup> *Connell v. West. U. Tel. Co.*, 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 172, 38 Am. St. Rep. 575; see chapter IX.

ure to deliver a message "within a reasonable time,"<sup>7</sup> or "with due diligence,"<sup>8</sup> the company shall be liable for a certain fixed penalty, a recovery of the penalty could not be had by showing that the company negligently or incorrectly transmitted the message; or where it provides that the penalty shall be imposed where there is a negligent transmission, and the action is to recover the penalty on an oral or telephone message,<sup>9</sup> or the failure to promptly deliver<sup>10</sup> a written one, the penalty cannot be recovered; neither can there be a recovery by the addressee where the statute provides that the sender shall maintain such suits; but the rule is otherwise if it provides that the party aggrieved may recover.<sup>11</sup>

§ 631. **Same continued—intention of statute—must not be defeated by construction.**—It is generally held that these statutes must be strictly construed, yet that construction must not be placed on them which will defeat the manifest purpose of the legislature in enacting them.<sup>12</sup> There are different degrees of strictness to be placed on penal statutes;<sup>13</sup> and it seems that, on account of the

<sup>7</sup> *Wilkins v. West. U. Tel. Co.*, 68 Miss. 6, 8 South. 678. See chapter IX.

<sup>8</sup> *West. U. Tel. Co. v. Rountree*, 92 Ga. 611, 18 S. E. 979, 44 Am. St. Rep. 93. See, also, *Wolf v. West. U. Tel. Co.*, 94 Ga. 434, 19 S. E. 717. See chapter IX.

<sup>9</sup> *Pollard v. Mo., etc., Tel. Co.*, 114 Mo. App. 533, 90 S. W. 121; *Cumberland Tel., etc., Co. v. Sanders*, 83 Miss. 357, 35 South. 653. See chapter IX.

<sup>10</sup> *West. U. Tel. Co. v. Pearce*, 82 Miss. 487, 34 South. 152; *West. U. Tel. Co. v. Pallotta*, 81 Miss. 216, 32 South. 310; *West. U. Tel. Co. v. Hall*, 79 Miss. 623, 31 South. 202; *Marshall v. West. U. Tel. Co.*, 79 Miss. 154, 27 South. 614, 89 Am. St. Rep. 585; entire failure to transmit, *Hilley v. West. U. Tel. Co.*, 85 Miss. 67, 37 South. 556; delay in delivering after the transmission, *West. U. Tel. Co. v. Pearce*, supra; *Hilley v. West. U. Tel. Co.*, supra; *West. U. Tel. Co. v. Pallotta*, supra; *West. U. Tel. Co. v. Hall*, supra; *Marshall v. West. U. Tel. Co.*, supra. Statutes relating to transmission do not apply to defaults in delivery. *Connell v. West. U. Tel. Co.*, 108 Mo. 459, 18 S. W. 883; *Brooks v. West. U. Tel. Co.*, 56 Ark. 224, 19 S. W. 572; *Rixke v. West. U. Tel. Co.*, 96 Mo. App. 406, 70 S. W. 265; *Dudley v. West. U. Tel. Co.*, 54 Mo. App. 391, disapproving *Brashears v. West. U. Tel. Co.*, 45 Mo. App. 433; *Butner v. West. U. Tel. Co.*, 2 Okl. 234, 37 Pac. 1087; *Hearn v. West. U. Tel. Co.*, 36 Misc. Rep. 557, 73 N. Y. Supp. 1077. But see, contrary, *West. U. Tel. Co. v. Braxtan*, 165 Ind. 165, 74 N. E. 985; *West. U. Tel. Co. v. Ferguson*, 157 Ind. 37, 60 N. E. 679; *West. U. Tel. Co. v. Gougar*, 84 Ind. 176; *Parker v. West. U. Tel. Co.*, 87 Mo. App. 553. See *West. U. Tel. Co. v. Powell*, 94 Va. 268, 26 S. E. 828.

<sup>11</sup> See § 633.

<sup>12</sup> *Arkansas*.—*Frauenthal v. West. U. Tel. Co.*, 50 Ark. 78, 6 S. W. 236.

*California*.—*Thurn v. Alta Tel. Co.*, 15 Cal. 473.

*Georgia*.—*Langley v. West. U. Tel. Co.*, 88 Ga. 777, 15 S. E. 291; *Greenberg v. West. U. Tel. Co.*, 89 Ga. 754, 15 S. E. 651; *Moore v. West. U. Tel. Co.*, 87 Ga. 613, 13 S. E. 639. Compare *Horn v. West. U. Tel. Co.*, 88 Ga. 538, 15 S. E. 16.

*Indiana*.—*West. U. Tel. Co. v. Axtell*, 69 Ind. 199; *Hadley v. West. U. Tel.*

<sup>13</sup> *United States v. Hartwell*, 6 Wall. 395, 18 L. Ed. 830; *State v. McCrystol*, 43 La. Ann. 907, 9 South. 922; *State v. Archer*, 73 Md. 44, 20 Atl. 172.



objects for which these were enacted, the most strict degree should not be insisted upon by the courts.<sup>14</sup> It is the object in the construction of penal, as all other statutes, to ascertain the true legislative intent;<sup>15</sup> and, while the courts will not apply such statute to cases which are not within the obvious meaning of the language employed by the legislature, even though the cases may be within the mischief intended to be remedied,<sup>16</sup> they will not, on the other hand, apply the rule of strict construction with such technicalities as to defeat the purpose for which the statute was enacted.<sup>17</sup> As said at first, the object of these statutes is to provide a remedy for the enforcement of duties and obligations which these companies owe to the public generally, and which are not recognized by the common-law remedies; on account of this, and for the further fact that it has become absolutely necessary that some remedy should be provided for in order that these companies may not become derelict in their duties toward the public, these statutes should not be construed in the strictest degree, and the purpose and intention of the legislature is that they shall not be.<sup>18</sup> Thus, where a statute provides that, on failure of a telegraph company to correctly transmit and promptly deliver all messages tendered to it for transmission, the latter will be liable to a penalty to the party aggrieved, a construction of this statute in its strictest terms would mean that the message should have been delivered to the company in writing, and the same has been so held;<sup>19</sup> but the circumstances of

Co., 115 Ind. 191, 15 N. E. 845; West. U. Tel. Co. v. Roberts, 87 Ind. 377; West. U. Tel. Co. v. Kilpatrick, 97 Ind. 42.

*Iowa*.—Taylor v. West. U. Tel. Co., 95 Iowa, 740, 64 N. W. 660.

*Mississippi*.—Wilkins v. West. U. Tel. Co., 68 Miss. 6, 8 South. 678; Cumberland, etc., Tel. Co. v. Sanders, 83 Miss. 357, 35 South. 653.

*South Dakota*.—Kirby v. West. U. Tel. Co., 4 S. D. 463, 57 N. W. 202.

*Missouri*.—Thompson v. West. U. Tel. Co., 32 Mo. App. 191.

*Virginia*.—West. U. Tel. Co. v. Powell, 94 Va. 268, 26 S. E. 829.

<sup>14</sup> Statute construed as a whole, West. U. Tel. Co. v. Braxtan, 165 Ind. 165, 74 N. E. 985; West. U. Tel. Co. v. Ferguson, 157 Ind. 37, 60 N. E. 679; U. S. Tel. Co. v. West. U. Tel. Co., 56 Barb. (N. Y.) 46.

<sup>15</sup> Parker v. West. U. Tel. Co., 87 Mo. App. 553.

<sup>16</sup> Crosby v. Hawthorn, 25 Ala. 221; Parkinson v. State, 14 Md. 184, 74 Am. Dec. 522; State v. Walsh, 43 Minn. 444, 45 N. W. 721; Daggett v. State, 4 Conn. 61, 10 Am. Dec. 100; United States v. Wiltberger, 5 Wheat. 76, 5 L. Ed. 37.

<sup>17</sup> See note 6.

<sup>18</sup> West. U. Tel. Co. v. Wilson, 108 Ind. 308, 9 N. E. 172; West. U. Tel. Co. v. Meredith, 95 Ind. 93, 8 Am. & Eng. Corp. Cas. 54; West. U. Tel. Co. v. Pendleton, 95 Ind. 12, 48 Am. Rep. 692.

<sup>19</sup> Cumberland, etc., Tel. Co. v. Sanders, 83 Miss. 357, 35 South. 653; Wilkins v. West. U. Tel. Co., 68 Miss. 6, 8 South. 678; Pollard v. Mo., etc., Tel. Co., 114 Mo. App. 533, 90 S. W. 121.

the case may be such as to give a less degree of strict construction, so as to warrant a recovery of the penalty, although the message was telephoned to the operator.<sup>20</sup>

§ 632. **A penalty—not damages—for person injured.**—The penalty provided by these statutes is different from those imposed for the commission of a crime. In these latter statutes, the wrong or crime is one committed more directly against the state, and for this reason the penalty should go to the state. In those statutes enacted for the express purpose of enforcing the duties which telegraph and telephone companies owe to the public, the wrong inflicted is more of a personal injury, or one in which the injured party is more directly concerned, and, for this reason, the penalty is one to be recovered by him.<sup>21</sup> It must be understood that the penalty is not in the nature of liquidated damages,<sup>22</sup> or a compensation to be recovered for the loss sustained by the injured person, but it is purely a penalty. It is imposed particularly as a punishment on the company for a breach of its duty,<sup>23</sup> and to be an object lesson to others, and, at the same time, the injured person is pecuniarily benefited for the wrong.

§ 633. **Who maintain suit.**—As will be seen in another part of this work, the sender under the English rule could only maintain an action against a telegraph company for a breach of a contract of sending, since the privity of contract only existed between the sender and the company.<sup>24</sup> This rule has not been followed in our states, but the sendee, under the American rule, can sue as well as the sender.<sup>25</sup> With respect to who shall maintain the action, under these statutes, the statutes themselves must be referred to in order to ascertain this fact.<sup>26</sup> While the statutes are similar in nature, yet the wording of each is not always the same, and the least difference in the wording might cause quite a different construction to be placed on each. Thus some of these statutes provide that, on a failure of a prompt delivery, the sender of the message may recover a certain penalty. It has been held, under these, that no one except

<sup>20</sup> *West. U. Tel. Co. v. Jones*, 69 Miss. 658, 13 South. 471, 30 Am. St. Rep. 579.

<sup>21</sup> *West. U. Tel. Co. v. Pendleton*, 95 Ind. 12, 48 Am. Rep. 692, reversed on other grounds in 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187.

<sup>22</sup> *Id.* See *Brown v. West*, etc., *Coal Co.*, 143 Iowa, 662, 120 N. W. 732, 28 L. R. A. (N. S.) 1260; *Herbert v. Lake Charles*, etc., *W. Co.*, 111 La. 522, 25 South. 731, 100 Am. St. Rep. 505, 64 L. R. A. 101; *Boyd v. Elec. Co.*, 40 Or. 126, 66 Pac. 576, 57 L. R. A. 619. See, also, chapter IX.

<sup>23</sup> *Id.*

<sup>24</sup> See § 471 et seq.

<sup>25</sup> See § 473 et seq.

<sup>26</sup> *Thompson v. West. U. Tel. Co.*, 40 Misc. Rep. 443, 82 N. Y. Supp. 675.

the sender could maintain the action.<sup>27</sup> In other statutes it is provided that any person or "any party aggrieved" by such failure of duty may recover the penalty.<sup>28</sup> Under these provisions, either the sender or the addressee may recover the penalty when the default is shown.<sup>29</sup> It is on account of the strict construction placed on these statutes that these different rules are adhered to. If the statute fails altogether to provide by whom the action may be brought, it has been held that the rules applicable in an ordinary action for damages apply.<sup>30</sup>

§ 634. **Extraterritorial effect—not any.**—It is the general rule that, when a liability imposed by the statute of a state is in its nature a penalty, such liability cannot be enforced beyond the state in which the statute was enacted; or, in other words, such statutes have no extraterritorial effect.<sup>31</sup> As said, these statutes are penal, and, independently of the constitutional question in this connection, cannot be enforced beyond the limits of the state enacting them.<sup>32</sup> It is not meant by this, however, that these statutes can only be

<sup>27</sup> *Thurn v. Alta Tel. Co.*, 15 Cal. 472; *West. U. Tel. Co. v. Brown*, 108 Ind. 538, 8 N. E. 171; *West. U. Tel. Co. v. Kinney*, 106 Ind. 468, 7 N. E. 191; *West. U. Tel. Co. v. Reed*, 96 Ind. 195; *Thompson v. West. U. Tel. Co.*, 40 Misc. Rep. 443, 82 N. Y. Supp. 675.

<sup>28</sup> *West. U. Tel. Co. v. Ferguson*, 157 Ind. 37, 60 N. E. 679; *Hadley v. West. U. Tel. Co.*, 115 Ind. 191, 15 N. E. 845.

<sup>29</sup> *West. U. Tel. Co. v. Tyler*, 90 Va. 297, 18 S. E. 280, 44 Am. St. Rep. 910. The state need not be made a party to the suit. *West. U. Tel. Co. v. Tyler*, supra.

<sup>30</sup> *Hadley v. West. U. Tel. Co.*, 115 Ind. 191, 15 N. E. 845.

<sup>31</sup> *West. U. Tel. Co. v. Carter*, 156 Ind. 531, 60 N. E. 305; *West. U. Tel. Co. v. Reed*, 96 Ind. 195; *Carnahan v. West. U. Tel. Co.*, 89 Ind. 526, 46 Am. Rep. 175; *Taylor v. West. U. Tel. Co.*, 95 Iowa, 740, 64 N. W. 660; *Connell v. West. U. Tel. Co.*, 108 Mo. 459, 18 S. W. 883; *Tel. Co. v. Gilkison*, 46 Ind. App. 29, 90 N. E. 650; *Wagner v. Tel. Co.*, 152 Mo. App. 369, 133 S. W. 91; *Tel. Co. v. Davis*, 114 Va. 154, 75 S. E. 766.

<sup>32</sup> *Arkansas*.—*Little Rock, etc., Tel. Co. v. Davis*, 41 Ark. 79.

*Georgia*.—*West. U. Tel. Co. v. Michelson*, 94 Ga. 436, 21 S. E. 169.

*Indiana*.—*West. U. Tel. Co. v. Carter*, 156 Ind. 531, 60 N. E. 305; *Rogers v. West. U. Tel. Co.*, 122 Ind. 395, 24 N. E. 157, 17 Am. St. Rep. 373; *West. U. Tel. Co. v. Reed*, 96 Ind. 195; *Carnahan v. West. U. Tel. Co.*, 89 Ind. 526, 47 Am. Rep. 175. But see *West. U. Tel. Co. v. Hamilton*, 50 Ind. 181.

*Iowa*.—*Taylor v. West. U. Tel. Co.*, 95 Iowa, 740, 64 N. W. 660.

*Mississippi*.—*Alexander v. West. U. Tel. Co.*, 66 Miss. 161, 5 South. 397, 14 Am. St. Rep. 556, 3 L. R. A. 71.

*Missouri*.—*Rixke v. West. U. Tel. Co.*, 96 Mo. App. 406, 70 S. W. 265; *Connell v. West. U. Tel. Co.*, 108 Mo. 459, 18 S. W. 883.

*New York*.—*Hearn v. West. U. Tel. Co.*, 36 Misc. Rep. 557, 73 N. Y. Supp. 1077.

*Oklahoma*.—*Butner v. West. U. Tel. Co.*, 2 Okl. 234, 37 Pac. 1087.

*Tennessee*.—*West. U. Tel. Co. v. Mellon*, 100 Tenn. 429, 45 S. W. 443.

*Virginia*.—*Tel. Co. v. Davis*, 114 Va. 154, 75 S. E. 766.

*United States*.—*West. U. Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934.



enforced where the company has failed to discharge its duty with respect to the delivery of such messages as are transmitted wholly within the state; but if the message is sent from one state into another, and the wrong has been committed in the state of sending, the penalty may be recovered.<sup>33</sup> It is held by some that the duty imposed by these statutes is a continuous one, and is not one performed by the company by merely discharging its duty with respect to messages transmitted within the state of this enactment.<sup>34</sup> Judge Elliott said, while discussing this point: "The duty which the statute seeks to enforce is owing here in Indiana and not elsewhere; it was here that the contract was made which imposed the duty on the telegraph company, and it was here that the failure occurred, for the message was not transmitted, as the law commands, in good faith and with diligence and impartially. The duty which the company failed to perform was not a duty owing in Iowa, but was a duty owing in Indiana, where the parties executed the contract out of which the duty arose. The duty of the company did not end at the state line; it extended throughout the whole scope of the undertaking and required the message to be transmitted and delivered in good faith and with reasonable diligence to the person to whom it was sent. The breach of duty, no matter where the specific act constituting it occurred, was a breach here and not elsewhere. The duty is a general and a continuous one, and if not performed, irrespective of the place where the failure occurred, is a breach of the duty at the place of the creation."<sup>35</sup> But this decision was overruled.<sup>36</sup> It is held in Georgia that, if the nondelivery to the sender was due to some default or other cause arising beyond the limits of the state in which it was received for transmission, recovery could not be had.<sup>37</sup> In Indiana the penalty

40 L. Ed. 1105; *West. U. Tel. Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187, reversing 95 Ind. 12, 48 Am. Rep. 692.

In Indiana the contract of sending must have been made in that state. *Carnahan v. West. U. Tel. Co.*, supra; *Rogers v. West. U. Tel. Co.*, supra; *West. U. Tel. Co. v. Reed*, supra. And the breach must have occurred in another state. *West. U. Tel. Co. v. Carter*, supra.

<sup>33</sup> *West. U. Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105; *West. U. Tel. Co. v. Crovo*, 220 U. S. 364, 31 Sup. Ct. 399, 55 L. Ed. 498. See, also, § 615.

<sup>34</sup> See §§ 375, 615.

<sup>35</sup> *West. U. Tel. Co. v. Pendleton*, 95 Ind. 12, 48 Am. Rep. 693.

<sup>36</sup> 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187; *West. U. Tel. Co. v. Carter*, 156 Ind. 531, 60 N. E. 305.

<sup>37</sup> *West. U. Tel. Co. v. Howell*, 95 Ga. 194, 22 S. E. 286, 51 Am. St. Rep. 68, 30 L. R. A. 158. See *West. U. Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105; *West. U. Tel. Co. v. Crovo*, 220 U. S. 364, 31 Sup. Ct. 399, 55 L. Ed. 498. See note 32, supra, for other cases.

cannot be recovered if the contract of sending was made in another state, although the default may have occurred in that state.<sup>38</sup>

§ 635. **Constitutionality of statutes.**—The principal grounds upon which the constitutionality of these statutes have been attacked is that to enforce such would be an interference with the exclusive power of Congress over interstate commerce.<sup>39</sup> One reason why it was claimed that they were in violation of the clause of the federal constitution wherein the control of interstate commerce was vested in Congress was that they applied only to telegraph companies and thereby denied these companies the equal protection of the law; but it has been held that, while they apply to these companies, yet they apply equally to all companies of that class.<sup>40</sup> Another reason for claiming that they were in violation of the federal constitution with respect to interstate commerce was that they impaired the obligation of the contract of sending, in that they made a different liability from that assumed in the contract; but this reason, in so far as it applied to persons other than the sender, has been held unfounded.<sup>41</sup> So it is generally held, both by the state and the federal courts, that these statutes are not in conflict with the constitution of the United States, in so far as they inter-

<sup>38</sup> *Rogers v. West. U. Tel. Co.*, 122 Ind. 395, 24 N. E. 157, 17 Am. St. Rep. 373. See *Taylor v. West. U. Tel. Co.*, 95 Iowa, 740, 64 N. W. 660.

<sup>39</sup> *West. U. Tel. Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187, reversing 95 Ind. 12, 48 Am. Rep. 692; *Tel. Co. v. Gilkison*, 46 Ind. App. 29, 90 N. E. 650.

<sup>40</sup> *West. U. Tel. Co. v. Ferguson*, 157 Ind. 37, 60 N. E. 679; *West. U. Tel. Co. v. Mellon*, 100 Tenn. 429, 45 S. W. 443. Elliott, J., while discussing the Indiana statute, said: "No discrimination is made in favor of any person, or in favor of any article of commerce, the freedom of commercial intercourse is not abridged, and no new duty or burden is imposed upon the company. The statute secures to all alike the privilege of demanding that the duties of a corporation be performed with diligence, impartiality and good faith. It enforces an existing duty, and provides a penalty, but it confines the duty to no class and denies the penalty to none. It is impossible to conceive the slightest restriction upon commercial intercourse, or the faintest discrimination in favor of any person or thing. Granting then the lack of power in the state to abridge the freedom of commercial intercourse, or discriminate in favor of the products of one state, or grant commercial rights to the citizens of some particular state and deny them to others, but we do maintain that the sovereign state has power to enact laws requiring persons, artificial or natural, doing business within its borders, to transact that business with fairness, diligence, and impartiality. A statute operating upon persons within the state declaring an existing duty, adding neither new nor additional ones, usurps no function of the federal Congress, and infringes no constitutional provision." *West. U. Tel. Co. v. Pendleton*, 95 Ind. 12, 48 Am. Rep. 694. See, also, *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819; *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *West. U. Tel. Co. v. Com'l Milling Co.*, 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815.

<sup>41</sup> *West. U. Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105.

fere with Congress in the control of interstate commerce.<sup>42</sup> However, a statute which imposes an excessive penalty upon a telephone company for refusing to furnish its facilities to patrons—who are in arrears for services—cannot be enforced since it is violative of the constitution, in that it would be depriving the company of its property without due process of law.<sup>43</sup>

§ 636. **Discrimination, statutes relating to.**—Where telegraph companies are merely directed by penal statutes to receive and transmit messages impartially and in good faith, and without discrimination, it is intended that no partiality or discrimination shall be shown between different patrons<sup>44</sup> and done intentionally and willfully.<sup>45</sup> Such statutes do not embrace mere negligent acts or omissions of a telegraph company,<sup>46</sup> such as a failure to transmit,<sup>47</sup> or a delay in the transmission or delivery of a message,<sup>48</sup> or an

<sup>42</sup> West. U. Tel. Co. v. James, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105. See West. U. Tel. Co. v. Lark, 95 Ga. 806, 23 S. E. 118; West. U. Tel. Co. v. Ferris, 103 Ind. 91, 2 N. E. 240; West. U. Tel. Co. v. Mellon, 100 Tenn. 429, 45 S. W. 443; West. U. Tel. Co. v. Powell, 94 Va. 268, 26 S. E. 828; West. U. Tel. Co. v. Commercial Milling Co., 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815; West. U. Tel. Co. v. Michelson, 94 Ga. 436, 21 S. E. 169; West. U. Tel. Co. v. Howell, 95 Ga. 194, 22 S. E. 286, 51 Am. St. Rep. 68, 30 L. R. A. 158; Postal Tel. Cable Co. v. State, 110 Md. 608, 73 Atl. 679; Louisville v. Wehmhoff, 116 Ky. 812, 76 S. W. 876, 79 S. W. 201.

<sup>43</sup> Southwestern Tel. Co. v. Danaher, 238 U. S. 482, 35 Sup. Ct. 886, 59 L. Ed. 1419, L. R. A. 1916A, 1208, reversing 94 Ark. 533, 127 S. W. 963, 30 L. R. A. (N. S.) 1027; Id., 102 Ark. 547, 144 S. W. 925. See Home Tel. Co. v. People's Tel., etc., Co., 125 Tenn. 270, 141 S. W. 845, 43 L. R. A. (N. S.) 550.

<sup>44</sup> Weaver v. Grand Rapids, etc., R. Co., 107 Mich. 300, 65 N. W. 225; State v. West. U. Tel. Co., 76 Ark. 124, 88 S. W. 834; Hearn v. West. U. Tel. Co., 36 Misc. Rep. 557, 73 N. Y. Supp. 1077; Wichelman v. West. U. Tel. Co., 30 Misc. Rep. 450, 62 N. Y. Supp. 491; Tel., etc., Co. v. Garrigan, 107 Ark. 611, 156 S. W. 447; Gifford v. Glen Tel. Co., 54 Misc. Rep. 468, 106 N. Y. Supp. 53; Petze v. West. U. Tel. Co., 128 App. Div. 192, 112 N. Y. Supp. 516.

<sup>45</sup> State v. West. U. Tel. Co., 76 Ark. 124, 88 S. W. 834; Weaver v. Grand Rapids, etc., R. Co., 107 Mich. 300, 65 N. W. 225; Wichelman v. West. U. Tel. Co., 30 Misc. Rep. 450, 62 N. Y. Supp. 491; Vermilye v. Cable Co., 205 Mass. 598, 91 N. E. 904, 30 L. R. A. (N. S.) 472.

<sup>46</sup> State v. West. U. Tel. Co., 76 Ark. 124, 88 S. W. 834; Frauenthal v. West. U. Tel. Co., 50 Ark. 78, 6 S. W. 236; Hearn v. West. U. Tel. Co., 36 Misc. Rep. 557, 73 N. Y. Supp. 1077; Weaver v. Grand Rapids, etc., R. Co., 107 Mich. 300, 65 N. W. 225; Tel., etc., Co. v. Murphy, 100 Ark. 546, 140 S. W. 720, statutes prescribing penalties for discrimination between applicants for service do not apply to negligence or inattention in failing to repair a patron's telephone; West. U. Tel. Co. v. Jones, 116 Ind. 361, 18 N. E. 529; West. U. Tel. Co. v. Swain, 109 Ind. 405, 9 N. E. 927; Hadley v. West. U. Tel. Co., 115 Ind. 191, 15 N. E. 845; West. U. Tel. Co. v. Steele, 108 Ind. 163, 9 N. E. 78. But see West. U. Tel. Co. v. Braxtan, 165 Ind. 165, 74 N. E. 985; West. U. Tel. Co. v. Ferguson, 157 Ind. 37, 60 N. E. 679.

<sup>47</sup> Frauenthal v. West. U. Tel. Co., 50 Ark. 78, 6 S. W. 236.

<sup>48</sup> Hearn v. West. U. Tel. Co., 36 Misc. Rep. 557, 73 N. Y. Supp. 1077.



error in its transmission,<sup>49</sup> or sometimes to a positive refusal to accept a message based upon good reasons.<sup>50</sup> But it has been held by some courts that, if such negligence or omission is within the terms of such statutes, it will be immaterial whether such negligence or omission was intentional or merely negligent.<sup>51</sup>

§ 637. **Character and form of message—"futures."**—These statutes generally provide that, on failure to transmit or deliver *any* message, the company will be liable to a certain penalty; this means any and all messages irrespective of the form or character, provided they are not immoral, libelous or fraudulent. As it has been said elsewhere in this work, the object of these companies is not to perpetrate or assist in the perpetration of a crime, nor to do any act which would subject them to a civil action, and, of course, it follows that they would not be under any obligation to accept a message for transmission which, to do so, would make them liable to a civil or criminal action.<sup>52</sup> If, then, a message is tendered for transmission, the company may refuse to transmit it, where it would have this effect, and still not be liable for the statutory penalty. It is not every message whose object is for an immoral or illegal purpose, or such as would support an action for damages against the company, that can be rejected by the company. Thus, where there is a message tendered for transmission which relates to transactions in "futures," the company would be under obligations to exercise the same care and promptness that it would over any other message,<sup>53</sup> unless there should be a statute which would make it illegal for such messages to be transmitted.

§ 638. **Same continued—form—cipher telegrams.**—As said, these statutes apply, with few exceptional cases, to all messages, and that whether they are intelligible or not. Messages are often written in cipher, the meaning of which is generally known only by the sender and the addressee. Where this is the case, the company, as we have elsewhere shown, may require the sender to inform it of the nature of the message; or, in other words, the sender

<sup>49</sup> *Wichelman v. West. U. Tel. Co.*, 30 Misc. Rep. 450, 62 N. Y. Supp. 491.

<sup>50</sup> *State v. West. U. Tel. Co.*, 76 Ark. 124, 88 S. W. 834.

<sup>51</sup> *West. U. Tel. Co. v. Ferguson*, 157 Ind. 37, 60 N. E. 679, disapproving *West. U. Tel. Co. v. Jones*, 116 Ind. 361, 18 N. E. 529; *West. U. Tel. Co. v. Braxtan*, 165 Ind. 165, 74 N. E. 985; *Wood v. West. U. Tel. Co.*, 59 Mo. App. 236; *Burnett v. West. U. Tel. Co.*, 39 Mo. App. 599.

<sup>52</sup> See § 431. But see *West. U. Tel. Co. v. Lillard*, 86 Ark. 208, 110 S. W. 1035, 17 L. R. A. (N. S.) 836, not improper message.

<sup>53</sup> See §§ 285, 429.

should do this voluntarily in order that he may hold the company liable for any mishaps or losses sustained in its transmission.<sup>54</sup> If the company has no information of the nature of the message, it would not be liable for all the consequences arising from a failure to transmit and deliver same. But, if the message should be written in cipher and accepted by the company, for transmission, the latter would be liable for the statutory penalty, if the message was not sent at all, although the company may not have had knowledge of its purpose or contents.<sup>55</sup> While the company may have refused to accept such message, yet, on the acceptance of it, the duty was then assumed. It is the assumption of the duty, and the failure to perform same, and not the form of the message, that makes out the case for the statutory penalty.

§ 639. Same continued—written on message blank—waiver of right.—One of the stipulations generally provided for by these companies is that all messages must be written on the blank forms furnished by them.<sup>56</sup> It is generally held by the courts that these stipulations are reasonable and are therefore enforceable.<sup>57</sup> So, when a message is written on any paper other than these forms, the company's operator may refuse to accept same, and, in doing so, he would not subject the company to the statutory penalty.<sup>58</sup> If, however, the operator accepts such message, the fact that it was not written on one of the company's blanks will be no defense to an action to recover the penalty.<sup>59</sup> It is presumed, in such cases, that the company has waived the right acquired under the stipulation. But in order to hold the company, even under this state of facts, the operator must have known that the writing was a message. Thus, where the message was written on a piece of memorandum paper and handed to the operator by the sender's servant in such a causal way as not to indicate that it was a message for transmission, this fact will be a good defense under the statute.<sup>60</sup> In this instance, there would not be a presumption of a waiver of the right, unless the operator knew it was a message.

<sup>54</sup> See chapter XX.

<sup>55</sup> *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 13 S. E. 562, 14 L. R. A. 95, 27 Am. St. Rep. 259; *West. U. Tel. Co. v. Lillard*, 86 Ark. 208, 110 S. W. 1035, 17 L. R. A. (N. S.) 836.

<sup>56</sup> See § 277.

<sup>57</sup> *Id.*

<sup>58</sup> *Kirby v. West. U. Tel. Co.*, 7 S. D. 623, 65 N. W. 37, 30 L. R. A. 621, 624, 46 Am. St. Rep. 765, overruling 4 S. D. 105, 55 N. W. 759, 30 L. R. A. 612, 46 Am. St. Rep. 765.

<sup>59</sup> *West. U. Tel. Co. v. Jones*, 69 Miss. 658, 13 South. 471, 30 Am. St. Rep. 579.

<sup>60</sup> *West. U. Tel. Co. v. Liddell*, 68 Miss. 1, 8 South. 510. See, also, *West. U. Tel. Co. v. Dozier*, 67 Miss. 288, 7 South. 325.

§ 640. **Breach of duty—proof of.**—Where the plaintiff brings an action against a telegraph company to recover the statutory penalty imposed for a failure to promptly transmit or deliver a message, he must prove the breach of such duty in order to recover.<sup>61</sup> The statute being penal, the case must not only be one covered by such,<sup>62</sup> and under which it is accurately described,<sup>63</sup> but it must also be proved as alleged in the bill of complaint.<sup>64</sup> In actions brought against these companies to recover damages as a result of their negligence, a *prima facie* case is made out when it is shown that the message was accepted by the company and that it was delayed in transmission or delivery an unreasonable time;<sup>65</sup> or that the message as received by the addressee was not the same as that delivered to the company. The same rule in this respect as in other cases against these companies applies in actions brought to recover the statutory penalty, except that it is not necessary to prove any loss.

§ 641. **Same continued—amount of proof.**—It has been held in some cases that the plaintiff must prove more than mere negligence on the part of the company, by showing that it acted in bad faith or willfully.<sup>66</sup> It will be found, however, in the examination of the cases which hold such a rule, that there are only particular instances when this rule will apply. Thus, when the complaint is that the company unduly postponed the message in order to send others, or that the message was not accepted or would not be ac-

<sup>61</sup> West. U. Tel. Co. v. Wilson, 108 Ind. 308, 9 N. E. 172; West. U. Tel. Co. v. Ward, 23 Ind. 377, 85 Am. Dec. 462; West. U. Tel. Co. v. Liddell, 68 Miss. 1, 8 South. 510; Kirby v. West. U. Tel. Co., 7 S. D. 623, 65 N. W. 37, 30 L. R. A. 621, 46 Am. St. Rep. 765; Hearn v. West. U. Tel. Co., 36 Misc. Rep. 557, 73 N. Y. Supp. 1077; Tel., etc., Co. v. Murphy, 100 Ark. 546, 140 S. W. 720; Adcox v. Tel. Co., 171 Mo. App. 331, 157 S. W. 989, plaintiff must prove payment or tender charges.

<sup>62</sup> As to persons entitled to enforce liability, see Thompson v. West. U. Tel. Co., 40 Misc. Rep. 443, 82 N. Y. Supp. 675; Hadley v. West. U. Tel. Co., 115 Ind. 191, 15 N. E. 845; Thurn v. Alta Tel. Co., 15 Cal. 472; West. U. Tel. Co. v. Rountree, 92 Ga. 611, 18 S. E. 979, 44 Am. St. Rep. 93. See, also, § 644.

<sup>63</sup> See following sections.

<sup>64</sup> See § 644.

<sup>65</sup> West. U. Tel. Co. v. Scircle, 103 Ind. 227, 2 N. E. 604. See McCloud v. Telephone Co., 170 Mo. App. 624, 157 S. W. 101, as to sufficiency of delivery to company.

<sup>66</sup> West. U. Tel. Co. v. Swain, 109 Ind. 405, 9 N. E. 927; West. U. Tel. Co. v. Brown, 108 Ind. 538, 8 N. E. 171; West. U. Tel. Co. v. Steele, 108 Ind. 163, 9 N. E. 78; Hadley v. West. U. Tel. Co., 115 Ind. 191, 15 N. E. 845; West. U. Tel. Co. v. Jones, 116 Ind. 361, 18 N. E. 529; Weaver v. Grand Rapids, etc., R. Co., 107 Mich. 300, 65 N. W. 225. See, also, Wicheluan v. West. U. Tel. Co., 30 Misc. Rep. 450, 62 N. Y. Supp. 491. See Little Rock, etc., Tel. Co. v. Davis, 41 Ark. 79; McCloud v. Telephone Co., 170 Mo. App. 624, 157 S. W. 101.



cepted, it must be shown that the acts of the company were willful or in bad faith.<sup>67</sup> The contributory negligence of the sender in failing to give a sufficiently definite address, although it might be such as would afford a good ground for a defense to an action for failure to deliver,<sup>68</sup> is not a defense where the action is based on the willful partiality of the company.<sup>69</sup> But if the action is to recover the penalty for failure to transmit or deliver a message, the proof of ordinary negligence on the part of the company is sufficient.<sup>70</sup>

§ 642. **Complaint and proof must fall under statute.**—As has been elsewhere said, the cause of complaint must fall within the statute.<sup>71</sup> Thus a statute providing that the telegraph company shall transmit and deliver messages with “due diligence,” and prescribing a penalty for a failure to comply with the terms of the statute, relates to the time within which messages must be transmitted and delivered, and not to the accuracy and correctness in sending and transcribing them, and the company is not liable, by virtue of the terms of the statute, for the penalty prescribed merely because it makes a verbal, though material, mistake and error in transcribing a message received and transmitted.<sup>72</sup> A case is not made out by showing that the company negligently failed to deliver a message, when the statute under which the action is brought imposes a penalty on these companies for negligence or refusal to receive and transmit messages promptly.<sup>73</sup> A refusal to transmit, for which the statute provides a penalty, is not shown by proof merely of a refusal to deliver after the message has been transmitted.<sup>74</sup> Nor is the intent of the statute complied with so as to justify a recovery of the penalty where it appears that the com-

<sup>67</sup> See § 637. See, also, *Vermilye v. Postal Tel. Cable Co.*, 205 Mass. 598, 91 N. E. 904, 30 L. R. A. (N. S.) 472, what is willful within statute.

<sup>68</sup> *West. U. Tel. Co. v. Patrick*, 92 Ga. 607, 18 S. E. 980, 44 Am. St. Rep. 90.

<sup>69</sup> *West. U. Tel. Co. v. Ferguson*, 157 Ind. 37, 60 N. E. 679. See, also, § 637.

<sup>70</sup> *Burnett v. West. U. Tel. Co.*, 39 Mo. App. 599; *Little Rock, etc., Tel. Co. v. Davis*, 41 Ark. 79; *West. U. Tel. Co. v. Lindley*, 89 Ga. 484, 15 S. E. 636; *West. U. Tel. Co. v. Scirele*, 103 Ind. 227, 2 N. E. 604.

<sup>71</sup> See § 630.

<sup>72</sup> *Wilkins v. West. U. Tel. Co.*, 68 Miss. 6, 8 South. 678; *West. U. Tel. Co. v. Rountree*, 92 Ga. 611, 18 S. E. 979, 44 Am. St. Rep. 93; *West. U. Tel. Co. v. Pallotta*, 81 Miss. 216, 32 South. 310.

<sup>73</sup> *Connell v. West. U. Tel. Co.*, 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 172, 38 Am. St. Rep. 575. See *West. U. Tel. Co. v. Pearce*, 82 Miss. 487, 34 South. 152; *West. U. Tel. Co. v. Hall*, 79 Miss. 623, 31 South. 202; *West. U. Tel. Co. v. Pallotta*, 81 Miss. 216, 32 South. 310; *Marshall v. West. U. Tel. Co.*, 79 Miss. 154, 27 South. 614, 89 Am. St. Rep. 585; *Meyers v. Telephone Co.*, 82 Misc. Rep. 266, 143 N. Y. Supp. 574.

<sup>74</sup> *Brooks v. West. U. Tel. Co.*, 56 Ark. 224, 19 S. W. 572; *Dudley v. West. U. Tel. Co.*, 54 Mo. App. 391; *Rixke v. West. U. Tel. Co.*, 96 Mo. App. 406, 70 S. W. 265. Compare *West. U. Tel. Co. v. Gougar*, 84 Ind. 176. See § 630.

pany made a *bona fide* effort to transmit the message and acted with impartiality, although the message was lost, and this, too, no matter how culpable may have been the conduct of the company by reason of which the loss occurred.<sup>75</sup> Where the statute imposes a penalty for the incorrect transmission of messages, a recovery cannot be had on the proof of a mere delay in transmission.<sup>76</sup>

§ 643. **Complaint—allegations therein.**—To recover the statutory penalty, the complaint must aver facts which bring the case presented by it within both the letter and spirit of the statute.<sup>77</sup> Hence the penalty cannot be recovered under the statute unless the complaint alleges and the proof shows that the defendant was engaged in business of telegraphing for the public.<sup>78</sup> But it need not also appear that the company was engaged in telegraphing for hire.<sup>79</sup> In a suit before a justice of the peace to recover the penalty, it was held that the complaint must aver and the evidence must prove that the sender of the message had paid or tendered the usual charges at the time of sending it. "Under the provisions of the statute \* \* \* it is not every telegraph company which is subject to such penalty for such failure, but it is a telegraph company which has 'a line of wire wholly or partly in this state' that is made amenable to the penalty prescribed by our statute for the failure to transmit a message, 'on payment or tender of the usual charge.'" <sup>80</sup> It was held that the averment in the complaint that defendant "was engaged in the business of transmitting telegraphic messages for

<sup>75</sup> *Frauenthal v. West. U. Tel. Co.*, 50 Ark. 78, 6 S. W. 236; *Baltimore, etc., Tel. Co. v. State (Ark.)* 6 S. W. 513; *Weaver v. Grand Rapids, etc., R. Co.*, 107 Mich. 300, 65 N. W. 225. See § 630.

<sup>76</sup> *West. U. Tel. Co. v. McLaurin*, 70 Miss. 26, 13 South. 36; *West. U. Tel. Co. v. McCormick (Miss.)* 27 South. 606. See § 630.

<sup>77</sup> *Greenberg v. West. U. Tel. Co.*, 89 Ga. 754, 15 S. E. 651; *West. U. Tel. Co. v. Kinney*, 106 Ind. 468, 7 N. E. 191; *Reese v. West. U. Tel. Co.*, 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583; *West. U. Tel. Co. v. Mossler*, 95 Ind. 29; *West. U. Tel. Co. v. Axtell*, 69 Ind. 199; *Rixke v. West. U. Tel. Co.*, 96 Mo. App. 406, 70 S. W. 265; *Pollard v. Missouri, etc., Tel. Co.*, 114 Mo. App. 533, 90 S. W. 121; *Wood v. West. U. Tel. Co.*, 59 Mo. App. 236; *Mayo v. West. U. Tel. Co.*, 112 N. C. 343, 16 S. E. 1006; *West. U. Tel. Co. v. Powell*, 94 Va. 268, 26 S. E. 828; *Bradshaw v. Telephone Co.*, 150 Mo. App. 711, 131 S. W. 912; *Elliott v. Telephone Co.*, 175 Mo. 213, 157 S. W. 670; *Durant v. West. U. Tel. Co.*, 94 Ga. 442, 20 S. E. 1, complaint may be amended; *Conyers v. Postal Tel. Cable Co.*, 92 Ga. 619, 19 S. E. 253, 44 Am. St. Rep. 100; *Chandler v. West. U. Tel. Co.*, 94 Ga. 422, 21 S. E. 832; need not follow the exact language of the statute. *West. U. Tel. Co. v. Walker*, 102 Ind. 599, 2 N. E. 137; *West. U. Tel. Co. v. Griffin*, 1 Ind. App. 46, 27 N. E. 113; *West. U. Tel. Co. v. Meredith*, 95 Ind. 93.

<sup>78</sup> *West. U. Tel. Co. v. Trissal*, 98 Ind. 566; *West. U. Tel. Co. v. Ferguson*, 57 Ind. 499; *West. U. Tel. Co. v. Adams*, 87 Ind. 598, 44 Am. Rep. 776; *West. U. Tel. Co. v. Axtell*, 69 Ind. 199.

<sup>79</sup> *West. U. Tel. Co. v. Seircle*, 103 Ind. 227, 2 N. E. 604.

<sup>80</sup> *West. U. Tel. Co. v. Ferguson*, 57 Ind. 495.

hire" was insufficient as being equivalent to an averment that the defendant was "engaged in telegraphing for the public," as required by the statute.<sup>81</sup> The court said: "A statute so highly penal must be construed strictly. The party claiming under it must bring his case clearly within the letter and spirit of the act. Keeping in mind the main purpose of the statute, its highly penal nature, and the rule of strict construction, we cannot hold that the words 'engaged in the business of transmitting telegraphic messages for hire' are equivalent to the words 'engaged in telegraphing for the public.' \* \* \* A court cannot create a penalty by construction, but must avoid it by construction, unless it is brought within the letter and the necessary meaning of the act creating it."<sup>82</sup> But the complaint need not negative the exceptions in the proviso, nor any facts of excuse;<sup>83</sup> these must come from the defense.<sup>84</sup> The exculpatory matter set forth in the statute need not be mentioned in the complaint, although available for the defense.<sup>85</sup> No actual damages need to be alleged and proved to recover the penalty under the statute.<sup>86</sup> "The statute fixes the amount or penalty to be recovered, whether the actual damages be great or small."<sup>87</sup> A different rule prevailed under the common law, where it was necessary to allege and prove actual damages, otherwise nominal damages could only be recovered.<sup>88</sup>

§ 644. **Actual damages—need not prove.**—The penalty imposed by these statutes, as said, is a punishment inflicted for a violation of the company's duties, and is not in any sense a compensation as liquidated damages to the injured person.<sup>89</sup> It has no reference to the actual loss sustained by him who sues for the recovery of the

<sup>81</sup> West. U. Tel. Co. v. Axtell, 69 Ind. 199.

<sup>82</sup> Id.

<sup>83</sup> West. U. Tel. Co. v. Gougar, 84 Ind. 176; West. U. Tel. Co. v. Burskirk, 107 Ind. 549, 8 N. E. 557; West. U. Tel. Co. v. Lindley, 62 Ind. 371. See Reese v. West. U. Tel. Co., 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583.

<sup>84</sup> West. U. Tel. Co. v. Troth, 43 Ind. App. 7, 84 N. E. 727; West. U. Tel. Co. v. Scirele, 103 Ind. 227, 2 N. E. 604; Elliott v. Telephone Co., 175 Mo. App. 213, 157 S. W. 670.

<sup>85</sup> West. U. Tel. Co. v. Gouger, 84 Ind. 176; West. U. Tel. Co. v. Ward, 23 Ind. 377, 85 Am. Dec. 462; West. U. Tel. Co. v. Lewelling, 58 Ind. 367; West. U. Tel. Co. v. Meek, 49 Ind. 53; West. U. Tel. Co. v. Buchanan, 35 Ind. 429, 9 Am. Rep. 744.

<sup>86</sup> West. U. Tel. Co. v. Buchanan, 35 Ind. 429, 9 Am. Rep. 744; Little Rock, etc., Tel. Co. v. Davis, 41 Ark. 79.

<sup>87</sup> Little Rock, etc., Tel. Co. v. Davis, 41 Ark. 79.

<sup>88</sup> 1 Sutherland on Damages, § 10; Hibbard v. West. U. Tel. Co., 33 Wis. 565, 14 Am. Rep. 775.

<sup>89</sup> West. U. Tel. Co. v. Pendleton, 95 Ind. 12, 48 Am. Rep. 692, reversed on other grounds in 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187.



penalty, but is a means of punishing<sup>90</sup> the company for its negligent acts and is only recoverable by the person<sup>91</sup> injured by the negligence committed. As it is not damages, or in any sense such, it is not necessary to show that it is to be recovered as damages; nor is it necessary to prove that any actual damages have been sustained in order to recover the penalty.<sup>92</sup> While it is not necessary to prove actual damages, yet if such is shown it will not affect the right to recover the penalty.<sup>93</sup> When the negligence has been sufficiently shown, the company will be liable for the penalty, although no loss has been sustained. The object of these statutes is to enforce the duties and obligations which these companies owe to the public generally; and when it is shown that they have failed to properly and promptly discharge them, the penalty may be recovered.

§ 645. **Same continued—does not bar action for damages.**—An action brought to recover the statutory penalty is based on a separate and distinct ground from that brought for the recovery of damages. One is maintainable on the ground that the company has failed to discharge its duty toward the public by neglect, refusal or failure as to time and the other is brought to recover damages sustained as a result of the negligence in transmission, by being inaccurate, or that the message is unreasonably delayed in delivery.<sup>94</sup> One is criminal in nature but civil in form, and the other is civil both in nature and in form. They, being founded on different grounds, may be instituted separately; and an action in one will not bar an action in the other.<sup>95</sup> While these two actions are sepa-

<sup>90</sup> *West. U. Tel. Co. v. Axtell*, 69 Ind. 199. See, also, *Carnahan v. West. U. Tel. Co.*, 89 Ind. 526, 46 Am. Rep. 175.

<sup>91</sup> *Hadley v. West. U. Tel. Co.*, 115 Ind. 191, 15 N. E. 845; *Thurn v. Alta Tel. Co.*, 15 Cal. 472; *Thompson v. West. U. Tel. Co.*, 40 Misc. Rep. 443, 82 N. Y. Supp. 675.

<sup>92</sup> *West. U. Tel. Co. v. Axtell*, 69 Ind. 199; *Little Rock, etc., Tel. Co. v. Davis*, 41 Ark. 79; *West. U. Tel. Co. v. Buchanan*, 35 Ind. 429, 9 Am. Rep. 744; *West. U. Tel. Co. v. Allen*, 66 Miss. 549, 6 South. 461.

<sup>93</sup> *Little Rock, etc., Tel. Co. v. Davis*, 41 Ark. 79; *West. U. Tel. Co. v. Cobbs*, 47 Ark. 344, 1 S. W. 558, 58 Am. Rep. 756; *West. U. Tel. Co. v. Pendleton*, 95 Ind. 12, 48 Am. Rep. 698; *West. U. Tel. Co. v. Adams*, 87 Ind. 598, 44 Am. Rep. 776; *West. U. Tel. Co. v. Ferguson*, 157 Ind. 37, 60 N. E. 679; *West. U. Tel. Co. v. Allen*, 66 Miss. 549, 6 South. 461; *Jacobs v. Postal Tel. Cable Co.*, 76 Miss. 278, 24 South. 535.

<sup>94</sup> *West. U. Tel. Co. v. Lindley*, 89 Ga. 484, 15 S. E. 636; *West. U. Tel. Co. v. Pendleton*, 95 Ind. 12, 48 Am. Rep. 692; *Hadley v. West. U. Tel. Co.*, 115 Ind. 191, 15 N. E. 845; *Carnahan v. West. U. Tel. Co.*, 89 Ind. 526, 46 Am. Rep. 175; *Wilkins v. West. U. Tel. Co.*, 68 Miss. 6, 8 South. 678. See, also, *Stafford v. West. U. Tel. Co. (C. C.)* 73 Fed. 273.

<sup>95</sup> *West. U. Tel. Co. v. Ferguson*, 157 Ind. 37, 60 N. E. 679; *Wilkins v. West. U. Tel. Co.*, 68 Miss. 6, 8 South. 678. See *West. U. Tel. Co. v. Lindley*, 89 Ga.

rate and distinct and are based on different grounds, yet the same act of the company may be the cause of both of the actions. For instance, if the statute provides that on failure to promptly deliver a message the company will be liable for a certain penalty, under this, if the company has failed to discharge its duty, it will be liable for the penalty; and if the plaintiff has sustained a loss in consequence of such delay, he may also recover the actual loss sustained thereby. As will be seen, the delay, in this instance, is the cause of both actions, but one is founded upon the statutory remedy for the enforcement of its duty with respect to the promptness as to time in the delivery and the other is founded on the fact of its violating its common-law duties or obligations and those assumed when the rights and benefits of a corporation were acquired. In some jurisdictions it is held that an action for the recovery of the penalty and a suit to recover the damages sustained as a consequence of such act may be asserted in one suit.<sup>96</sup> It has been held that, under these statutes, parties who have signed a dispatch jointly may bring a joint suit to recover the penalty for a failure to transmit the same.<sup>97</sup>

§ 646. **Actions survive.**—In actions brought to recover the statutory penalty, the recovery is not based upon any injury to the person of the plaintiff. It is an action to enforce a right created by statute and does not belong to the class of actions where redress is sought for a personal injury. As is known, all actions for personal injuries die with the person, unless the rule is otherwise changed by statute. In these cases, brought for the recovery of the statutory penalty, the right of action does not die with the person injured by such act of the company, but survives.<sup>98</sup> Under the common-law practice, the remedy in such cases as these would be an action of debt.<sup>99</sup> There may be statutes, however, which provide that these actions shall not survive; when this is the case, of course, there can be no recovery after the death of the person injured by the act of the company.

§ 647. **Connecting line—liable.**—As it has been seen at other places, it is the duty of the connecting line to receive all messages

484, 15 S. E. 636, holding that the penalty and damages may be recovered in the same action.

<sup>96</sup> West. U. Tel. Co. v. McLaurin, 70 Miss. 26, 13 South. 36; West. U. Tel. Co. v. McCormick (Miss.) 27 South. 606.

<sup>97</sup> West. U. Tel. Co. v. Huff, 102 Ind. 535, 26 N. E. 85.

<sup>98</sup> West. U. Tel. Co. v. Scircle, 103 Ind. 227, 2 N. E. 604.

<sup>99</sup> 1 Chitt. Pl. 125; Washington v. Eaton, 4 Cranch C. C. 352, Fed. Cas. No. 17,228; United States v. Colt, 1 Pet. C. C. 145, Fed. Cas. No. 14,839; Bogart v. City, 1 Ind. 38.

which may be tendered it by an initial line.<sup>100</sup> The same care and diligence must be exercised by this line as is imposed on the first line, and any damages arising as a result of the company's failure to properly discharge these duties will subject it to liability therefor.<sup>101</sup> These statutes which place a penalty on telegraph companies for a failure to perform properly the duties which they owe to the public apply to all telegraph companies doing a public business, and it matters not with whom they do business. As said, they may either transact business with respect to the transmission of news, either with a private person, or with another company. It is not only a privilege, but it is a duty for them to transact such business, where the messages are such as may be sent without subjecting them to an action. So it has been held that these statutory penalties may be enforced against connecting telegraph lines where the initial company would be liable for the same act.<sup>102</sup> The claim by the connecting line that it acted merely as the agent for the first company is no defense to an action to recover the penalty.<sup>103</sup> But in such cases, if the statute provides that the sender shall maintain the suit, it seems that the initial line must be the party to recover the penalty;<sup>104</sup> in other words, the original sender of the message cannot recover the penalty from the connecting line.<sup>105</sup> But if the statute provides that the penalty may be recovered either by the sender or the addressee, the latter may maintain a suit to recover same.<sup>106</sup> The various statutes enacted in the several states are so different in wording that each should be referred to in order that the proper construction may be placed on each.

§ 648. **Defenses—office hours.**—Telegraph companies may set up the same defenses in actions brought to recover the statutory penalty as are available in ordinary actions to recover damages resulting from their negligence.<sup>107</sup> It has been seen that they may

<sup>100</sup> See § 447 et seq.

<sup>101</sup> See §§ 365, 447, et seq.

<sup>102</sup> *United States Tel. Co. v. West. U. Tel. Co.*, 56 Barb. (N. Y.) 46; *People v. West. U. Tel. Co.*, 166 Ill. 15, 46 N. E. 731, 36 L. R. A. 637. The two companies cannot be held jointly liable unless the default was joint. *Chandler v. West. U. Tel. Co.*, 94 Ga. 422, 21 S. E. 832.

<sup>103</sup> *Conyers v. Postal Tel. Cable Co.*, 92 Ga. 619, 19 S. E. 253, 44 Am. St. Rep. 100.

<sup>104</sup> *United States Tel. Co. v. West. U. Tel. Co.*, 56 Barb. (N. Y.) 46.

<sup>105</sup> *Thurn v. Alta Tel. Co.*, 15 Cal. 473.

<sup>106</sup> *Conyers v. Postal Tel. Cable Co.*, 92 Ga. 619, 19 S. E. 256, 44 Am. St. Rep. 100.

<sup>107</sup> *West. U. Tel. Co. v. Harding*, 103 Ind. 505, 3 N. E. 172; *Given v. West. U. Tel. Co.* (C. C.) 24 Fed. 119. See *West. U. Tel. Co. v. Jones*, 95 Ind. 228, 48 Am. Rep. 713; *West. U. Tel. Co. v. Yopst* (Ind.) 11 N. E. 16; *West. U. Tel. Co. v. Greer*, 115 Tenn. 368, 89 S. W. 327, 1 L. R. A. (N. S.) 525. But see *Mathis v. West. U. Tel. Co.*, 94 Ga. 338, 21 S. E. 564, 1039, 47 Am. St. Rep. 167.



regulate their office hours and provide that all messages shall be tendered for transmission within such hours, both at the receiving and terminal offices.<sup>108</sup> As a result of such regulations, they are not liable to deliver the message immediately on its receipt if the terminal office should be closed; it would only be liable for such delay when the message was transmitted during the office hours of both the receiving and terminal offices.<sup>109</sup> The same rule applies notwithstanding the fact that the action was brought to recover the statutory penalty.<sup>110</sup> For the reason that one is maintainable under a common-law remedy and the other under a statutory remedy in which a penalty is imposed on the wrongdoer does not change the rule that the same defense is available under each case. When the action is brought under the same statute, that is, one providing for a penalty when the message is not promptly transmitted, it may be shown that the delay was caused by a derangement of its lines due to an unavoidable casualty and that the message was sent within a reasonable time after the difficulty was removed.

§ 649. **Same continued—free delivery limits.**—Another regulation of telegraph companies is that they will deliver all messages within a certain radius of the terminal office free of any extra charge.<sup>111</sup> It is the duty, as has been said, for them to deliver all messages within a reasonable distance from their central offices, but they may prescribe the distance, provided it be reasonable. This being a reasonable regulation for these companies to enforce, it does not become their duty to deliver a message beyond the free delivery limit, unless it has become additionally compensated for such services. If they should fail to make such delivery, they would not be liable for any damages resulting from the failure to deliver same. There are some statutes which provide that, on failure to deliver a message, or where it has been unreasonably delayed in delivery, a penalty may be recovered.<sup>112</sup> In an action to recover this penalty, the defense that the addressee resides beyond the free

<sup>108</sup> See § 347 et seq.

<sup>109</sup> *Id.*

<sup>110</sup> *West. U. Tel. Co. v. Harding*, 103 Ind. 505, 3 N. E. 172.

<sup>111</sup> See § 302 et seq.; § 344.

<sup>112</sup> Such statutes do not apply to deliveries beyond the free delivery limit, *West. U. Tel. Co. v. Powell*, 94 Va. 268, 26 S. E. 828; nor do they apply to a nonresident temporarily within such limits, *West. U. Tel. Co. v. Timmons*, 93 Ga. 345, 20 S. E. 649; *West. U. Tel. Co. v. Murphey*, 96 Ga. 768, 22 S. E. 297; although he has given to the company an address within such limits at which he can be found, *West. U. Tel. Co. v. Timmons*, *supra*. See *West. U. Tel. Co. v. Mansfield*, 93 Ga. 349, 20 S. E. 650.

delivery limit may be set up as a good defense for not delivering the message.<sup>113</sup>

§ 650. **Same continued—not under operation of statute—contributory negligence.**—It is hardly necessary to enter into any lengthy discussion of the available defenses in actions brought to recover the statutory penalty imposed on these companies for failing to discharge their public duties, since the same defense may be used in these cases as may be set up in ordinary actions brought to recover damages for some negligent act, and which have been discussed heretofore.<sup>114</sup> But having entered into the subject, we shall say a few things about each defense. As has been said, the cause of the action must be one covered by the statute;<sup>115</sup> and should the action not be covered by such statute, or if the proof fails to sustain an action which is brought thereunder,<sup>116</sup> this may be used as a defense in an action to recover the penalty. Penalties are not given as a matter of favor, and one who claims a penalty must bring himself fully and clearly within the law. The plaintiff in the case must not be guilty of any act which contributed directly to the cause of complaint, and if the company should show that he was guilty of contributory negligence, the penalty cannot be recovered. Thus, where the action is brought under a statute which provides for the recovery of a penalty in case a message is not promptly delivered, it may be shown as a defense that the plaintiff failed to give the proper address,<sup>117</sup> or that he failed to give the Christian name, street, and number of the sendee in a city of 12,000 inhabitants.<sup>118</sup>

§ 651. **Same continued—harmless errors.**—Where the error made in transmission is harmless and is due to mere inadvertence the penalty cannot be recovered.<sup>119</sup> Thus, under the Mississippi statute, the penalty is recoverable where there is a failure to “transmit correctly,” yet it has been held that, if there is no harm caused

<sup>113</sup> West. U. Tel. Co. v. Lindley, 62 Ind. 371. See, also, Horn v. West. U. Tel. Co., 88 Ga. 538, 15 S. E. 16.

<sup>114</sup> See cases cited in note 107, *supra*.

<sup>115</sup> See § 644.

<sup>116</sup> West. U. Tel. Co. v. Trissal, 98 Ind. 566. Evidence held sufficient to sustain verdict for penalty. See West. U. Tel. Co. v. Lindley, 89 Ga. 484, 15 S. E. 636; Bradshaw v. Telephone Co., 150 Mo. App. 711, 131 S. W. 912; Keeting v. Telephone Co., 167 Mo. App. 601, 152 S. W. 95; Neet v. Telephone Co., 170 Mo. App. 603, 157 S. W. 113. See Telephone, etc., Co. v. Hartley, 127 Tenn. 184, 154 S. W. 531; Wilkinson v. Telephone Co., 163 Mo. App. 71, 145 S. W. 520.

<sup>117</sup> West. U. Tel. Co. v. Patrick, 92 Ga. 607, 18 S. E. 980, 90 Am. St. Rep. 90.

<sup>118</sup> West. U. Tel. Co. v. McDaniel, 103 Ind. 294, 2 N. E. 709.

<sup>119</sup> West. U. Tel. Co. v. Clarke, 71 Miss. 157, 14 South. 452. See, also, West. U. Tel. Co. v. Rountree, 92 Ga. 611, 18 S. E. 979, 44 Am. St. Rep. 93; Wolf v. West. U. Tel. Co., 94 Ga. 434, 19 S. E. 717.

by the error, the penalty cannot be recovered. As was said by Judge Campbell, while rendering an opinion on this point: "Can it be supposed that for changing my signature or address from Campbell to Camel, or Campel or Cambelle, or Camwell, according to the form of writing it sometimes meets with, in a message sent by me or to me and promptly delivered, and accomplishing its purpose, and doing no harm, the penalty would be incurred? To so hold would impute to the legislature a spirit of injustice and cruelty that would seriously reflect on its attempt to legislate in this matter for the public interest. To limit the operation of the section as we do, is to secure all by it that will subserve the interest of the public, which is the object of the law."<sup>120</sup>

§ 652. Same continued—Sunday dispatches.—It is held, in the Indiana and Missouri courts, that the penalty cannot be recovered by one who delivers his message for transmission on Sunday. In so holding, the court in one case said: "A penalty cannot be recovered for failure to perform an illegal contract. The statute does not apply to contracts which are without legal force. The evident intention of the legislature was to secure the performance of such contracts as imposed binding obligations upon the telegraph companies. The statute is a highly penal one, and we cannot extend its operation by a liberal construction."<sup>121</sup> We certainly cannot bring within its provisions a case, such as the present, where there is, in legal effect, no contract at all. Courts cannot declare, as a matter of law, that the business of telegraphing is a work of necessity. There are, doubtless, many cases in which the sending and delivery of a message would be a work of necessity within the meaning of our statute. But we cannot judicially say that all contracts for transmission of telegraphic messages are to be deemed within the statutory exception. Whether the contract is within the exception must be determined, as a question of fact, from the evidence in each particular case."<sup>122</sup> A different ruling obtains in Mississippi, where it was held that the penalty could be recovered, although the message was delivered on Sunday for transmission, regardless of the fact of its being or not being about a matter of necessity, within the exception of the Sunday law.<sup>123</sup>

§ 653. Stipulations—time for presenting claim—effect of.—Telegraph companies may adopt and enforce stipulations wherein it is provided that all claims must be presented within a certain

<sup>120</sup> West. U. Tel. Co. v. Clarke, 71 Miss. 157, 14 South. 452.

<sup>121</sup> West. U. Tel. Co. v. Axtell, 69 Ind. 199.

<sup>122</sup> Id.

<sup>123</sup> Id.



time, otherwise the plaintiff will be barred from recovery. The reason for this rule has already been discussed.<sup>124</sup> Where the language of these stipulations makes them applicable to actions for penalties, it is as effective in such actions as for the recovery of damages,<sup>125</sup> and the same reasons why they should be enforced with respect to the recovery of damages are applicable for the recovery of the statutory penalty. It has been held, with few exceptions, that a stipulation requiring "all claims for damages" to be presented within a certain time embraces a claim for the penalty.<sup>126</sup> Judge Elliotte, in an opinion on this point, said: "We think that in order to carry into effect the evident intention of the parties, and to give the clause the meaning which the context shows it should have, it must be held that all claims which will confer a right to a recovery in money for a breach of contract or of duty, must be presented within sixty days. In a broad sense the word 'damages' means that which is assessed in the plaintiff's favor as the amount of his recovery, and that statutory penalty is in this sense 'damages.'" <sup>127</sup> The correctness of this holding has been denied in other cases.<sup>128</sup> In Georgia these stipulations are held void so far as they apply to the claim for the statutory penalty.<sup>129</sup> After giving considerable study to the subject, we have arrived at the conclusion that the proper view in which the matter should be considered is that, where these stipulations provide that all claims for damages shall be presented within a certain time, they embrace claims for statutory penalties as well as claims for actual damages sustained.

<sup>124</sup> See § 386 et seq.

<sup>125</sup> *West. U. Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; *West. U. Tel. Co. v. Jones*, 95 Ind. 228, 48 Am. Rep. 713; *Albers v. West. U. Tel. Co.*, 98 Iowa, 51, 66 N. W. 1040; *Montgomery v. West. U. Tel. Co.*, 50 Mo. App. 591; *Barrett v. West. U. Tel. Co.*, 42 Mo. App. 546; *Kirby v. West. U. Tel. Co.*, 7 S. D. 623, 65 N. W. 37, 30 L. R. A. 621, 624, 46 Am. St. Rep. 765; *West. U. Tel. Co. v. Powell*, 94 Va. 268, 26 S. E. 828.

<sup>126</sup> *West. U. Tel. Co. v. Jones*, 95 Ind. 228, 48 Am. Rep. 713; *West. U. Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; *Clement v. West. U. Tel. Co.*, 77 Miss. 747, 27 South. 603; *West. U. Tel. Co. v. Meredith*, 95 Ind. 93; *Kendall v. West. U. Tel. Co.*, 56 Mo. App. 192; *Barrett v. West. U. Tel. Co.*, 42 Mo. App. 542; *Montgomery v. West. U. Tel. Co.*, 50 Mo. App. 591; *West. U. Tel. Co. v. Greer*, 115 Tenn. 368, 89 S. W. 327, 1 L. R. A. (N. S.) 525; *Kirby v. West. U. Tel. Co.*, 7 S. D. 623, 65 N. W. 37, 46 Am. St. Rep. 765, 30 L. R. A. 621, 624; *West. U. Tel. Co. v. Powell*, 94 Va. 268, 26 S. E. 828.

<sup>127</sup> *West. U. Tel. Co. v. Jones*, 95 Ind. 228, 48 Am. Rep. 713.

<sup>128</sup> *West. U. Tel. Co. v. James*, 90 Ga. 254, 16 S. E. 83; *West. U. Tel. Co. v. Cobbs*, 47 Ark. 344, 1 S. W. 558, 58 Am. Rep. 756; *West. U. Tel. Co. v. Cooledge*, 86 Ga. 104, 12 S. E. 264. But see *West. U. Tel. Co. v. Jones*, 95 Ind. 228, 48 Am. Rep. 713.

<sup>129</sup> *Mathis v. West. U. Tel. Co.*, 94 Ga. 338, 21 S. E. 564, 1039, 47 Am. St. Rep. 167; *Meadors v. West. U. Tel. Co.*, 96 Ga. 788, 23 S. E. 837.

§ 654. **Accord and satisfaction.**—It is a general rule that, where there is an agreement to satisfy all claims which may be pending and an execution of such agreement, this fact will bar all actions afterward brought to recover such claims, unless there was fraud of some kind perpetrated. The agreement must be made in good faith and cover all the claims demanded, and the same must be satisfied according to the agreement. As has been said, the penalty provided for in these statutes is not an award of liquidated damages, but is a punishment imposed on these companies for a violation of some of the duties which they owe to the public generally, and is recoverable only by the person against whom the duties are particularly violated. There can be an accord and satisfaction executed in such a manner as to bar the plaintiff from recovering the penalty. Thus, if the company should voluntarily tender or pay to the plaintiff the price paid for transmission and such damages as may have been sustained by the act of the company, and it also appears that these payments were made in full settlement for all claims which he may have had against the company, he will be barred from afterward recovering the statutory penalty. But unless the fact appears that the voluntary payment of the damages which may have been sustained, and the price for transmission, were paid by way of accord and satisfaction, he will not be barred in afterward recovering the penalty.<sup>130</sup>

§ 655. **Prepayment of charges.**—Some of the statutes which impose a penalty for the violation of these companies' duties expressly state that the charges for transmission of the messages must be prepaid; when this is the case there can be no recovery of the penalty when it is shown that the charges have not been paid.<sup>131</sup> If the message was sent without charges because of the sender's connection with the company, or for other reasons, the penalty is not recoverable, although the message was marked "prepaid."<sup>132</sup> Where the sender tenders the amount of the charges and then withdraws them, observing that the addressee ought to pay the charges, the tender amounts to nothing and the penalty is not

<sup>130</sup> *West. U. Tel. Co. v. Taylor*, 84 Ga. 419, 11 S. E. 396, 8 L. R. A. 189; *West. U. Tel. Co. v. Moss*, 93 Ga. 494, 21 S. E. 63; *West. U. Tel. Co. v. Brightwell*, 94 Ga. 434, 21 S. E. 518; *West. U. Tel. Co. v. Buchanan*, 35 Ind. 429, 9 Am. Rep. 744.

<sup>131</sup> *West. U. Tel. Co. v. Mossler*, 95 Ind. 32; *West. U. Tel. Co. v. Ferguson*, 57 Ind. 495; *Langley v. West. U. Tel. Co.*, 88 Ga. 777, 15 S. E. 291; *Wood v. West. U. Tel. Co.*, 59 Mo. App. 236.

<sup>132</sup> This is under the Georgia statute. *West. U. Tel. Co. v. Ryals*, 94 Ga. 336, 21 S. E. 573.

recoverable.<sup>133</sup> But if the message is paid for, the fact that the operator returns the money to the person paying and substitutes a free or a "collect" message for the prepaid one without the sender's knowledge, the company will be liable for the penalty.<sup>134</sup>

§ 656. **Repeal of statute—effect of.**—The general rule is that the repeal of a statute prescribing a penalty in a civil action takes away the right of recovery,<sup>135</sup> whether an action has been begun<sup>136</sup> or not;<sup>137</sup> since there is no vested right in the penalty entitling its actual recovery by final judgment.<sup>138</sup> The same rule applies to statutes which impose a penalty on telegraph companies for failing to perform the duties which they owe to the public;<sup>139</sup> but in Indiana the right to recover an accrued penalty for the delaying of a telegram is by special provision of the statute saved to the person injured by the delay, notwithstanding the repeal of the statute prescribing it.<sup>140</sup> In some cases, where the right to recover a penalty is destroyed by the repeal of the statute giving it, there may still be a recovery for the violation of the statute on common-law grounds. Thus, where a statute prohibits an act, and a violation of its provisions is such an act of negligence as, on common-law principles, subjects the offender to a civil action for damages on account of the loss or injury thereby caused, the repeal of the statute, while it destroys the right to recover the penalty, does not take away or impair a right of action which has already accrued by reason of such negligence.<sup>141</sup> Applying this rule to those statutes which we have been discussing, the repeal of the statute will not impair the right to recover the actual damages sustained by reason of the negligent act of the company.

<sup>133</sup> *West. U. Tel. Co. v. Power*, 93 Ga. 543, 21 S. E. 51.

<sup>134</sup> *West. U. Tel. Co. v. Moss*, 93 Ga. 494, 21 S. E. 63.

<sup>135</sup> *Pope v. Lewis*, 4 Ala. 487; *Victory Webb Printing Co. v. Beecher*, 26 Hun (N. Y.) 48; *Wood v. Kennedy*, 19 Ind. 68; *Hunt v. Jennings*, 5 Blackf. (Ind.) 195, 33 Am. Dec. 465; *Welch v. Wadsworth*, 30 Conn. 149, 79 Am. Dec. 239; *Gregory v. German Bank*, 3 Colo. 332, 25 Am. Rep. 760; *Musgrove v. Vicksburg, etc., R. Co.*, 50 Miss. 677.

<sup>136</sup> *Bay City, etc., R. Co. v. Austin*, 21 Mich. 390; *Van Dyck v. McQuade*, 86 N. Y. 38; *Rood v. Chicago, etc., R. Co.*, 43 Wis. 147.

<sup>137</sup> *Comm. v. Standard Oil Co.*, 101 Pa. 119; *Smith v. Banker*, 3 How. Prac. (N. Y.) 142.

<sup>138</sup> *Com. v. Welch*, 2 Dana (Ky.) 330; *State v. Bank*, 1 Stew. (Ala.) 347.

<sup>139</sup> *Hadley v. West. U. Tel. Co.*, 115 Ind. 191, 15 N. E. 845.

<sup>140</sup> *West. U. Tel. Co. v. Brown*, 108 Ind. 538, 8 N. E. 171.

<sup>141</sup> *Grey v. Mobile Trade Co.*, 55 Ala. 387, 28 Am. Rep. 729; *Gorman v. McArdle*, 67 Hun, 484, 22 N. Y. Supp. 479; *Vanderkar v. Rensselaer, etc., R. Co.*, 13 Barb. (N. Y.) 393.



## CHAPTER XXVI

## TAXATION,

## § 657. Introduction.

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663. Lien of assessment.

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665. Property of telegraph and telephone companies used in interstate commerce—subject to state taxes.

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670. Distinction between property tax and privilege tax.

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673. Same on message.

674. Foreign companies.

675. Power of a municipality to impose tax.

676. Special franchise taxes.

677. Where rights of being a corporation are derived from the United States.

678. Lines on railroads.

679. Same—suits to collect.

680. Interest when payment of taxes is delayed.

680a. Special assessment for improvements.

§ 657. Introduction.—We propose to discuss, in this chapter, the right to tax telegraph, telephone, and electric companies; and, in treating the subject, we shall discuss the rights of the several states to make such imposition, then the rights as derived under the federal constitution. These rights might be more appropriately discussed under two separate chapters; but, as the subject of taxation has been more thoroughly discussed in a general way by other text-writers, we shall be brief in our treatment of the subject—applying the law thereunder, particularly to telegraph, telephone and electric companies—and embrace the entire subject under one chapter. Telegraph and telephone companies occupy the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods;<sup>1</sup> and while the nature of the busi-

<sup>1</sup> West. U. Tel. Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067; Pensacola Tel. Co. v. West. U. Tel. Co., 96 U. S. 1, 24 L. Ed. 708; Postal Tel. Co. v. Richmond, 99 Va. 102, 37 S. E. 789, 86 Am. St. Rep. 881.

ness of these companies is quite different, yet the relation which each bears toward commerce is the same, and the law with respect to taxation, unless otherwise expressed, is applicable to both. The cases against telegraph and telephone companies, with respect to taxation, are not so numerous as those which have been maintained against common carriers of goods; and for this reason we shall, in many instances, refer the reader to such as may have been brought against the latter companies, where the same questions are involved.

§ 658. **Power of state to tax.**—It is a sovereign power of the state to tax property of every description belonging to telegraph, telephone, and electric companies, found within the state, and over purely domestic or intrastate telegraph and telephone messages the power of the state is supreme;<sup>2</sup> but over those engaged in interstate commerce the power of the state is necessarily abridged by the commerce clause of the federal constitution.<sup>3</sup> The property of these companies engaged in interstate commerce which is not used in its business of conducting commerce between the states

<sup>2</sup> West. U. Tel. Co. v. Massachusetts, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; West. U. Tel. Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067; Postal Cable Tel. Co. v. Adams, 71 Miss. 555, 14 South. 36, 42 Am. St. Rep. 483; So. Express Co. v. Mobile, 49 Ala. 404; State v. West. U. Tel. Co., 73 Me. 518; State v. West. U. Tel. Co., 165 Mo. 502, 65 S. W. 775; Western Union Tel. Co. v. Missouri ex rel. Gottlieb, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. Ed. 1116; People v. Gold, etc., Tel. Co., 98 N. Y. 67; Com. v. West. U. Tel. Co., 2 Dauph. Co. Rep. (Pa.) 40; West. U. Tel. Co. v. Trapp, 186 Fed. 114, 108 C. C. A. 226; West. U. Tel. Co. v. Taggart, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. Ed. 49; Massachusetts v. West. U. Tel. Co., 141 U. S. 40, 11 Sup. Ct. 889, 35 L. Ed. 628.

*Tax on dividends.*—See Atlantic, etc., Tel. Co. v. Com., 66 Pa. 57.

*Electric companies* are subject to taxation. Com. v. New Castle Elec. Co., 11 Pa. Dist. Co. R. 389, tax on gross receipts; State v. Anderson, 97 Wis. 114, 72 N. W. 386, overruling State v. Anderson, 90 Wis. 550, 63 N. W. 746, where an electric light company transfers its property to a street railroad company, is thereafter taxable to the street railroad company.

*Electrical appliances considered personally for taxes.*—People v. Feitner, 99 App. Div. 274, 90 N. Y. Supp. 904, affirmed in 181 N. Y. 549, 74 N. E. 1124; Shelbyville Water Co. v. People, 140 Ill. 545, 30 N. E. 678, 16 L. R. A. 505; Newport Ill. Co. v. Newport Tax Assessors, 19 R. I. 632, 36 Atl. 426, 36 L. R. A. 266. But see Herkimer Co. Lt., etc., Co. v. Johnson, 37 App. Div. 257, 55 N. Y. Supp. 924; People v. Feitner, supra; Newport Ill. Co. v. Newport Tax Assessors, supra. See People v. N. Y. Tax, etc., Com'rs, 58 Misc. Rep. 249, 110 N. Y. Supp. 833; So. Elec. Lt., etc., Co. v. Philadelphia, 191 Pa. 170, 43 Atl. 123; Lancaster v. Edison Elec. Ill. Co., 8 Pa. Co. Ct. R. 631.

<sup>3</sup> Ratterman v. West. U. Tel. Co., 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. Ed. 229; West. U. Tel. Co. v. Seay, 132 U. S. 472, 10 Sup. Ct. 161, 33 L. Ed. 409, reversing 80 Ala. 273, 60 Am. Rep. 99; West. U. Tel. Co. v. Pendleton, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187; West. U. Tel. Co. v. Tex., 105 U. S. 460, 26 L. Ed. 1067. See Great Northwestern Tel. Co. v. Fortier, 12 Quebec K. B. 405, as to interprovincial lines in Canada.

is, of course, subject to taxation by the state to the same extent and in the same manner as the same property of natural persons or other corporations.<sup>4</sup> For instance, if these companies are the owners of real property<sup>5</sup>—such as houses and lots—which is not used in connection with their business as a carrier of interstate messages, this property is subject to state taxation to the same extent as if it belonged to an individual, and the power to tax is not affected by the clause in the federal constitution.<sup>6</sup> So it is seen that the federal constitution exerts a very important influence upon the subject of taxation, and for this reason we shall attempt to discuss the subject separately, and take up, first, the power of the state to tax.

§ 659. **How assessments may be made.**—The legislature of the state, except where it is limited by the constitution, is invested with the supreme power over the subject of taxation. The taxes are levied by the legislature, and the mode of assessing property must be prescribed by statute.<sup>7</sup> The best method of taxing the property of telegraph and telephone companies, where it forms a part of its lines, is to regard it as a unit and assess the property as an entity,<sup>8</sup> since any other method would divide or cut up the property into fragmentary parts and lead to confusion and injustice. Some of the courts have held that this is the only method which can be exercised by the legislature;<sup>9</sup> but it seems that, where the legislature is not restricted by constitutional provisions, it ought

<sup>4</sup> *Leloup v. Mobile*, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311. See *State v. Northwestern Tel. Exch. Co.*, 96 Minn. 389, 104 N. W. 1086; *People v. Dolan*, 126 N. Y. 166, 27 N. E. 269, 12 L. R. A. 251; *West. U. Tel. Co. v. State*, 9 Baxt. (Tenn.) 509, 40 Am. Rep. 90, holding the payment of a privilege tax does not exempt a telegraph company from taxation on its property.

<sup>5</sup> *Poles real property.*—The following cases hold that the poles, wires, conduits, and instruments of telegraph and telephone companies are assessable as real estate: *West. U. Tel. Co. v. State*, 9 Baxt. (Tenn.) 509, 40 Am. Rep. 90; *In re Canadian Pacific Tel. Co.*, 25 Ont. App. 351; *Bell Tel. v. Ascot. Pt.*, 16 Quebec Sup. Ct. 436. But see *Portland v. New England Tel., etc., Co.*, 103 Me. 240, 68 Atl. 1040; *People v. Hall*, 57 Misc. Rep. 308, 109 N. Y. Supp. 402. See, also, cases in note 2, *supra*.

<sup>6</sup> See cases in note 2, *supra*.

<sup>7</sup> See *Wisconsin Cent. R. v. Taylor Co.*, 52 Wis. 37, 8 N. W. 833; *State v. Central, etc., Co.*, 21 Nev. 260, 30 Pac. 689; *North Missouri, etc., Co. v. Maguire*, 20 Wall. 46, 22 L. Ed. 287; *Cooley Const. Lim. (5th Ed.)* 637; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197.

<sup>8</sup> See § 666 *et seq.*

<sup>9</sup> See *Applegate v. Ernst*, 3 Bush (Ky.) 648, 96 Am. Dec. 272. See, also, *Graham v. Mt. Sterling Coal Co.*, 14 Bush (Ky.) 425, 29 Am. Rep. 412; *Franklin Co. v. Nashville, etc., Co.*, 12 Lea (Tenn.) 521.



to be the sole judge of the method which should be pursued in such matters.<sup>10</sup>

**§ 660. Methods of taxation.**—The four principal methods of taxation are: (1) On the capital stock;<sup>11</sup> (2) on the corporate property;<sup>12</sup> (3) on the franchise;<sup>13</sup> (4) on the business done by the corporation.<sup>14</sup> As was said, the legislature has the power to levy taxes and prescribe the method by which the assessments shall be made. This power is supreme so far as the property subject to taxation is exclusively within the control of the jurisdiction of the states; and where a method is prescribed by statute for the assessment of the taxes, none other can be pursued.<sup>15</sup> While the courts may declare a statute invalid where it conflicts with the constitution, they cannot supervise or control legislative discretion, nor can they dictate the policy to be pursued.<sup>16</sup>

**§ 661. Classification—discretion of legislature.**—The discretionary powers of the legislature are very broad and comprehensive, and no matter how unjustly they may be exercised, the courts cannot, so long as the constitutional powers are not transcended, interfere with them. The question always is as to whether it has these powers; and if it be clear that the same may be exercised, the courts cannot alter, amend or annul the statute; otherwise they may. Different methods may be prescribed, under the legislative discretionary powers, for assessing corporations of different

<sup>10</sup> See *Wilson v. Weber*, 96 Ill. 454; *State v. I. C. R. Co.*, 27 Ill. 64, 79 Am. Dec. 396; *Sangamon, etc., Co. v. Morgan*, 14 Ill. 163, 56 Am. Dec. 497.

<sup>11</sup> No state can impose taxes on the capital stock as a whole unless the company is organized under its own laws. *West. U. Tel. Co. v. Lieb*, 76 Ill. 172; *Riley v. West. U. Tel. Co.*, 47 Ind. 511. See *State v. West. U. Tel. Co.*, 165 Mo. 502, 65 S. W. 775; *West. U. Tel. Co. v. Atty. Gen.*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *West. U. Tel. Co. v. Taggart*, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. Ed. 49. But see *Com. v. Louisville Gas Co.*, 135 Ky. 324, 122 S. W. 164; *People v. Assor.*, 19 App. Div. 599, 46 N. Y. Supp. 388, affirmed 156 N. Y. 417, 51 N. E. 269, 42 L. R. A. 290.

<sup>12</sup> § 666 et seq.

<sup>13</sup> *Stockton, etc., Elect. Co. v. San Joaquin County*, 148 Cal. 313, 83 Pac. 54, 5 L. R. A. (N. S.) 174, 7 Ann. Cas. 511; *Elect., etc., Co. v. Judson*, 21 Wash. 49, 56 Pac. 829, 57 L. R. A. 78. Compare, *People v. Assor.*, 19 App. Div. 599, 46 N. Y. Supp. 388, affirmed, 156 N. Y. 417, 51 N. E. 269, 42 L. R. A. 290. See § 676.

<sup>14</sup> See § 665 et seq. See, also, *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692, 14 Sup. Ct. 1094, 38 L. Ed. 871; *West. U. Tel. Co. v. Board of Assessment*, 132 U. S. 472, 10 Sup. Ct. 161, 33 L. Ed. 409; *Atlanta, etc., Tel. Co. v. Savannah*, 133 Ga. 66, 65 S. E. 184; *West. U. Tel. Co. v. Wakefield*, 69 Neb. 272, 95 N. W. 659; *Postal Tel. Cable Co. v. Richmond*, 99 Va. 102, 37 S. E. 789, 86 Am. St. Rep. 877.

<sup>15</sup> See *Louisville, etc., Co. v. Warren County*, 5 Bush (Ky.) 243.

<sup>16</sup> See *Legal Tender Cases*, 12 Wall. 457, 20 L. Ed. 287. *State v. Hayworth*, 122 Ind. 462, 23 N. E. 946, 7 L. R. A. 240; *City of Dubuque v. Chicago, etc., Co.*, 47 Iowa, 196.

classes, and a statute which provides different methods for this purpose cannot be successfully assailed upon the ground that it provides a method for assessing telegraph, telephone, and electric companies different from that for assessing other corporations.<sup>17</sup> Classification of different corporations may be made, and if these companies are put in a separate and distinct class from others, a method of assessing them may be prescribed different from that prescribed in the assessment of other corporations of a different class. But if the constitution provides that taxes shall be equal and uniform, the mode of assessing these companies must be uniform; that is, one company of the same class and character cannot be assessed differently from another of precisely the same class and character.<sup>18</sup>

§ 662. **Discrimination.**—Where the state constitution provides that taxes shall be equal and uniform, no material and unjust discrimination can be made against the property of telegraph, telephone, and electric companies, independent of any federal rule or regulation. These requirements are violated by imposing a heavier burden upon these companies than that imposed upon the property of railroad companies or other corporations, or that on the property of natural persons. The word “person,” in our constitution, comprehends corporations; and when it provides that as to the property of all persons taxation shall be equal and uniform, it is meant by this that the property of corporations must be taxed equally and uniformly, not only with respect to that belonging to other corporations of the same or different class, but also with respect to that belonging to private persons. The burden, as we understand it, must be palpably and materially greater than that imposed on other property, since in all systems of taxation there is some inequality.

§ 663. **Lien of assessment.**—The statutes which provide the method of assessing property generally provide that the property shall be subject to a lien thereon for its taxes. The tax lien owes its existence wholly to the statute, and is not created by implication. The extent, duration and the property subject to such lien must be determined by the statute creating it. These statutes generally provide that the lien for taxes shall have a priority over all other claims against the property. As it has been said, the property of telegraph and telephone companies may be assessed as a unit.

<sup>17</sup> *West. U. Tel. Co. v. Poe*, 64 Fed. 9, 16 C. C. A. 683, overruling (C. C.) 61 Fed. 449.

<sup>18</sup> See *Worth v. Whittington, etc., Co.*, 89 N. C. 291, 45 Am. Rep. 679; *New Orleans v. Kaufman*, 29 La. Ann. 283, 29 Am. Rep. 328; *Pittsburg, etc., R. Co. v. State*, 49 Ohio St. 189, 30 N. E. 435, 16 L. R. A. 380.

When this method is prescribed by statute, the conclusion is that the lien for taxes assessed attaches to the entire property. This fact, however, may be controlled by statutory provisions, but if there is no other method prescribed by the statute, the entire property will be subject to the lien for taxes. It must be understood, however, that only such property of the company as is within the jurisdiction of the state is subject to such lien, since the provisions of any statute can have no effect beyond the boundaries of the state creating it.

§ 664. *Interstate commerce—obstruction of.*—A state unquestionably has the right to tax all property of telegraph, telephone, and electric companies over which it has jurisdiction and which is not used in interstate commerce, but when it attempts to tax that property used exclusively in carrying on commerce between the states, an infringement of the commerce clause of the federal constitution is then made. While this is the rule, yet it is very difficult in applying it to every particular case. The powers of the state to tax property cannot be exercised so as to obstruct commerce between the states, or to defeat or restrain the power of the federal Congress to regulate commerce.<sup>19</sup> The power, as may have been

<sup>19</sup> In the case of *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678, Chief Justice Marshall, speaking of the taxing power, said: "We admit this power to be sacred, but cannot admit that it may be so used as to obstruct the free exercise of power given Congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed that the power remaining with the states may be exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the constitution has applied it to the often interfering powers of the general and state governments, as vital principles of perpetual operation. It results, necessarily, from this principle, that the taxing power of the state must have some limits." In the *State Freight Tax Case*, 15 Wall. 232, 21 L. Ed. 146, Justice Wayne expressed the same general doctrine in this language: "While on the other hand it is of the utmost importance that the states should possess the power to raise revenue for all the purposes of a state government, by any means and in the manner not inconsistent with the powers which the people of the state have conferred upon the general government, it is equally important that the domain of the latter should be preserved from invasion and that the state legislation should be sustained which defeats the avowed purpose of the federal constitution, or which assumes to regulate or control subjects committed by the constitution exclusively to the regulation of Congress." See, also, *Osborn v. State*, 33 Fla. 162, 14 South. 588, 25 L. R. A. 120, 30 Am. St. Rep. 99. The fact that a telephone company has extended its line through different states and is engaged in interstate commerce will not relieve it from the operation of state statute, upon business conducted wholly within that state, nor justify its refusal of a telephone and the best telephonic connections and facilities to persons doing business in such state, on the terms prescribed by such statute. *Central U. Tel. Co. v. Falley*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114.



seen, to tax property used in interstate commerce is within the exclusive control of Congress, and if there is a state tax which so operates as to regulate or control commerce between the states there is an invasion of the domain of the federal government.<sup>20</sup>

Messages sent over such telephones are commerce between the states, and cannot be prohibited by injunction in either state against persons or corporations engaged in sending such messages because they do not pay the taxes assessed against them by such state. In *re Pennsylvania Telephone Company*, 48 N. J. Eq. 91, 20 Atl. 846, 27 Am. St. Rep. 462.

A state statute making it the duty of every telegraph and telephone company to deliver with promptness every message received to the person to whom it is addressed, if the regulation of the company require such delivery, or to forward it promptly as directed, and providing a penalty for every failure to deliver or forward such message as promptly as practicable, such penalty to be paid to the person sending the message, or to whom it is addressed, as imposing a burden upon, or as a regulation of, interstate commerce, when applied to the failure of an interstate telegraph company to deliver a message in that state sent from another state and delivered in the former state. *West. U. Tel. Co. v. Tyler*, 90 Va. 297, 18 S. E. 280, 44 Am. St. Rep. 910; *Gray v. Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, 56 L. R. A. 301, 91 Am. St. Rep. 706. But see *Marshall v. West. U. Tel. Co.*, 79 Miss. 154, 27 South. 614, 89 Am. St. Rep. 585. They may enact laws subjecting telegraph companies to penalties for acts of negligence occurring entirely within the limits of that state, although such acts may be committed in dealing with message to be transmitted to points in other states. *West. U. Tel. Co. v. Howell*, 95 Ga. 194, 22 S. E. 286, 30 L. R. A. 158, 51 Am. St. Rep. 68.

A statute prohibiting all persons from engaging in the business of transmitting money to any race track or other place, to be there bet on any horse race trial of speed, skill, or endurance, etc., whether within or without the state, and also from keeping any place in which such business is permitted or carried on, is valid and not unconstitutional as a regulation of interstate commerce as applied to the agent of the telegraph company who is engaged in such business, and transmits money to another state by telegraph to be there bet upon the result of horse races: *State v. Harbourn*, 70 Conn. 484, 40 Atl. 179, 40 L. R. A. 607, 66 Am. St. Rep. 126; *Lacey v. Palmer*, 93 Va. 159, 24 S. E. 930, 31 L. R. A. 822, 57 Am. St. Rep. 795. And statutes providing the time in which suits are to be brought against telegraph companies for losses occurring in failing to transmit or deliver messages promptly are not unconstitutional when applied to interstate commerce. *Burgess v. West. U. Tel. Co.*, 92 Tex. 125, 46 S. W. 794, 71 Am. St. Rep. 833.

<sup>20</sup> *San Francisco v. West. U. Tel. Co.*, 96 Cal. 140, 31 Pac. 10, 17 L. R. A. 301; *Pensacola Tel. Co. v. West. U. Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708; *West. U. Tel. Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067.

A revenue law (Gen. St. 1888, c. 92, art. 4, § 4) providing that, at a certain time in each year, the managing officer of "any telegraph company, working, operating or controlling any telegraph line in this state," shall "pay to the treasurer a tax equal to one dollar per mile for the line of poles and first wire, and fifty cents per mile for each additional wire" imposed a tax on the business, not on the property, of the companies affected, and those companies are agencies of interstate commerce, the law is invalid as being an attempted exercise of a power belonging exclusively to the federal legislature. *Com. v. Smith*, 92 Ky. 38, 17 S. W. 187, 36 Am. St. Rep. 578. But a state tax imposed upon telegraph companies operating within the state, in lieu of all other taxes, as a privilege tax, its amount being graduated according to the amount and

So it follows that, if a state tax operates so as to obstruct such commerce, the statute imposing such tax is invalid, since no state can obstruct or hinder interstate commerce. The general principle in regard to this subject is easily understood, but it is very difficult to apply it to the different cases, and it is well to say that each case must be considered in its own light in order to ascertain as to whether the principles are applicable thereto.

§ 665. **Property of telegraph and telephone companies used in interstate commerce—subject to state taxes.**—When property of telegraph, telephone, or electric companies is used in interstate commerce, this fact does not relieve it from state taxes.<sup>21</sup> The property of telegraph and telephone companies having its situs within the state imposing the taxes may be taxed by the state although it is used exclusively for interstate commerce, but the business of interstate commerce itself cannot be burdened with such taxes.<sup>22</sup> "Its property in the state is subject to taxation the same

value of the property measured by miles, if reasonable in amount, and especially if less than the ad valorem state tax, is valid, and not an interference with interstate commerce when imposed upon a foreign telegraph company operating its lines in and across the state, although such company is engaged in sending interstate messages. *Postal Tel., etc., Co. v. Adams*, 71 Miss. 555, 14 South. 36, 42 Am. St. Rep. 476; *Postal Tel. Co. v. Richmond*, 99 Va. 102, 37 S. E. 789, 86 Am. St. Rep. 877.

<sup>21</sup> *West. U. Tel. Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067; *West. U. Tel. Co. v. Atty. Gen.*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *Leloup v. Mobile*, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311; *Postal Tel. Cable Co. v. Adams*, 71 Miss. 555, 14 South. 36, 42 Am. St. Rep. 476. See § 658.

In *West. U. Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790, the court said: "While the state could not interfere by any specific statute to a corporation from placing its lines along their post roads or stop the use of them after they were placed there, nevertheless the company receiving the benefits of the laws of the state for the protection of its property and its rights is liable to be taxed upon its real, and personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one state the authority to enter the territory of another state, and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

In another case the court said: "The Western Union Telegraph Company, having accepted restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the state is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and business." *West. U. Tel. Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067. See, also, *West. U. Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790.

<sup>22</sup> *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613; *Dubuque v. I. C. R. Co.*, 39 Iowa, 56; *West. U. Tel. Co. v.*

as other property; and it may undoubtedly be taxed in a proper way on account of its occupation and its business.”<sup>23</sup> The exemption of interstate and foreign commerce from state regulation does not prevent the state from taxing the property of those engaged in such commerce located within the state, as the property of other citizens is taxed, nor from regulating matters of local concern which may incidentally affect commerce.<sup>24</sup> Thus a statute is held valid which authorizes the taxation by several towns of the state of the portions of telegraph lines in such towns, including the interest on the value of land occupied by the line, all poles, insulators, wires

Taggart, 141 Ind. 281, 40 N. E. 1051, 60 L. R. A. 671, note; *Osborne v. State*, 33 Fla. 162, 14 South. 588, 25 L. R. A. 120, 39 Am. St. Rep. 99; *Postal Tel. Cable Co. v. Richmond*, 99 Va. 102, 37 S. E. 789, 86 Am. St. Rep. 877; *Southern Express Co. v. Mobile*, 49 Ala. 404; *State v. West. U. Tel. Co.*, 73 Me. 518; *State v. West. U. Tel. Co.*, 165 Mo. 502, 65 S. W. 775; *People v. Gold*, etc., *Tel. Co.*, 98 N. Y. 67; *Com. v. West. U. Tel. Co.*, 2 Dauph. Co. Ct. Rep. (Pa.) 40; *West. U. Tel. Co. v. Taggart*, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. Ed. 49; *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688, 15 Sup. Ct. 268, 39 L. Ed. 311; *Massachusetts v. West. U. Tel. Co.*, 141 U. S. 40, 11 Sup. Ct. 889, 35 L. Ed. 628; *West. U. Tel. Co. v. Atty. Gen.*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *Postal Tel. Cable Co. v. City of Cordele*, 139 Ga. 126, 76 S. E. 744, Ann. Cas. 1914A, 984, holding that a municipal ordinance imposing a tax of \$100.00 on every telegraph company doing business in the city, or in lieu thereof requiring each of such companies to pay \$2.00 for each and every pole used within the city limits, is void as being an unlawful interference with interstate commerce.

<sup>23</sup> *West. U. Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *Atty. Gen. v. Western Union Tel. Co. (C. C.)* 33 Fed. 129; *Id.*, 141 U. S. 40, 11 Sup. Ct. 889, 35 L. Ed. 628; *Taylor v. Secor*, 92 U. S. 575, 23 L. Ed. 663; *West. U. Tel. Co. v. State*, 9 Baxt. (Tenn.) 509, 40 Am. Rep. 99; *Postal Tel. Cable Co. v. Adams*, 71 Miss. 555, 14 South. 36, 42 Am. St. Rep. 476.

<sup>24</sup> *Leloup v. Mobile*, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311, affirming *West. U. Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790.

The grant by the United States to construct and operate lines along any military or post roads is not such a grant of a franchise as to exempt a telegraph company from taxes imposed by a state in which its lines are constructed. *State v. West. U. Tel. Co.*, 165 Mo. 502, 65 S. W. 775; *Atty. Gen. v. West. U. Tel. Co.*, 141 U. S. 40, 11 Sup. Ct. 889, 35 L. Ed. 628; *Ratterman v. West. U. Tel. Co.*, 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. Ed. 229; *West. U. Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *Atty. Gen. v. West. U. Tel. Co. (C. C.)* 33 Fed. 129. A tax based upon the capital or property is not invalidated because no deduction in the valuation is made on account of the valuation of the federal franchise. *West. U. Tel. Co. v. Taggart*, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. Ed. 49; *West. U. Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790. But this rule does not authorize the imposition independently of the capital and property. *West. U. Tel. Co. v. Visalia*, 149 Cal. 744, 87 Pac. 1023; *West. U. Tel. Co. v. Lakin*, 53 Wash. 326, 101 Pac. 1094, 17 Ann. Cas. 718; *San Francisco v. West. U. Tel. Co.*, 96 Cal. 140, 31 Pac. 10, 17 L. R. A. 301. A municipality does not grant any new franchise subject to taxation. *West. U. Tel. Co. v. Visalia*, *supra*. The state cannot enjoin a company from transacting business until its delinquent taxes are paid, where its lines are located upon military



and apparatus, although such lines may run into other states.<sup>25</sup> And the fact that the company has paid a privilege tax does not release it from liability for taxes assessed on its property, such as its poles, wires and other instruments.<sup>26</sup>

§ 666. **Taxation on capital stock in proportion to length of line in state.**—It has been held by courts of last resort that the taxing officers may take into consideration the lines of wires extending into and through other states, in determining the value of the entire line.<sup>27</sup> A Massachusetts statute<sup>28</sup> provided that every telegraph company owning a line in the state should be taxed on such proportion of the whole value of its capital stock as the length of its line in the state bears to the whole length of its line everywhere, after deducting the value of any property owned by it subject to local taxation in the cities and towns of the state. It was held that such tax was not in violation of the interstate commerce clause of the constitution. In rendering an opinion on this statute, the court said: "The statute \* \* \* intended to govern the taxation of all corporations doing business within its territory, whether organized under its own laws or under those of some other state; and the rule adopted to ascertain the amount of the capital engaged in that business within its boundaries on which the tax should be assessed is not an unfair or unjust one, and the details of the method by which this was determined have not exceeded the fair range of legislative discretion."<sup>29</sup>

§ 667. **Mileage basis of valuation.**—It has also been decided that the taxing officers may make a valuation upon the mileage basis, although the property may be used for interstate commerce. Thus a state privilege tax of a certain amount per mile of wires operating within the state, imposed on all telegraph, telephone or electric companies therein operating, in lieu of all other state, county and municipal taxes, and amounting to less than the ordinary *ad valorem* tax, is substantially a mere tax on property, to which a

or post roads of the United States. *West. U. Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790.

<sup>25</sup> *People v. Tierney*, 57 Hun, 357, 10 N. Y. Supp. 940; *People v. Dolan*, 126 N. Y. 166, 27 N. E. 269, 12 L. R. A. 251.

<sup>26</sup> *West. U. Tel. Co. v. State*, 9 Baxt. (Tenn.) 509, 40 Am. Rep. 99.

<sup>27</sup> *West. U. Tel. Co. v. Atty. Gen.*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *Pittsburg, etc., Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031; *Columbus, etc., R. Co. v. Wright*, 151 U. S. 470, 14 Sup. Ct. 396, 38 L. Ed. 238; *West. U. Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790. See cases in note 22, *supra*.

<sup>28</sup> Pub. St. 1882, c. 13, §§ 38-40.

<sup>29</sup> *West. U. Tel. Co. v. Massachusetts*, 141 U. S. 40, 11 Sup. Ct. 889, 35 L. Ed. 628.

foreign corporation operating within the state is subject, notwithstanding it is engaged in interstate commerce.<sup>30</sup> But a general license tax, imposed upon a telegraph company, affects its entire business, interstate as well as domestic or internal, and is unconstitutional. So there is a distinction between such cases when the taxes are imposed upon the business of interstate commerce itself and those which may be laid upon the property within the state employed in such business.<sup>31</sup>

§ 668. **Assessment of telegraph lines for taxation—New York state.**—A statute<sup>32</sup> in New York provides that telegraph lines shall be assessed “in the manner provided by law for the assessment of lands,” and that the word “line” shall include “the interest in the land on which the poles stand, the right or license to erect such poles on land, and all poles, arms, insulators, wires, apparatus, instruments, or other things connected with or used as a part of such line.” It is held that, in making the assessment, the property is not to be regarded as a whole, nor as a complete telegraph line in operation, but that the true value is obtained by taking the cost of production of poles, wires and other apparatus, which are in their nature personalty, and adding thereto the value of the company’s interest in the land on which the poles stand, and the right to erect the poles thereon.<sup>33</sup> In the same case it is held that, in arriving at the value of the interest in the land on which the poles stand and of the right to erect such poles, it is to be considered that, so far as the line is erected upon the highway, the only interest that the company has is a mere license, revocable at the will of the legislature, of which license any other company may avail itself. The expense which the company incurred in obtaining the interest is the correct criterion by which to judge of its value.<sup>34</sup>

§ 669. **License tax—cannot be imposed.**—A license tax is a tax imposed as a condition of permitting business to be conducted within the state imposing such tax, and is therefore a tax upon in-

<sup>30</sup> *West. U. Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *Pullman, etc., Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613; *Maine v. Grand Trunk, etc., Co.*, 142 U. S. 217, 12 Sup. Ct. 121, 35 L. Ed. 994.

<sup>31</sup> *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311; *Postal Tel. Cable Co. v. Mayor, etc.*, 139 Ga. 126, 76 S. E. 744, Ann. Cas. 1914A, 984.

<sup>32</sup> *Laws 1886, c. 659.*

<sup>33</sup> *People v. Dolan*, 126 N. Y. 166, 27 N. E. 269, 12 L. R. A. 251. See, *Kentucky Elec. Co. v. Buechel*, 146 Ky. 660, 143 S. W. 58, 38 L. R. A. (N. S.) 907, Ann. Cas. 1913C, 714, lines not exempt although plant may be as manufacturing plant under statute.

<sup>34</sup> *Id.*

terstate commerce, and for this reason is invalid. Thus, where a telegraph company is carrying on the business of transmitting messages between the different states, and has accepted and is acting under the telegraph laws passed by Congress,<sup>35</sup> no state within which it sees fit to establish an office can impose upon it a license tax, or require it to take out a license for the transaction of such business.<sup>36</sup> Such tax is not a tax upon the property of these com-

<sup>35</sup> July 24, 1866, c. 230, 14 Stat. 221 (U. S. Comp. St. 1913, §§ 10072-10077).

<sup>36</sup> *Leloup v. Mobile*, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311. The Western Union Telegraph Company established an office in the city of Mobile and was required to pay a license tax under a city ordinance imposing an annual tax of two hundred and twenty-five dollars on every telegraph company in the city. The agent of the company was fined for nonpayment of the tax. In an action to recover the amount of the fine, it was held, reversing the decision of the state supreme court, that such tax affected the entire business of the company, interstate as well as domestic, and was constitutional. The state court relied mainly on the case of *Osborne v. Mobile*, 16 Wall. 479, 21 L. Ed. 470, which held that an ordinance of the city of Mobile was not unconstitutional which required every express company or railroad company doing business there, and having a business extending beyond the limits of the state, to pay an annual tax of five hundred dollars; if the business was confined within the limits of the state, a tax of one hundred dollars; if confined within the city, of fifty dollars. The decision of the state court, however, was reversed.

A license tax imposed by a city upon telegraph companies in the following terms: "Telegraph companies each, for business done exclusively within the city of Charleston, and not including any business done to or from points without the state, and not including any business done for the government of the United States, its officers or agents, \$500," is not invalid as applied to a company partly engaged in transmitting interstate messages, and which has accepted the provisions of Act July 24, 1866, c. 230, 14 Stat. 221 (U. S. Comp. St. 1913, §§ 10072-10077), and thereby become an agency of the United States (*C. C.*) 56 Fed. 419; affirming *Postal Tel. Cable Co. v. City Council of Charleston*, 153 U. S. 692, 14 Sup. Ct. 1049, 38 L. Ed. 871. A contention that a telegraph company seeking to enjoin collection of the tax is not within the scope of the ordinance because it in fact does no business "exclusively within the city," and that its city offices are merely initial points for sending messages to points outside the city, cannot be considered, for, if the state has power to tax business done within the limit, the exercise of that power cannot be corrected by the federal court.

A similar tax was sustained in *West. U. Tel. Co. v. City of Fremont*, 39 Neb. 692, 58 N. W. 415, 26 L. R. A. 698. The ordinance levying the tax was as follows: "Section 1. That there is hereby levied a license tax on each and every occupation and business within the limits of this city, in this section hereinafter enumerated, to raise a revenue thereby in the several different sums of the several different businesses and occupations, respectively, as follows: No. 1. The sum of one hundred dollars per year on the business and occupation of receiving messages in this city from persons in this city and transmitting the same by telegraph from this city within this state to persons and places within this state, and receiving in this city messages by telegraph transmitted within this state from persons and places in this state to persons within this city and delivering the same to persons in this city, excepting the receipt, transmission and delivery of any such message to and



panies, nor is it the exaction of a fee for the privilege of becoming a corporation. If, however, the license tax is only imposed on "each and every person or company engaging in the business of sending and receiving telegraphic messages to and from points within the state \* \* \* and keeping an office or place of business" therein, the rule would be otherwise.<sup>37</sup> In this case the license tax may be enforced without interfering with interstate commerce or the rights of the general government secured to it under the act of Congress.<sup>38</sup> So it has been held that an annual charge of five dollars per pole upon the poles of a telegraph company already established, under an express provision by ordinance imposed by a municipality as a "consideration for the privilege," is not a tax, either on property or as a license; nor is it an exercise of the police power, as it involves no consideration of public order, health, morals, or convenience, and cannot therefore be sustained,<sup>39</sup> although it may be enforced if the ordinance imposing it is a police regulation.<sup>40</sup>

§ 670. **Distinction between property tax and privilege tax.**—As it has been seen, a state may impose a tax upon property within the state, although it may be used for interstate commerce, but a privi-

from any department, agency, or agent of the United States and excepting the receipt, transmission and delivery of any such message are interstate commerce; the business and occupation of receiving, transmitting and delivering of the messages herein excepted is not taxed hereby." The court held the following propositions: 1. State and municipal authorities are powerless to impose a tax upon messages to or from other states, since such a tax would be in conflict with that clause of the federal Constitution which gives to Congress the exclusive power to regulate commerce among the several states. 2. Where a telegraph company is engaged in both interstate and intrastate business, an ordinance levying an occupation tax on that portion of such business which is carried on wholly within the state is not repugnant to section 8, art. 1, of the Constitution of the United States, since it in no way interferes with, or regulates, interstate commerce.

<sup>37</sup> *Leloup v. Mobile*, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311; *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692, 14 Sup. Ct. 1049, 38 L. Ed. 871; *West. U. Tel. Co. v. Freemont*, 39 Neb. 692, 58 N. W. 415, 26 L. R. A. 698.

<sup>38</sup> *Leloup v. Mobile*, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311.

<sup>39</sup> *New Orleans v. Great South. Tel., etc.*, 52 La. Ann. 1082, 27 South. 590, 78 Am. St. Rep. 387.

<sup>40</sup> *West. U. Tel. Co. v. Philadelphia*, 12 Atl. 144, 9 Sadler (Pa.) 300.

The power of a municipality to charge license fees to railway companies, telegraph and telephone companies, and other public institutions cannot be questioned, so long as such license is a police regulation, and tends to accomplish the object sought. See, on this subject, *Mayor of Mobile v. Yuille*, 3 Ala. 137, 36 Am. Dec. 441; *Chicago Packing & Provision Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545; *State v. Herod*, 29 Iowa, 123; *Boston v. Schaffer*, 26 Mass. (9 Pick.) 415; *Van Baalen v. People*, 40 Mich. 258; *State v. Cassidy*, 22 Minn. 312, 21 Am. Rep. 705; *New York City v. Second Ave. R. Co.*, 32 N. Y. 261; *Mays v. Cincinnati*, 1 Ohio St. 268; *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77. See, also, § 675 et seq.

lege tax, as said, is not a property tax. Whether the tax is laid upon property or imposed as a condition or privilege of conducting business within the state is a question to be determined from the operation and practical effect of the statute, and not from its mere form.<sup>41</sup> The distinction between a privilege tax and property tax is a subtle one, and it is not by any means easy to draw the line which separates them.<sup>42</sup>

<sup>41</sup> *New Orleans v. Great South. Tel., etc., Co.*, 52 La. Ann. 1082, 27 South. 590, 78 Am. St. Rep. 387.

The nature and object of a license and a tax are entirely different; the object of a tax is the revenue, the object of a license is a regulation; and the fact that the license fee is payable into the treasury of the municipality does not make such license a tax where the fee is unreasonable, and tends to promote the object of the ordinance. *East St. Louis v. Wehrung*, 46 Ill. 392; *State v. Herod*, 29 Iowa. 123. If the license is unreasonable, and more than sufficient to effect the ostensive regulative purposes, it will be a tax, and not a license. *New Orleans v. Great South. Tel., etc., Co.*, 52 La. Ann. 1082, 27 South. 590, 78 Am. St. Rep. 387.

<sup>42</sup> The question received consideration in the case of the Postal, etc., v. Adams, 155 U. S. 688, 15 Sup. Ct. 268, 39 L. Ed. 311, where it was held that a tax of a designated sum per mile of telegraph wire in the state was a tax on property and not a mere privilege tax. The court used this language: "As pointed out by Mr. Justice Field in *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 12 Sup. Ct. 403 [36 L. Ed. 164] the right of the state to tax the franchise or privilege of being a corporation as personal property has been repeatedly recognized by this court, and this whether the corporation be domestic or foreign corporation, doing business by permission within the state. But a state cannot exclude from its limits a corporation engaged in interstate or foreign commerce, or a corporation in the employment of the general government, either directly in terms or indirectly by the imposition of inadmissible conditions. Nevertheless the state may subject it to such property taxation as only incidentally affects its occupation, as all business, whether of individuals or corporations, is affected by common governmental burdens. *Ashley v. Ryan*, 153 U. S. 436, 14 Sup. Ct. 865 [38 L. Ed. 773], and cases cited. Doubtless no state could add to the taxation of property according to the rule of ordinary property taxation the burden of a license or other tax or the privilege of using, constructing or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce; but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the constitution. *Cleveland, etc., R. Co. v. Backus*, 154 U. S. 439, 14 Sup. Ct. 1122 [38 L. Ed. 1041]. The method of 'taxation by a tax on privileges' has been determined by the Supreme Court of Mississippi to be in harmony with the constitution of that state, and that 'where the particular arrangement of taxation provided by legislative wisdom may be accounted for on the assumption of compromising or commuting for a just equivalent, according to the determination of the legislature, in the general scheme of taxation, it will not be condemned by the courts as violative of the state constitution.' *Vicksburg Bank v. Worrell*, 67 Miss. 47, 7 South. 219. In that case privilege taxes imposed on bank of deposit or discount, which varied with the amount of capital stock or assets, and were

§ 671. **Excise tax.**—It has been held by a divided opinion of the United States Supreme Court, that an excise tax could be imposed upon a railroad company carrying on interstate commerce. In this decision, the cases denying the power of a state to levy a privilege tax are not denied expressly, but it is held therein that a state is not precluded from levying an excise tax.<sup>43</sup> No case against a telegraph company, to our knowledge, has been tested with respect to this question, but we presume the same ruling would be held. The distinction drawn between the excise tax as given in the case cited and the privilege tax is not very clear, and it seems that the reasons given by the minority of judges who sat upon this case are the more plausible.<sup>44</sup>

declared to be in lieu of all other taxes, state, county or municipal, upon the shares and assets of said bank, came under review, and it was decided that the privilege tax, to be effectual as a release from liability for all other taxes, must be measured by the capital stock, and the entire assets or wealth of the bank, and that real estate bought with funds of the bank was exempt from the ordinary ad valorem taxes, but was part of the assets of the bank to be considered in fixing the basis of its privilege tax."

<sup>43</sup> In the case of *Maine v. Grand Trunk, etc., Co.*, 142 U. S. 217, 12 Sup. Ct. 163, 35 L. Ed. 994, the court said: "The tax for the collection of which this action is brought is an excise tax upon the defendant corporation for the privilege of exercising its franchises within the state of Maine. It is so declared in the statute which imposes it; and that a tax of this character is within the power of the state to levy there can be no question. The designation does not always indicate merely an inland imposition or duty on the consumption of commodities, but often denotes an impost for a license to pursue certain callings, or to deal in special commodities, or to exercise particular franchises. It is used more frequently, in this country, in the latter sense than in any other. The privilege of exercising the franchises of a corporation within a state is generally one of value, and often of great value, and the subject of earnest contention. It is natural, therefore, that the corporation should be made to bear some proportion of the burdens of government. As the granting of the privilege rests entirely in the discretion of the state, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the state, in its judgment, may deem most conducive to its interest or policy. It may require the payment into its treasury each year of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years. The character of the tax, or its validity, is not determined by the mode adopted in fixing its amount for any specific period, or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation is open to the consideration of the state in determining what may be justly exacted for the privilege. The rule of apportioning the charge of the receipts of the business would seem to be eminently reasonable, and likely to produce the most satisfactory results, both to the state and to the corporation taxed."

<sup>44</sup> Mr. Justice Bratley, who wrote the minority opinion (concurred in by Harland, Lamar, and Brown, JJ.), said: "But passing this by, the decisions of this court for a number of years past have settled the principle that taxation (which is a mode of regulation) of interstate commerce, or of the revenues



§ 672. **Taxation on gross receipts—interstate business.**—It is a general rule, upheld by all the courts, that a tax cannot be imposed on the business of interstate commerce,<sup>45</sup> but it is sometimes difficult to give practical effect to the general rule. A tax cannot be laid on the gross receipts of an interstate company, as this is a tax upon the business of interstate commerce.<sup>46</sup> But it has been held

derived therefrom (which is the same thing), is contrary to the Constitution. Going no further back than *Pickard v. Pullman, etc., Car Co.*, 117 U. S. 34, 6 Sup. Ct. 635 [29 L. Ed. 785], we find that principle laid down. There a privilege tax was imposed upon Pullman's Palace Car Company, by general legislation, it is true, but applied to the company, of \$50 per annum on every sleeping car going through the state. It was known, and appears by the record, that every sleeping car going through the state carried passengers from Ohio and other Northern states to Alabama, and *vice versa*, and we held that Tennessee had no right to tax those cars. It was the same thing as if they had taxed the amount derived from the passengers in the cars. So, also, in the case of *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1383 [32 L. Ed. 311], we held that the receipts derived by the telegraph company from the messages sent from one state to another could not be taxed. So in the case of *Norfolk, etc., R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958, [34 L. Ed. 394], where the railroad was a link in a through line by which passengers and freight were carried into other states, the company was held to be engaged in the business of interstate commerce, and could not be taxed for the privilege of keeping an office in the state. And in the case of *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, [35 L. Ed. 649], we held that the taxation of an express company for doing an express business between different states was unconstitutional and void. And in the case of *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118, [30 L. Ed. 1200], we held that a tax upon the gross receipts of the company was void, because they were derived from interstate and foreign commerce. A great many other cases might be referred to showing that in the decisions and opinions of this court this kind of taxation is unconstitutional and void. We think that the present decision is a departure from the line of these decisions. The tax, it is true, is called a 'tax on franchise.' It is so called, but what is it in fact? It is a tax on the receipts of the company derived from international transportation. This court and some of the state courts have gone a great length in sustaining various forms of taxes upon corporations. The train of reasoning upon which it is founded may be questionable. A corporation, according to this class of decisions, may be taxed several times over. It may be taxed for its charter, for its franchises, for the privilege of carrying on its business, it may be taxed on its capital, and it may be taxed on its property. Each of these taxations may be carried to the full amount of the property of the company."

<sup>45</sup> *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311; *Ratterman v. West. U. Tel. Co.*, 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. Ed. 229; *West. U. Tel. Co. v. Texas*, 105 U. S. (15 Otto.) 460, 26 L. Ed. 1067; *Pensacola Tel. Co. v. West. U. Tel. Co.*, 96 U. S. (6 Otto.) 1, 24 L. Ed. 708; *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1, 6 L. Ed. 23; *Smith v. Turner*, 48 U. S. (7 How.) 283, 12 L. Ed. 702; *Thurlo v. Massachusetts*, 46 U. S. (5 How.) 504, 12 L. Ed. 256; *Brown v. Maryland*, 25 U. S. (12 Wheat.) 419, 6 L. Ed. 678; *Moran v. New Orleans*, 112 U. S. (12 Otto.) 69, 28 L. Ed. 653; *Philadelphia, etc., R. Co. v. Pennsylvania*, 82 U. S. (15 Wall.) 232, 21 L. Ed. 146.

<sup>46</sup> *Tel. Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067; *Philadelphia, etc., Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200; *Ratterman v. West. U. Tel. Co.*, 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. Ed. 229; *Gloucester*

that a single tax assessed under the statute of a state upon the receipts of a telegraph company, which are derived partly from interstate commerce and partly from commerce within the state, which tax is assessed and returned in gross and without separation and apportionment, is not wholly invalid, but is invalid only to the extent that such receipts are derived from interstate commerce.<sup>47</sup>

§ 673. **Same on message.**—A tax imposed by a state on telegraph messages in general is invalid,<sup>48</sup> except in respect to messages transmitted wholly within the state.<sup>49</sup> A different rule was held by some of the state courts, but the ruling of the Supreme Court of the United States is as first stated.<sup>50</sup> Where a statute re-

*Ferry Co. v. Pennsylvania Co.*, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158; *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. Ed. 391; *West. U. Tel. Co. v. Pennsylvania*, 128 U. S. 39, 9 Sup. Ct. 6, 32 L. Ed. 345; *West. U. Tel. Co. v. Seay*, 132 U. S. 472, 10 Sup. Ct. 161, 33 L. Ed. 409; *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311; *Charleston v. Postal Tel. Cable Co. (S. C.)* 9 Ry. & Corp. Law J. 129; *Crandall v. Nevada*, 6 Wall. (U. S.) 35, 18 L. Ed. 745.

<sup>47</sup> See *Nebraska Tel. Co. v. Lincoln*, 82 Neb. 59, 117 N. W. 284, 28 L. R. A. (N. S.) 221; *Ratterman v. West. U. Tel. Co.*, 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. Ed. 229.

*Electric company.*—Tax on receipts of business may be imposed. *Elec. Co. v. Board of Assessors*, 69 N. J. Law, 116, 54 Atl. 246; *People v. Sohmer*, 162 App. Div. 207, 147 N. Y. Supp. 726; *Elec. Corp. v. Los Angeles*, 163 Cal. 621, 126 Pac. 594; *Com. v. Elec. L. Co.*, 204 Pa. 249, 53 Atl. 1096.

<sup>48</sup> *Wabash St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244; *West. U. Tel. Co. v. Texas*, 105 U. S. (15 Otto.) 460, 26 L. Ed. 1067; *Hall v. De Cuir*, 95 U. S. (5 Otto.) 485, 24 L. Ed. 547; *The Daniel Ball*, 77 U. S. (10 Wall.) 557, 19 L. Ed. 999; *West. U. Tel. Co. v. Board of Assessment*, 32 U. S. 472, 10 Sup. Ct. 161, 33 L. Ed. 409; *West. U. Tel. Co. v. Com.*, 128 U. S. 39, 9 Sup. Ct. 6, 32 L. Ed. 345; *Leloup v. Mobile*, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311; *West. U. Tel. Co. v. Wakefield*, 69 Neb. 272, 95 N. W. 659; *Ratterman v. West. U. Tel. Co.*, 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. Ed. 229.

<sup>49</sup> *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692, 14 Sup. Ct. 1094, 38 L. Ed. 571; *West. U. Tel. Co. v. Ass.*, 132 U. S. 472, 10 Sup. Ct. 161, 33 L. Ed. 409; *Atlantic Postal Tel. Cable Co. v. Savannah*, 133 Ga. 66, 65 S. E. 184; *West. U. Tel. Co. v. Wakefield*, 69 Neb. 272, 95 N. W. 659; *Postal Tel. Cable Co. v. Richmond*, 99 Va. 102, 37 S. E. 789, 86 Am. St. Rep. 877.

<sup>50</sup> *West. U. Tel. Co. v. Com.*, 110 Pa. 405, 20 Atl. 720, reversed in 128 U. S. 39, 9 Sup. Ct. 6, 32 L. Ed. 345; also, *West. U. Tel. Co. v. State Board*, 80 Ala. 273, 60 Am. Rep. 99, reversed in 132 U. S. 472, 10 Sup. Ct. 161, 33 L. Ed. 409; *Mobile v. Leloup*, 76 Ala. 401, reversed in 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311.

In *West. U. Tel. Co. v. Alabama St. Board of Assessment*, 132 U. S. 472, 10 Sup. Ct. 161, 33 L. Ed. 409, it was said that: "The principle is, in regard to telegraph companies which have accepted the provision of Act Cong. July 24, 1866, c. 230, 14 Stat. 221, sections 5263 to 5268 of the revised Statutes of the United States (Comp. St. 1913, §§ 10072-10077), that they shall not be taxed by the authorities of the state for any messages, or receipts arising from messages, from points within the state to points without, or from points without the state to points within, but that such taxes may be levied upon all messages carried and delivered exclusively within the state. The foundation of this

quired a statement to be made by the chief manager of the telegraph company, of the entire number of full-rate and half-rate messages of the company, and that thus the amount of taxes due should be ascertained, a tax upon certain of the messages was held unconstitutional; but the law contained no direction requiring discrimination in the report between the messages that could be legally taxed and those that could not, and the entire law was held inoperative and void.<sup>51</sup>

§ 674. **Foreign companies.**—A telegraph or telephone company doing an interstate business is protected by that provision of the constitution of the United States which says that Congress shall have power “to regulate commerce with foreign nations and among the several states.”<sup>52</sup> This provision renders illegal an excessive fee demanded by a state as a condition to allowing a foreign telegraph or telephone company to do business in the state.<sup>53</sup>

principle is that messages of the former class are elements of commerce between the states and not subject to legislative control of the states, while the latter class are elements of internal commerce solely within the limits and jurisdiction of the state, and therefore subject to its taxing power.”

<sup>51</sup> *West. U. Tel. Co. v. Texas*, 62 Tex. 630.

<sup>52</sup> Article 1, § 8.

<sup>53</sup> The Kansas statute requiring foreign corporations before doing business in the state to pay a specified license fee is not valid as against foreign corporations engaged in interstate commerce where such fee is a tax on the interstate business, and also a tax on the company's property outside of the state, and hence a judgment of the state court ousting a foreign telegraph corporation from doing business in the state because it did not pay this fee, which amounted to \$20,100, is invalid. The mere fact that the statute recited that it was not intended to burden or regulate interstate commerce is immaterial. *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355, reversing 75 Kan. 609, 90 Pac. 299. So also as to the Arkansas statute where the fee amounted to \$25,050. *Ludwig v. West. U. Tel. Co.*, 216 U. S. 146, 30 Sup. Ct. 280, 54 L. Ed. 423, disapproving *West. Union, etc., Co. v. State*, 82 Ark. 309, 101 S. W. 748, 10 L. R. A. (N. S.) 1133, 12 Ann. Cas. 38. In the case of *Mulford Co. v. Curry*, 163 Cal. 276, 125 Pac. 236, the court in declaring illegal a graduated license fee on the capital stock of foreign corporations as a condition of allowing them to do business in the state said that the recent decisions of the supreme court of the United States had established the following: “The admitted power of the state to regulate and prescribe terms under which a foreign corporation may engage in intrastate or domestic business is subject to this limitation, that where such foreign corporation is engaged in interstate, as well as intrastate business, no such term, condition or requirement will be constitutional if it imposes any burden upon the interstate business of such corporation, whatever be its name or form; a license or privilege tax for the conduct of such intrastate business, based upon the total capital or the total capital stock of such corporation without just relation to the proportion which the capital or the capital stock used in the state bears to the whole capital or capital stock, though in terms declared to be directed solely to the intrastate business of said corporation, is unconstitutional and void, (a) as being in violation of the commerce clause of the con-



§ 675. **Power of a municipality to impose tax.**—A municipality has no inherent power to exact a license fee from a telegraph or telephone company because of the fact of its doing business within the city limits or by having its poles and wires therein;<sup>54</sup> but the state may constitutionally authorize one of its municipalities to exact such a license where the amount to be so collected is to be used in defraying the expenses for inspecting and regulating the lines,<sup>55</sup> provided the amount of such expenses is reasonable, and

stitution by the imposition of an illegal burden upon interstate commerce, and (b) because violative of the 14th amendment of the constitution and its equal protection and due process of law clause, as an effort to tax the property of citizens of the United States, which property is situated beyond the jurisdiction of the taxing state and is not amenable to its revenue laws." A state may prohibit a foreign telegraph company from doing a local telegraph business in the state unless it pays a certain fee, being a percentage of its capital stock, even though the telegraph company has accepted the Post Roads Act of Congress. *Western Union Tel. Co. v. State (Tex. Civ. App.)* 121 S. W. 194. Taxes levied on an interstate telegraph company cannot be collected by excluding it from doing business, nor by injunction against its doing business. *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *Re Pennsylvania Tel. Co.*, 48 N. J. Eq. 91, 20 Atl. 846, 27 Am. St. Rep. 462; *City of Bradford v. Postal Tel. Co.*, 11 Ry. & Corp. L. J. 54 (Penn. Com. Pl. 1891). A state may impose other conditions. A New York company, organized to conduct both a telegraph and telephone business, cannot compel the secretary of state of Michigan to issue to it a certificate of authority to transact both a telegraph and telephone business in Michigan, it appearing that the Michigan statutes do not authorize a company to incorporate for both of those purposes, and the statutes authorize foreign corporations to do only such business as a domestic corporation may do. *American Tel. & Tel. Co. v. Secretary of State*, 159 Mich. 195, 123 N. W. 568.

<sup>54</sup> *La Crosse v. La Crosse Gas, etc., Co.*, 145 Wis. 408, 130 N. W. 530; *New York v. New York City Ry.*, 138 App. Div. 131, 123 N. Y. Supp. 132; *Wisconsin, etc., Co. v. Milwaukee*, 126 Wis. 1, 104 N. W. 1009, 1 L. R. A. (N. S.) 581, 110 Am. St. Rep. 886; *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828. See *Allentown v. West. U. Tel. Co.*, 148 Pa. 117, 23 Atl. 1070, 33 Am. St. Rep. 820; *Southern Bell Tel., etc., Co. v. Harrisonburg*, 111 Va. 494, 69 S. E. 348, 31 L. R. A. (N. S.) 327, line outside city limits, but connected with line in city, no right to tax.

<sup>55</sup> *Postal Tel. Cable Co. v. Baltimore*, 79 Md. 502, 29 Atl. 819, 24 L. R. A. 161; *West. U. Tel. Co. v. Fremont*, 39 Neb. 692, 58 N. W. 415, 26 L. R. A. 698; *Philadelphia v. Postal Tel. Co.*, 67 Hun. 21, 21 N. Y. Supp. 556; *Taylor v. Postal Tel. Cable Co.*, 202 Pa. 583, 52 Atl. 128; *New Hope v. Postal Tel. Cable Co.*, 202 Pa. 532, 52 Atl. 127; *Chester v. Philadelphia, etc., Co.*, 148 Pa. 120, 23 Atl. 1070; *Allentown v. West. U. Tel. Co.*, 148 Pa. 117, 23 Atl. 1070, 33 Am. St. Rep. 820; *Atlantic, etc., Tel. Co. v. Philadelphia*, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. Ed. 995, reversing 102 Fed. 254, 42 C. C. A. 325; *West. U. Tel. Co. v. New Hope*, 187 U. S. 419, 23 Sup. Ct. 204, 47 L. Ed. 240; *Postal Tel. Co. v. Charleston*, 153 U. S. 692, 14 Sup. Ct. 1094, 38 L. Ed. 871; *St. Louis v. West. U. Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 990, 37 L. Ed. 810; *Sunset Tel., etc., Co. v. Medford (C. C.)* 115 Fed. 202; *Philadelphia v. West. U. Tel. Co.*, 89 Fed. 454, 32 C. C. A. 246; *Leloup v. Mobile*, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311; *City of Memphis v. Postal Tel. Cable Co.*, 145 Fed. 602, 76 C. C. A. 292; 164 Fed. 600, 91 C. C. A. 135, 16 Ann. Cas. 342; *Williams v. City of*

based upon the disbursements of the municipality in connection with the poles and wires.<sup>56</sup> In such cases the amount to be paid for supervision depends upon all the circumstances in a particular case, and if there is conflicting evidence, the question may be submitted to a jury.<sup>57</sup> The license fee cannot be primarily a means of raising revenue, so the expense for supervision is limited to this charge, but this, being fixed in advance, may be large enough to cover any reasonable anticipated expense.<sup>58</sup> It has been held that

Talladega, 226 U. S. 404, 33 Sup. Ct. 116, 57 L. Ed. 275. See § 83. But see Wisconsin, etc., Co. v. Milwaukee, 126 Wis. 1, 104 N. W. 1009, 1 L. R. A. (N. S.) 581, 110 Am. St. Rep. 886; Ex parte Cramer, 62 Tex. Cr. R. 11, 136 S. W. 61, 36 L. R. A. (N. S.) 78, Ann. Cas. 1913C, 588.

<sup>56</sup> Leloup v. Mobile, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311; Postal Tel., etc., Co. v. Mobile (C. C.) 179 Fed. 955; Troy v. West. U. Tel. Co., 164 Ala. 482, 51 So. 523, 27 L. R. A. (N. S.) 627; Ft. Smith v. Hunt, 72 Ark. 556, 82 S. W. 163, 66 L. R. A. 238, 105 Am. St. Rep. 51; Hot Springs, etc., Co. v. Hot Springs, 70 Ark. 302, 67 S. W. 761; Sunset Tel., etc., Co. v. Pasadena, 161 Cal. 265, 118 Pac. 796; Pensacola v. Southern Bell Tel. Co., 49 Fla. 161, 37 South. 820; Atlanta, etc., Co. v. Mayor, 133 Ga. 66, 65 S. E. 184; Id., 136 Ga. 657, 71 S. E. 1115; Wright v. Southern Bell Tel., etc., Co., 127 Ga. 227, 56 S. E. 116; Springfield v. Postal Tel., etc., Co., 253 Ill. 346, 97 N. E. 672; Leavenworth v. Ewing, 80 Kan. 58, 101 Pac. 664; Cumberland, etc., Co. v. Hopkins, 121 Ky. 850, 90 S. W. 594; Cumberland, etc., Co. v. Calhoun, 151 Ky. 241, 151 S. W. 659; Louisville v. Pooley, 136 Ky. 286, 124 S. W. 315, 25 L. R. A. (N. S.) 582; Postal, etc., Co. v. Newport (Ky.) 76 S. W. 159; State v. Citizens' Bank, 52 La. Ann. 1086, 27 South. 709; Postal Tel. Cable Co. v. Baltimore, 79 Md. 502, 29 Atl. 819, 24 L. R. A. 161; Saginaw v. Swift E. L. Co., 113 Mich. 660, 72 N. W. 6; Hodges v. West. U. Tel. Co., 72 Miss. 910, 18 South. 84, 29 L. R. A. 770; St. Louis v. West. U. Tel. Co., 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; Id., 149 U. S. 465, 13 Sup. Ct. 990, 37 L. Ed. 810; West. U. Tel. Co. v. Freemont, 39 Neb. 692, 58 N. W. 415, 26 L. R. A. 698; Id., 43 Neb. 499, 61 N. W. 724, 26 L. R. A. 706; Neb. Tel. Co. v. Lincoln, 82 Neb. 59, 117 N. W. 284, 28 L. R. A. (N. S.) 221; Lincoln, etc., Co. v. Lincoln (C. C.) 182 Fed. 926; Sunset, etc., Co. v. Medford (C. C.) 115 Fed. 202; Postal Tel., etc., Co. v. Charleston, 153 U. S. 692, 14 Sup. Ct. 1094, 38 L. Ed. 871; Memphis v. Postal Tel. Cable Co., 164 Fed. 600, 91 C. C. A. 135, 16 Ann. Cas. 342; Ogden v. Crossman, 17 Utah, 66, 53 Pac. 985; Postal Tel. Cable Co. v. Norfolk, 101 Va. 125, 43 S. E. 207; Postal Tel. Cable Co. v. Richmond, 99 Va. 102, 37 S. E. 789, 86 Am. St. Rep. 877; West. U. Tel. Co. v. Richmond (C. C.) 178 Fed. 310; Id., 224 U. S. 160, 32 Sup. Ct. 449, 56 L. Ed. 710; Postal Tel. Cable Co. v. Taylor, 192 U. S. 64, 24 Sup. Ct. 208, 48 L. Ed. 342; Atlantic, etc., Tel. Co. v. Philadelphia, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. Ed. 995. See § 83.

<sup>57</sup> Atlantic, etc., Tel. Co. v. Philadelphia, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. Ed. 995.

<sup>58</sup> Atlantic, etc., Co. v. Philadelphia, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. Ed. 995; Chester v. Philadelphia, etc., Tel. Co., 148 Pa. 120, 23 Atl. 1070; Allentown v. West. U. Tel. Co., 148 Pa. 117, 23 Atl. 1070, 33 Am. St. Rep. 820; Cochran v. Cochran Tel. Co., 41 Pa. Super. Ct. 146; Delaware, etc., Tel. Co.'s Petition, 224 Pa. 55, 73 Atl. 175, 132 Am. St. Rep. 750; Postal Tel., etc., Co. v. Taylor, 192 U. S. 64, 24 Sup. Ct. 208, 48 L. Ed. 342; New Hope v. Postal Tel., etc., Co., 202 Pa. 532, 52 Atl. 127; Postal Tel., etc., Co. v. New Hope, 192 U. S. 55, 24 Sup. Ct. 204, 48 L. Ed. 338. See § 83.

this question may be settled by statutes authorizing the courts to fix on a specified basis the amount levied by a municipality in the way of license fees.<sup>59</sup> So also such license fee must not interfere with interstate commerce.<sup>60</sup> So a license fee which affects interstate and governmental business<sup>61</sup> as well as local business is illegal;<sup>62</sup> and the mere fact that an ordinance imposing a license fee declares that it does not involve interstate telegraph business is not conclusive on the courts, and it may be shown that such license is so exorbitant as to constitute a burden on interstate commerce by reason of the local deficit being made good by drawing from the interstate receipts.<sup>63</sup>

§ 676. **Special franchise taxes.**—A new form of taxation, of very great importance, was introduced in New York state by the statute of 1899, making all franchises for the use of streets, highways, or public places, by railroads of any kind, or mains, pipes, tanks, conduits, or wires for any purpose, taxable as special franchises and to be deemed real property.<sup>64</sup> Great corporations have persistently fought it until now, by decision of the United States Supreme Court, they are compelled to submit to it.<sup>65</sup> The main contention of the corporations against the validity of this tax was that it impaired the obligation of the contracts under which these franchises

<sup>59</sup> *Re Petition of United Tel. & Tel. Co.*, 31 Pa. Co. Ct. R. 481; *West Chester v. Postal Tel., etc., Co.*, 227 Pa. 384, 76 Atl. 65. See *Delaware, etc., Tel. Co.'s Petition*, 224 Pa. 55, 73 Atl. 175, 132 Am. St. Rep. 750; *Ex parte Cramer*, 62 Tex. Cr. R. 11, 136 S. W. 61, 36 L. R. A. (N. S.) 78, Ann. Cas. 1913C, 588, may place cost on one making work. See *State v. Gantz*, 124 La. 535, 50 South. 524, 24 L. R. A. (N. S.) 1072.

<sup>60</sup> *West. U. Tel. Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355, in which it was said: "We are aware of no decision by this court holding that a state may, by any device or in any way, whether by a license tax, in the form of a 'fee,' or otherwise, burden the interstate business of a corporation of another state, although the state may tax the corporation's property regularly or permanently located within its limits, where the ascertainment of the amount assessed is made 'dependent in fact on the value of its property situated within the state.'" *Postal Tel. Cable Co. v. Mayor*, 139 Ga. 126, 76 S. E. 744, Ann. Cas. 1914A, 984.

<sup>61</sup> A license fee ordinance which does not expressly exclude governmental telegrams is illegal. *Williams v. Talladega*, 226 U. S. 404, 33 Sup. Ct. 116, 57 L. Ed. 275.

<sup>62</sup> *Postal Tel., etc., Co. v. Mayor*, 139 Ga. 126, 76 S. E. 744, Ann. Cas. 1914A, 984.

<sup>63</sup> *West. U. Tel. Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355. See *Armour, etc., Co. v. Lacy*, 200 U. S. 226, 26 Sup. Ct. 232, 50 L. Ed. 451.

<sup>64</sup> *People v. Woodberry*, 63 Misc. Rep. 1, 116 N. Y. Supp. 209; *People v. Hall*, 57 Misc. Rep. 308, 109 N. Y. Supp. 402. See *State v. West. U. Tel. Co.*, 73 Me. 518; *People v. Gold, etc., Tel. Co.*, 98 N. Y. 67.

<sup>65</sup> *New York ex rel. Metropolitan St. R. Co. v. State Board of Tax Com'rs*, 199 U. S. 1, 25 Sup. Ct. 705, 50 L. Ed. 65, 4 Ann. Cas. 381.



were obtained. Corporations which had paid a gross sum to obtain a franchise, or were required to pay annually either a fixed amount or a fixed percentage of their earnings, contended that such payments were all that the state could demand of them on account of such franchise. But the court held that the contract did not provide that these payments were to be in lieu of or an equivalent or substitute for taxes. As the state had not expressly relinquished the right to tax them, what they had paid for the grant of a privilege raised no implication of any relinquishment of the power to tax its value as in case of other property. The fact that the property was of an intangible kind made it no different in this respect from a grant of tangible property, like a tract of land. It was contended in one case that the valuation of such franchise was mere guesswork and speculation, which could not constitute process of law, but the court briefly disposed of this contention, holding that it had no merit where such valuation was made by a state board to which the owner of the franchise was required to furnish a written report, with notice and hearing accorded the owner and review of the assessment afforded by certiorari. The fact that some corporations were previously subjected to annual payments "in the nature of a tax," under these existing contracts, and that these were allowed to be deducted from the special franchise tax, was claimed to be a discrimination against other companies who had paid a lump sum for their franchises, and to deprive them of their property without due process of law, or to deny them the equal protection of the laws. But it was held that these constitutional rights were not thus impaired.

§ 677. **Where rights of being a corporation are derived from the United States.**—In many instances telegraph companies derive their privileges and franchises from the United States; and where they have a situs in a state, the latter may impose a tax upon the property of these companies notwithstanding this fact.<sup>60</sup> It is the property of the company that is subject to such tax, and not the business. This is one fact which should be clearly understood, other-

<sup>60</sup> *State v. West. U. Tel. Co.*, 165 Mo. 502, 65 S. W. 775; *Atty. Gen. v. West. U. Tel. Co.*, 141 U. S. 45, 11 Sup. Ct. 889, 35 L. Ed. 628; *Ratterman v. West. U. Tel. Co.*, 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. Ed. 229; *West. U. Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *Atty. Gen. v. West. Union Tel. Co. (C. C.)* 33 Fed. Ct. 29; *West. U. Tel. Co. v. Taggart*, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. Ed. 49; *West. U. Tel. Co. v. Visalia*, 149 Cal. 744, 87 Pac. 1023; *West. U. Tel. Co. v. Lakin*, 53 Wash. 326, 101 Pac. 1094, 17 Ann. Cas. 718. See *San Francisco v. West. U. Tel. Co.*, 96 Cal. 140, 31 Pac. 10, 17 L. R. A. 301; *West. U. Tel. Co. v. Wright*, 185 Fed. 250, 107 C. C. A. 356; *West. U. Tel. Co. v. County*, 160 Cal. 124, 116 Pac. 564.

wise great confusion will most surely be the result. That is, a telegraph company having its situs within a state may have its property in that state taxed although its franchise is derived from the United States, and for the purpose of carrying on commerce between the states; but the business or operation of such company cannot be taxed, since that would be a tax upon interstate commerce.<sup>67</sup> A state tax upon a franchise derived from the United States is void as an attempt to tax the operation of an instrument of the general government.<sup>68</sup>

§ 678. **Lines on railroads.**—A railroad company usually operates a telegraph or telephone system for its own private business in the running and operation of trains, etc. When this is the case, such system is not subject to taxation as a “telegraph company.”<sup>69</sup> But if the railroad company has no separate franchise or authority to carry on a general telegraph or telephone business and assumes such, it is subject to taxation under a statute providing for the taxation of franchises of telegraph and telephone companies.<sup>70</sup>

§ 679. **Same—suits to collect.**—It is necessary that a license fee should be collected by a suit in court and not by mandamus,<sup>71</sup> and the courts cannot impose an excessive penalty for the nonpayment of such license.<sup>72</sup> The United States district court may discharge an employé of a company who has been arrested by the municipal authority for a nonpayment of an illegal license fee on a writ of habeas corpus;<sup>73</sup> and this court has jurisdiction to grant an injunction against the collection of such a fee, where the value

<sup>67</sup> *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, 14 Sup. Ct. 1060, 38 L. Ed. 1028; *West. U. Tel. Co. v. Atty. Gen.*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *City of St. Louis v. West. U. Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380.

<sup>68</sup> *San Francisco v. West. U. Tel. Co.*, 96 Cal. 140, 31 Pac. 10, 17 L. R. A. 301; *West. U. Tel. Co. v. Visalia*, 149 Cal. 744, 87 Pac. 1023; *West. U. Tel. Co. v. Lakin*, 53 Wash. 326, 101 Pac. 1094, 17 Ann. Cas. 718; *California v. Central Pac. R. Co.*, 127 U. S. 1, 32 L. Ed. 150, 8 Sup. Ct. 1073.

<sup>69</sup> *Adams v. Louisville, etc., R. Co.* (Miss.) 13 South. 932.

<sup>70</sup> *Minneapolis, etc., R. Co. v. Oppegard*, 18 N. D. 1, 118 N. W. 830.

<sup>71</sup> *Chicago v. Chicago Tel. Co.*, 230 Ill. 157, 82 N. E. 607.

<sup>72</sup> *Ex Parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; *State v. Galveston, etc., R.*, 100 Tex. 153, 97 S. W. 71; *Cox v. Paul*, 175 N. Y. 328, 67 N. E. 586; *Morris, etc., Co. v. So. Express Co.*, 146 N. C. 167, 59 S. E. 667, 15 L. R. A. (N. S.) 983; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 29 Sup. Ct. 220, 53 L. Ed. 417.

<sup>73</sup> *Laundry License Case* (D. C.) 22 Fed. 701; *Ex parte Conway* (C. C.) 48 Fed. 77; *Hardee v. Brown*, 56 Fla. 377, 47 South. 834.

*Liability of agent.*—The local agent of a telephone company which has forfeited its license to do business in a city cannot be prosecuted individually for conducting such business without a license. *Carterville v. Gibson*, 259 Mo. 499, 168 S. W. 673, L. R. A. 1915A, 106.

of the right to be protected or the extent of the injury to be prevented is over three thousand dollars, even though the license itself is not that amount.<sup>74</sup> The question often arises as to when can a case of this nature be removed to the federal court, but this depends upon the usual rules applicable to other removal cases and which is somewhat foreign to this work.<sup>75</sup> If an illegal license has been levied upon one of these companies, it need not wait until the state has seized its property or commenced suit, but it may pay the fee and sue to recover the amount back.<sup>76</sup> A mere demand upon these companies of a tax is not duress, but a penalty for nonpayment may constitute duress.<sup>77</sup> And where an assessment or tax for one year has been adjudicated by the court, this will not be *res judicata* as to subsequent years if the value has changed or the assessors have changed.<sup>78</sup>

**§ 680. Interest when payment of taxes is delayed.**—Under a statute providing that interest shall be charged upon all taxes not paid on or before a specified date, a telegraph company is liable for interest from the date prescribed, on the amount of taxes payable by it, notwithstanding the fact that payment was delayed pending the decision of an appeal taken from the assessment, in which a reduction of the assessment was obtained.<sup>79</sup> If the taxes are such as ought not to be paid, the company has a remedy for not paying same. But in order to protect the company from paying interest on the taxes for the delayed payment, the company should tender the amount for which it is assessed.

**§ 680a. Special assessment for improvements.**—As justice requires that the local assessment for improvements of the streets, such as the widening, reduction of the grade, or the pavement thereof, shall be made only against property or persons benefited thereby and since the franchise of a telegraph, telephone or electric

<sup>74</sup> *Postal Tel., etc., Co. v. Mobile* (C. C.) 179 Fed. 955; *Humes v. Ft. Smith* (C. C.) 93 Fed. 857; *West. U. Tel. Co. v. City Council* (C. C.) 56 Fed. 419; *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692, 14 Sup. Ct. 1094, 38 L. Ed. 871; *West. U. Tel. Co. v. Andrews*, 216 U. S. 165, 30 Sup. Ct. 286, 54 L. Ed. 430; *West. U. Tel. Co. v. Andrews* (C. C.) 154 Fed. 95. See *West. U. Tel. Co. v. Atty. Gen.*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790, will not restrain from further operation within the state until payment of tax.

<sup>75</sup> *Memphis v. Postal Tel. Cable Co.*, 145 Fed. 602, 76 C. C. A. 292; *State v. Port Royal, etc., Ry.* (C. C.) 56 Fed. 333.

<sup>76</sup> *Atchison, etc., R. v. O'Connor*, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050.

<sup>77</sup> *Gaar, Scott & Co. v. Shannon*, 223 U. S. 468, 32 Sup. Ct. 236, 56 L. Ed. 510.

<sup>78</sup> *People v. Zundel*, 157 N. Y. 513, 52 N. E. 570.

<sup>79</sup> *West. U. Tel. Co. v. State*, 64 N. H. 265, 9 Atl. 547. See *Cooley on Tax.* (2d Ed.) 456.



company is not augmented by such improvement, these companies are not generally subjected to such an assessment.<sup>80</sup> Moreover, the value of that part of the franchise which is within the assessment area is so difficult of ascertainment that its indefiniteness in value renders it impracticable to levy an assessment against it for such improvements.<sup>81</sup>

<sup>80</sup> *Spring Creek Dr. Dist. v. Elgin, etc., R. Co.*, 249 Ill. 260, 94 N. E. 529; *In re Anthony Ave.*, 46 Misc. Rep. 525, 95 N. Y. Supp. 77, affirmed in 124 App. Div. 940, 109 N. Y. Supp. 1123.

<sup>81</sup> *In re Anthony Ave.*, 46 Misc. Rep. 525, 95 N. Y. Supp. 77, affirmed in 124 App. Div. 940, 109 N. Y. Supp. 1123.

## CHAPTER XXVII

## TELEGRAPH AND TELEPHONE COMMUNICATIONS AS EVIDENCE

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§ 681. In general.—We shall now discuss the law with respect to the admission of telegrams as evidence. In assuming this undertaking we shall first discuss the manner of proving the contents of telegrams, then the admission of such with respect to the statute of frauds, and, lastly, we shall speak of such evidence as a privi-

leged communication. In this chapter we shall only discuss the first of these subdivisions, the manner of proving the contents of telegrams, and leave the other to be treated in subsequent chapters. In taking up the subject which we propose to discuss at present, we shall, after discussing the subject in general, speak of the best proof, or such as is termed primary, then such as is secondary, after which we shall say something of telephone communications.

§ 682. **What is a telegram.**—Before entering into this subject, however, we shall see what is meant by the term “telegram.” A telegram is a message sent by telegraph;<sup>1</sup> but under some circumstances a message sent over a telephone line is considered a telegram.<sup>2</sup> In England, there was a law<sup>3</sup> which empowered the postmaster general to work and maintain telegraphs for the benefit and use of the public. It was held that conversations over or through telephone lines were “messages” or, at all events, “communications transmitted by telegraph,” and therefore “telegrams” within the meaning of the act; and that, since the company made a profit out of the rents, conversations held by subscribers through their telephones were infringements of the exclusive privileges of transmitting telegrams granted to the postmaster general by those acts.

§ 683. **Letters and telegrams—compared.**—There is a similarity between the means of communicating news by telegraph and by the postal system, with respect to the proof of the delivery of the news to the party addressed. Where a letter is duly posted, stamped and addressed for transmission by means of the United States mail, it is presumed that such letter reached its destination. A telegraph company is engaged in a public service, and is duty bound to transmit and deliver all messages entrusted to its care. Having assumed this duty, a similar presumption arises; that is, that the message was delivered.<sup>4</sup> The presumption is that letters properly directed and mailed were received, and the same is true of telegrams given

<sup>1</sup> Int. Dec.

<sup>2</sup> 6 Q. B. Div. 244; 29 Moak, 602.

<sup>3</sup> Telegraph Act, 1863 and 1869.

<sup>4</sup> Perry v. German American Bank, 53 Neb. 89, 73 N. W. 538, 68 Am. St. Rep. 593; West. U. Tel. Co. v. Call Pub. Co., 44 Neb. 326, 62 N. W. 506, 27 L. R. A. 622, 48 Am. St. Rep. 729; Oregon S. S. Co. v. Otis, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221. See, also, Eppinger v. Scott, 112 Cal. 369, 42 Pac. 301, 44 Pac. 723, 53 Am. St. Rep. 220; Breed v. Central City First Nat. Bank, 6 Colo. 235; Com. v. Jeffries, 7 Allen (Mass.) 548, 83 Am. Dec. 712; Western Twine Co. v. Wright, 11 S. D. 521, 78 N. W. 945, 44 L. R. A. 438; Lumber Co. v. Nyman, 145 Mich. 477, 108 N. W. 1019, 116 Am. St. Rep. 310; White v. Fleming, 20 Nova Scotia, 335. Compare State v. Gritzner, 134 Mo. 512, 36 S. W. 39, holding that delivery to person addressed is not to be permitted unless there is truth that the message was received by the telegraph office to which it was directed. Jones on Ev. § 53.



to a telegraph company for transmission and properly addressed,<sup>5</sup> and the presumption becomes conclusive when not denied.<sup>6</sup>

§ 684. **Same continued—admission of.**—The general rule relative to the admission of a letter in evidence against the person who is supposed to have written it is that it must first be proved that the letter was written by such person or by his request or authority. This may be done by comparing the written letter with other writings of his, or by any other evidence which will show that he had it done for himself. When it is shown by competent evidence that he is the author of the letter, it may then be admitted in evidence against him. If, however, the letter is in reply to one written to the person against whom it is to be admitted, it is not necessary to prove the latter's signature, but all that is necessary is to prove that the letter is one in reply to one written to such person in regard to the subject at issue. The rule relative to the admission of telegrams, with some exceptions, is similar to the above.<sup>7</sup> Thus, in

<sup>5</sup> *Com. v. Jeffries*, 7 Allen (Mass.) 548, 83 Am. Dec. 717, and note. A telegram is presumed to have been delivered in the regular course of business to the person to whom it was directed. The fact that the telegram was sent is therefore admissible in evidence, and tends to prove that it was received. *Eppinger v. Scott*, 112 Cal. 369, 53 Am. St. Rep. 220, 42 Pac. 301, 44 Pac. 723; *Perry v. German American Bank*, 53 Neb. 89, 73 N. W. 538, 68 Am. St. Rep. 593.

<sup>6</sup> *Oregon Steamboat Co. v. Otis*, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221; *Austin v. Holland*, 69 N. Y. 571, 25 Am. Rep. 246; *Eppinger v. Scott*, 112 Cal. 369, 42 Pac. 301, 44 Pac. 723, 53 Am. St. Rep. 220.

<sup>7</sup> That person signing name to communications sent was sender presumed. *Tel. Co. v. Troth*, 43 Ind. App. 7, 84 N. E. 727. But such presumption is rebuttable. *Id.*; *Edwards v. Erwin*, 148 N. C. 429, 62 S. E. 545, 16 Ann. Cas. 393, holding that a telegram received in due course and which purports to be a reply to another telegram shown to have been previously sent by the receiver is admissible evidence without further proof as to the identity of the sender. For further support of this proposition see *People v. Hammond*, 132 Mich. 422, 93 N. W. 1084; *Taylor v. The Robt. Campbell*, 20 Mo. 254; *Western Twine Co. v. Wright*, 11 S. D. 521, 78 N. W. 942, 44 L. R. A. 438; *So. R. Co. v. Howell*, 135 Ala. 639, 34 South. 6; *Com. v. Burton*, 183 Mass. 461, 67 N. E. 419; *Coupland v. Arrowsmith*, 18 L. T. (N. S.) 755; See *U. S. v. Babcock*, 3 Dill. (U. S.) 571, Fed. Cas. No. 14,485. However, a reply telegram may be excluded on the ground that it is not the best evidence. Thus, where there is no evidence that the original telegram given by the sender to the sending operator is lost or destroyed, the telegram given to the addressee by the receiving operator is not admissible. The fact that the telegram is a reply telegram does not interfere with the operation of the rule. *Howley v. Whipple*, 48 N. H. 487; *Cobb v. Glenn Boom, etc., Co.*, 57 W. Va. 49, 49 S. E. 1005, 110 Am. St. Rep. 734. In *Howley v. Whipple*, *supra*, the court said: "Telegraphic messages are instruments of evidence for various purposes and are governed by the same rules which are applied to other writings. If there be any difference, it results from the fact that messages are first written by the sender and are again written by the operator at the other end of the line, thus causing the inquiry as to which is the original. The original

order to admit a telegram in evidence against the sender, it must be first proved that he is the author of the telegram, and the same proof may be resorted to in this instance as that adopted for the proof of the authorship of letters. And while it may be admitted in evidence in the absence of proof of the sender's handwriting, when it is in reply to a letter written to such person, yet the general rule is that it cannot be admitted in the absence of such proof when it is in reply to a telegram sent to such person.<sup>8</sup> The reason for this rule may be readily seen. Where it is in reply to a letter, the signature of the author thereof may be known by the recipient thereof, or it is in such a place as to be known by him; but in the case of signatures to telegrams, the recipient of the latter has no means of ascertaining the genuineness of such, more than what the operator may tell him. The rule, however, would be different where the message is transmitted by means of the late improvements made in telegraphy, and which will be hereafter discussed. In these cases the same rule would apply as where the message is in reply to a letter.<sup>9</sup>

message, whatever it may be, must be produced, it being the best evidence; and in case of its loss or of inability to produce it from any other cause, the next best evidence the nature of the case will admit of must be furnished." "A reply telegram may also be excluded on the ground that its admission violates the constitutional right of an accused to be confronted with the witnesses against him. Thus in *Chester v. State*, 23 Tex. App. 577, 5 S. W. 125, it appeared that the defendant was accused of the forgery of a draft. While he was attempting to cash the draft, certain telegrams were sent by a witness at the instance of the defendant to inquire as to its validity. Reply telegrams thereto were proved by the same witness. The court, holding the evidence improper, said: "As to the pretended replies by telegram, we know of no rule of law by which they could, in any manner, become evidence against a defendant on trial in a criminal case, who is guaranteed the right by the constitution to be confronted with the witnesses against him, and when there is not the slightest evidence that the dispatch is the act of the party purporting to send it and when the statement it contains is most conclusive and damaging to the party against whom it is used, and that, too, a statement made by a party not under oath. It is indeed the veriest hearsay, which even the direst necessities of justice will not excuse or tolerate. It was patent error." But see *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355. See *State v. Massee*, 95 S. C. 315, 79 S. E. 97, 46 L. R. A. (N. S.) 781, message from Governor concerning withdrawal of requisition admissible in habeas corpus proceeding.

<sup>8</sup> *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355; *Howley v. Whipple*, 48 N. H. 487. See, also, *Ovenston v. Wilson*, 2 C. & K. 1, 61 C. L. 1. Compare *Thorp v. Philbin*, 15 Daly, 155, 3 N. Y. Supp. 939; *People v. Hammond*, 132 Mich. 422, 93 N. W. 1084.

<sup>9</sup> Gray on Tel. 135. This writer says: "The principle upon which it is admitted is that the person who answers a letter is almost invariably the person to whom it is addressed. This principle, since it is entirely independent of the question of handwriting, applies, apparently, with equal force to communication by telegraph. But it does not in reality do so. It is true that the person who answers a telegraph message is usually the person to whom it is

§ 685. **Same continued—presumption—exceptions.**—Where a letter has been received from a certain place in reply to a letter written to such person at such place, it is a presumption that he was at that place at the time the letter was mailed.<sup>10</sup> A different rule applies in case of telegrams. Thus, where a telegram was forwarded to a person at a certain place, and an answer purporting to be from him was received in due course, this is no evidence that such person was at that place at that particular time. "In the case of telegraphic communications, the ground of belief amounts merely to this: That the operator at one end of the line has informed the operator at the other end of the presence of the sender of the answer. This is mere hearsay."<sup>11</sup> But a receipt of a message over the wires at the point of destination creates a presumption that the message was sent from the office from which it purports to come.<sup>12</sup>

§ 686. **Authorship must be proved.**—As said heretofore, the authorship of a telegram must be proved before it can be admitted in evidence. If it is a reply to a letter, it is enough to show such fact; but if the original telegram is introduced, the handwriting of the sender must be shown, or other evidence of the genuineness must be given.<sup>13</sup> The authenticity of certain telegrams is sufficiently proven, *prima facie* at least, where one in an agreed cipher was proved to a certainty, others were referred to in exhibits of the opposite party, and still others contained directions to draw drafts

addressed. It is also true, however, that while it is unnecessary to disclose the intelligence contained in a letter to any one to effect its transportation by mail, it is absolutely necessary to disclose intelligence to at least two operators to effect its transmission by telegraph. Consequently the telegraph offers far greater opportunity to deliver fraudulent answers to inquiries than the mail does. This distinction renders the principle at present under consideration inapplicable to communications by telegraph, however sound its application to communications by mail may be deemed to be. The message written at the place of destination might be admissible to prove the authorization of the apparent sender, if it purported to be an answer to a letter proved to have been properly mailed to him, the opportunity to deliver fraudulent answers to inquiries in that form being comparatively slight."

<sup>10</sup> 1 Green, Ev. (14th Ed.) § 578.

<sup>11</sup> Howley v. Whipple, 48 N. H. 487. See Wig. Ev. § 2454.

<sup>12</sup> Elwood v. West. U. Tel. Co., 45 N. Y. 549, 6 Am. Rep. 140.

<sup>13</sup> Richie v. Bass, 15 Ia. Ann. 668; Burt v. Winona, etc., R. Co., 31 Minn. 472, 18 N. W. 285, 289; Smith v. Easton, 54 Md. 138, 39 Am. Rep. 355; Reynolds v. Hinrichs, 16 S. D. 602, 94 N. W. 694; Chester v. State, 23 Tex. App. 577, 5 S. W. 125. See, also, Eppinger v. Scott, 112 Cal. 369, 42 Pac. 301, 44 Pac. 723, 53 Am. St. Rep. 220; Lewis v. Havens, 40 Conn. 363; Yeiser v. Cathers, 5 Neb. (Unof.) 204, 97 N. W. 840; Cobb v. Glenn Boom, etc., Co., 57 W. Va. 49, 49 S. E. 1005, 110 Am. St. Rep. 734. See State v. Massee, 95 S. C. 315, 79 S. E. 97, 46 L. R. A. (N. S.) 787, to impeach Governor's signature; Johnson v. United States, 215 Fed. 679, 131 C. C. A. 613, L. R. A. 1915A, 862.



which were shown to have been drawn and paid.<sup>14</sup> So also testimony of the recipient that he received the message and the admission of the sender that it is the message he sent is abundant proof of the authenticity of the message.<sup>15</sup> But where the sender testifies that the message was in her own handwriting and was sent by her, a dispatch taken from the company's files of about the same date, purporting to be signed by her and referring to the subject-matter in question, is not admissible if not in her handwriting.<sup>16</sup> A paper offered in evidence, purporting to contain a dispatch received at a telegraph office, is not admissible as evidence when no proof is given that it was in the handwriting of any person employed in the telegraph office where it purports to have been received, and no other proof of its authenticity is given.<sup>17</sup>

§ 687. **Proof of signature.**—The same manner of proof necessary to prove a person's signature to a letter is applicable in the proof of signatures to telegrams. Thus evidence founded on mere comparison of handwriting is not admissible as a general rule to prove the genuineness of a signature;<sup>18</sup> but it is held that an expert may give his opinion from mere comparison.<sup>19</sup> Testimony by comparison of handwriting is admissible in corroboration of previous testimony.<sup>20</sup> So, if the witness has previous knowledge of the hand, he may, in corroboration of his testimony compare the writing with other signatures known to be genuine.<sup>21</sup> Writings used as standards in comparison of hands must be proved to be genuine. So letterpress copies of letters found in the party's letter book are not admissible as standards of comparison to prove the genuineness of a signature, but original signatures must be used.<sup>22</sup> In some instances, however, press copies may be admitted as secondary evidence, but not for comparison. When such is introduced, the witness should be asked if it appears to be in the handwriting of defendant; then, by proving that it is a press copy, it would follow

<sup>14</sup> *Oregon S. S. Co. v. Otis*, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221; *Johnson v. United States*, 215 Fed. 679, 131 C. C. A. 613, L. R. A. 1915A, 862.

<sup>15</sup> *Dunbar v. United States*, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390; *Johnson v. United States*, 215 Fed. 679, 131 C. C. A. 613, L. R. A. 1915A, 862.

<sup>16</sup> *Lewis v. Havens*, 40 Conn. 363.

<sup>17</sup> *Richie v. Bass*, 15 La. Ann. 668; *Oregon S. S. Co. v. Otis*, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221; *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355; *Dunbar v. United States*, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390.

<sup>18</sup> *Clark v. Wyatt*, 15 Ind. 271, 77 Am. Dec. 90.

<sup>19</sup> *Chance v. Indianapolis, etc., R. Co.*, 32 Ind. 474; *Forgey v. First Nat. Bank*, 66 Ind. 125.

<sup>20</sup> *Baker v. Haines*, 6 Whart. (Pa. 284), 36 Am. Dec. 224.

<sup>21</sup> *Shank v. Butsch*, 28 Ind. 21.

<sup>22</sup> See *Com. v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596, and notes

that the letter from which the impression was made is defendant's also. He should not be asked: "In whose handwriting was the original of which this purports to be a copy?" This question elicits the opinion of the witness concerning the handwriting and the necessary consequence of that opinion, in the same answer.<sup>23</sup>

§ 688. **Telegrams as declarations of sender.**—When a telegram is shown to have been delivered for transmission, and it is proven that the signature to same is that of the sender, such telegram may be admitted as the sender's declaration.<sup>24</sup> Thus evidence that a telegram was sent by the defendant to the drawee of an order which he had given to plaintiff, directing the drawee to withhold a part of the amount specified and to pay the remainder, is competent as tending to show an admission by the defendant of indebtedness, at least to the extent of the amount of such remainder.<sup>25</sup> The general rule is, that a wife cannot testify in a criminal case against her husband, unless the charge is one which has been committed on her by him.<sup>26</sup> So a telegram from a wife of one of the defendants in an action for conspiracy, not written nor sent by either of them, is inadmissible as evidence against them. As the declaration of the wife, it could not affect even her husband.<sup>27</sup>

§ 689. **Telegrams as evidence of communication.**—Business affairs may be transacted by means of telegrams as well as by means of correspondence by letter, and when there is an action arising over a business transaction, all letters sent or received by the parties to the action and in regard to the matter at issue may be admitted in evidence. So, when it is shown that telegrams have been received in due course from either party, they may be admitted as evidence of the communication between the parties.<sup>28</sup> They may also be admitted to show the information upon which the addressee

<sup>23</sup> *Com. v. Jeffries*, 7 Allen (Mass.) 548, 83 Am. Dec. 712.

<sup>24</sup> *Com. v. Jeffries*, 7 Allen (Mass.) 548, 83 Am. Dec. 712. See, also, *People v. Hammond*, 132 Mich. 422, 93 N. W. 1084. See, also, *State v. Massee*, 95 S. C. 315, 79 S. E. 97, 46 L. R. A. (N. S.) 781; *Montgomery v. United States*, 219 Fed. 162, 135 C. C. A. 60.

<sup>25</sup> *Griggs v. Deal*, 30 Mo. App. 152. See, also, *Benford v. Sanner*, 40 Pa. 9, 80 Am. Dec. 545.

<sup>26</sup> *State v. Jolly*, 20 N. C. 110, 32 Am. Dec. 656.

<sup>27</sup> *Benford v. Sanner*, 40 Pa. 9, 80 Am. Dec. 545.

<sup>28</sup> *Com. v. Jeffries*, 7 Allen (Mass.) 548, 83 Am. Dec. 712; *Taylor v. Steamboat Robert Campbell*, 20 Mo. 254. Telegrams transmitted to plaintiff in attachment suits by telephone, and reduced to writing by the person who received them, and in that form acted upon by plaintiff, are admissible as showing the information upon which the attachment was sued out; and it is not necessary that the dispatches should be verified by comparing them with the originals on file with the telegraph company. *Deere v. Bagley*, 80 Iowa, 197, 45 N. W. 557.

may have acted, where his good faith or his intentions are in question; provided it is shown that he read and acted upon them.<sup>29</sup> Thus a telegram sent by telephone and reduced to writing by the person receiving it may be admitted as showing information on which a plaintiff acted in suing out an attachment. It is not necessary, in such a case, that they should be verified by comparing them with the originals on file in the company's office; the question in such a case is, not what the original messages contained, but what was contained in them when they reached the plaintiff.<sup>30</sup>

§ 690. **Rule applicable to documentary evidence.**—It would be foreign to the purpose of this treatise to discuss the general rule in relation to the admission of evidence pertaining to documentary evidence, but suffice it to say the general rule governing such evidence is applicable in the case of telegrams.<sup>31</sup> As a rule, however, in order for the message to be admitted against any one, it must be shown that he is a party to the message, either as the sender or receiver.<sup>32</sup> Thus correspondence by wire between operators sending and receiving a message, which was not communicated to the sender, is not admissible to show that the person to whom the message was directed was absent from the place of delivery.<sup>33</sup> So also letters and telegrams as to the cancellation of an insurance policy, sent by an insurance company to its agent after a loss, are not admissible against the insured in an action on the policy.<sup>34</sup> There may be, however, some exceptions to the rule. Thus, where an action is brought to recover the price of goods sold, a telegram countermanding the order for such goods, although it was sent to one not a party to the action, is admissible when it appears that it was intended to be delivered to the sellers of the goods and that it

<sup>29</sup> *J. K. Armsby Co. v. Eckerly*, 42 Mo. App. 299.

<sup>30</sup> *Deere v. Bagley*, 80 Iowa, 197, 45 N. W. 557.

<sup>31</sup> *Com. v. Vosburg*, 112 Mass. 419; *Brownfield v. Phœnix Ins. Co.*, 35 Mo. App. 54; *Id.*, 26 Mo. App. 390; *Benford v. Sanner*, 40 Pa. 9, 80 Am. Dec. 545; *Eldridge v. Hargreaves*, 30 Neb. 638, 46 N. W. 923; *Hammond v. Beeson* (Mo.) 15 S. W. 1000; *State v. Espinozei*, 20 Nev. 209, 19 Pac. 677; *International, etc., R. Co. v. Prince*, 77 Tex. 560, 14 S. W. 171, 19 Am. St. Rep. 795; *Powell v. Brunner*, 86 Ga. 531, 12 S. E. 744; *J. K. Armsby Co. v. Eckerly*, 42 Mo. App. 299; *Richmond v. Sundburg*, 77 Iowa, 255, 42 N. W. 184; *West. U. Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772; *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148.

<sup>32</sup> *Powell v. Brunner*, 86 Ga. 531, 12 S. E. 744; *People v. Hammond*, 132 Mich. 422, 93 N. W. 1084.

<sup>33</sup> *West. U. Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772.

<sup>34</sup> *Brownfield v. Phœnix Ins. Co.*, 35 Mo. App. 54; *Id.*, 26 Mo. App. 390. See, also, *Larminie v. Carley*, 114 Ill. 196, 29 N. E. 382.



actually came into their possession and was replied to by such parties.<sup>35</sup>

§ 691. **Primary evidence—in general.**—One of the general rules of the law of evidence is that the best obtainable evidence must be adduced in court, or such as is generally termed primary evidence. It has been a rule repeatedly enunciated by the courts from the earliest times that the highest degree of proof of which the case from its nature is susceptible must, if obtainable, be produced; or, in other words, that no evidence shall be adduced which presupposes that the party offering it can obtain better evidence.<sup>36</sup> “The object of the rule of law,” as was ably said, “which requires the production of the best evidence of which the fact sought to be established is susceptible, is the prevention of fraud; for if a party is in possession of this evidence, and withholds it, and seeks to substitute inferior evidence in its place, the presumption naturally arises that the better evidence is withheld for fraudulent purposes which its production would expose and defeat.”<sup>37</sup> This rule does not mean that the strongest possible evidence of the matter at issue shall be given, or that all evidence in the case shall be produced; but it requires simply that no evidence shall be given which, from its nature, may warrant the inference that there is obtainable by the party evidence more direct, conclusive and original. In other words, it means that the most direct, satisfactory and conclusive evidence obtainable, and that of the highest degree or grade, must be produced.<sup>38</sup>

§ 692. **Rule applicable to documentary evidence only.**—This rule is applicable to the admission of documentary evidence only, since there is no primary and secondary evidence to such as may be oral. In other words, the testimony of one witness cannot be excluded on the ground that another might give more conclusive evidence.<sup>39</sup> If two parties claim that they are familiar with the circumstances of a particular transaction, but their statements in regard to same are conflicting, it is within the province of the jury

<sup>35</sup> *Eldridge v. Hargreaves*, 30 Neb. 638, 46 N. W. 923.

<sup>36</sup> *People v. Lambert*, 5 Mich. 349, 72 Am. Dec. 49; *Storm v. Green*, 51 Miss. 103; *Clifton v. U. S.*, 4 How. 242, 11 L. Ed. 957; *Church v. Hubbard*, 2 Cranch, 187, 2 L. Ed. 249; *Ward v. Kohn*, 58 Fed. 462, 7 C. C. A. 314.

<sup>37</sup> *Bagley v. McMickle*, 9 Cal. 430.

<sup>38</sup> *Elliott v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668; *West. U. Tel. Co. v. Stevenson*, 128 Pa. 442, 18 Atl. 441, 15 Am. St. Rep. 687, 5 L. R. A. 515; *Zang v. Wyant*, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145.

<sup>39</sup> *Nelson v. Boynton*, 3 Mete. (Mass.) 396, 37 Am. Dec. 148; *Elliott v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668.

to determine which statement is the more correct, and it is never the duty of the court to exclude the testimony of one witness because it may think that of another is better. Where, however, documents or other written instruments exist, the contents of which are in dispute, the original should be produced to prove such contents rather than to prove it by other evidence which would be open to the charge of inaccuracy.<sup>40</sup> In some instances, however, and more particularly with respect to proving telegrams, parol evidence may be best; which fact we shall speak of later.

§ 693. **Rule applicable to telegrams.**—The principal question involved in the consideration of the admission of telegrams as evidence to prove their contents is, What is the best evidence to prove such facts? The general rule is that the original telegram, when obtainable, shall be produced; but it is not an easy matter in every instance to determine what is the original telegram. In such communications there are two distinct documents; the one delivered by a person to the company for transmission, and the other delivered by the company to the person to whom it was sent. The contents of these two may be identical; and while the presumption may be that they are the same, yet it is not the case in every instance. So the presumption is not a conclusive one. It is generally held that this question depends upon the further question as to who the company represented as agent, the sender or the recipient of the message? In other words, if the person sending the message takes the initiative so that the company is to be regarded as his agent, the message actually delivered at the end of the line is the original and primary evidence; but if the person to whom the message is sent takes the risk of its transmission, or is the employer of the company, the message delivered to the operator is the original.<sup>41</sup>

<sup>40</sup> *Elliott v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668; *Heneky v. Smith*, 10 Or. 349, 45 Am. Rep. 143.

<sup>41</sup> *Durkee v. Vt. C. Ry. Co.*, 29 Vt. 127; *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511; *Bond v. Hurd*, 31 Mont. 314, 78 Pac. 579, 3 Ann. Cas. 566; *State v. Hopkins*, 50 Vt. 316; *Saveland v. Green*, 40 Wis. 431; *West. U. Tel. Co. v. Shotton*, 71 Ga. 760. See *Jones on Ev.* § 210. But see *Henkel v. Papa L. R. Co.*, 6 Ex. 7; *Matteson v. Noyes*, 25 Ill. 592; *Williams v. Brickell*, 37 Miss. 682, 75 Am. Dec. 88.

*Proving a contract.*—In proving a contract by telegram, the best evidence is the telegram containing the offer as received at the point of destination and a dispatch containing the acceptance as delivered for transmission. *Durkee v. Vt. C. Ry. Co.*, 29 Vt. 127; *Howley v. Whipple*, 48 N. H. 487; *Wilson v. Minn., etc., R. Co.*, 31 Minn. 481, 18 N. W. 291; *Saveland v. Green*, 40 Wis. 431; *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355; *Beach v. Raritan, etc., Ry. Co.*, 37 N. Y. 457; *Cobb v. Glenn Boom, etc., Co.*, 57 W. Va. 49, 49 S. E. 1005, 110 Am. St. Rep. 734.

§ 694. Depends upon which document is at issue.—The proper solution of this question, we think, depends upon which document is at issue. In other words, it depends upon whether the contents of the message delivered by the sender to the company are at issue, or whether it is the contents of the message delivered by the company to the addressee. The message delivered to the company is the original whenever the words authorized to be sent and which were thereupon agreed to be transmitted and delivered to the addressee are in issue.<sup>42</sup> It is necessary to prove these words, whenever a company is sued for a breach of contract,<sup>43</sup> that is, the rule applies to cases in which the telegraph company is a party. So also, when the message is offered as a declaration by the sender in a criminal proceeding, or as an admission in a civil action, the message as tendered to the company for transmission is the original and best proof.<sup>44</sup>

§ 695. Same continued—contents of message delivered to addressee.—Whenever the words which the company actually delivered to the person to whom the message was sent are at issue, the message delivered to such person is the original and best evidence. So, when the message relates to a contract between the sender and addressee, made by means of a telegram, the rule is that the nature of the contract depends upon the message delivered to the addressee; or, in other words, to be more clear on this subject, if the addressee is under legal obligation to obey the telegraphic orders of another, the message transmitted and delivered to him, and not what was intended or directed to be sent, contains the best proof of such facts, and should, therefore, be adduced in evidence,<sup>45</sup> and this, too, without accounting for the message tendered to the company for transmission.<sup>46</sup> This is not, however, always the rule. If, for instance, the addressee suggest that the telegraph company be used as a means to consummate the contract, this fact

<sup>42</sup> Gray on Tel. 233. In *Montgomery v. United States*, 219 Fed. 162, 135 C. A. 60, it was held that the original was one filed at sending office, but a copy of which found at same office was admissible against sender, the accused, without account for original.

<sup>43</sup> *West. U. Tel. Co. v. Hopkins*, 49 Ind. 223; *Conyers v. Postal Cable Co.*, 92 Ga. 619, 19 S. E. 253, 44 Am. St. Rep. 100; *West. U. Tel. Co. v. Blance*, 94 Ga. 431, 19 S. E. 255; *West. U. Tel. Co. v. Smith* (Tex. Civ. App.) 26 S. W. 216; *West. U. Tel. Co. v. Williford* (Tex. Civ. App.) 27 S. W. 700.

<sup>44</sup> *Com. v. Jeffries*, 7 Allen (Mass.) 548, 83 Am. Dec. 712. See, also, *Morgan v. People*, 59 Ill. 58.

<sup>45</sup> *Illinois*.—*Anheuser-Busch Brewing Assoc. v. Hutmacher*, 127 Ill. 652, 21

<sup>46</sup> *Saveland v. Green*, 40 Wis. 431; *Oregon S. S. Co. v. Otis*, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221.



will make the company the agent for the addressee, and the message which was delivered to the company will be the original and best evidence.<sup>47</sup> If the action is based merely on the delay in delivery, the message delivered to the addressee is the best evidence to prove such fact without proof of the message delivered to the company,<sup>48</sup> especially where there is no dispute as to the contents of the two.<sup>49</sup>

§ 696. **Messages given orally for transmission.**—The best evidence to prove the contents of a message given for transmission is not always by a written telegram but in order to exclude as a copy the message transmitted and delivered, it must appear that the message given for transmission was in writing, since there can be no copy of an oral communication.<sup>50</sup> Where it is sought to show by parol evidence the contents of a message delivered to the company's operator, it cannot be objected that the evidence offered was not the best evidence, unless it be shown that the message delivered to the operator was in writing; and since, as a matter of fact, many telegrams are communicated orally by the sender to the operator, the court cannot conclude, without proof, that telegrams given to an operator in any given case were in writing.<sup>51</sup> The general rule would clearly be applicable where it is sought to prove by parol the contents of a message transmitted and delivered, if it appeared that the message transmitted was delivered orally to the recipient without being reduced to writing.<sup>52</sup>

*N. E.* 626, 4 *L. R. A.* 575, affirming 29 *Ill. App.* 316; *Chicago, etc., R. Co. v. Russell*, 91 *Ill.* 298, 33 *Am. Rep.* 54; *Matteson v. Noyes*, 25 *Ill.* 591.

*Kansas.*—*Barons v. Brown*, 25 *Kan.* 414.

*Massachusetts.*—*Nickerson v. Spindell*, 164 *Mass.* 25, 41 *N. E.* 105.

*Minnesota.*—*Wilson v. Minneapolis, etc., R. Co.*, 31 *Minn.* 481, 18 *N. W.* 291; *Magie v. Herman*, 50 *Minn.* 424, 52 *N. W.* 909, 36 *Am. St. Rep.* 660.

*New Hampshire.*—*Howley v. Whipple*, 48 *N. H.* 487.

*New York.*—*Thorp v. Philbin*, 15 *Daly*, 155, 3 *N. Y. Supp.* 939.

*Vermont.*—*Durkee v. Vermont Cent. R. Co.*, 29 *Vt.* 127.

*West Virginia.*—*Merchants' Nat. Bank v. Wheeling First Nat. Bank*, 7 *W. Va.* 544.

<sup>47</sup> *Smith v. Easton*, 54 *Md.* 138, 39 *Am. Rep.* 355. See, also, *Pegram v. West U. Tel. Co.*, 100 *N. C.* 28, 6 *S. E.* 770, 6 *Am. St. Rep.* 557.

<sup>48</sup> *Conyers v. Postal Tel. Cable Co.*, 92 *Ga.* 619, 19 *S. E.* 253, 44 *Am. St. Rep.* 100; *West U. Tel. Co. v. Bates*, 93 *Ga.* 352, 20 *S. E.* 639; *West U. Tel. Co. v. Blance*, 94 *Ga.* 431, 19 *S. E.* 255.

<sup>49</sup> *West U. Tel. Co. v. Fatman*, 73 *Ga.* 285, 54 *Am. Rep.* 877.

<sup>50</sup> *Banks v. Richardson*, 47 *N. C.* 109. In this case it was held that dots and dashes made on paper at the telegraph office cannot constitute the original of a message when the words of the message are put in writing by the operator.

<sup>51</sup> *Terre Haute, etc., R. Co. v. Stockwell*, 118 *Ind.* 98, 20 *N. E.* 650. See, also, *Banks v. Richmond*, 47 *N. C.* 109.

<sup>52</sup> *Durkee v. Vermont Cent. R. Co.*, 29 *Vt.* 127.

§ 697. **Actions to recover statutory penalties and damages.**—In an action against a telegraph company to recover damages or a statutory penalty for failure to transmit and deliver a message with due diligence, the issue being not as to the contents of the telegram, but as to failure or delay in transmission and delivery, the message actually delivered by the company is admissible in evidence without producing or explaining the absence of the message delivered by the sender to the company.<sup>53</sup> There was one case, however, which held that the telegram delivered to the operator was the original and should have been produced.<sup>54</sup> This case has been later disapproved.<sup>55</sup> But it has been held that, if in such an action the contents of the telegram sent are material, the loss by plaintiff of the telegrams received will not lay the foundation for introducing parol evidence of the contents without accounting by notice to produce, or otherwise, for the nonproduction of the telegrams written and delivered by the sender for transmission.<sup>56</sup>

§ 698. **Secondary evidence.**—It is a general rule of evidence that, when written evidence of a fact exists, the writing constitutes the best evidence of the fact; and where the writing is not produced, parol evidence cannot be admitted to prove its contents, unless the absence of the writing is satisfactorily explained. In other words, parol evidence is not admissible in substitution for available written evidence, and the contents of a writing cannot be proved by parol evidence.<sup>57</sup> The contents of a letter may be proved by secondary evidence, where such letter, if existing, would itself be admissible. And this is so when the destruction of such letter is shown to have arisen from misapprehension, and was without any fraudulent purpose, though such destruction was the party's voluntary act.<sup>58</sup> Such evidence must not only appear to be the best secondary evidence, but it must be the best legal evidence obtainable under the circumstances.<sup>59</sup> The rule which governs the ad-

<sup>53</sup> *West. U. Tel. Co. v. Blance*, 94 Ga. 431, 19 S. E. 255; *West. U. Tel. Co. v. Bates*, 93 Ga. 352, 20 S. E. 639; *Conyers v. Postal Tel. Cable Co.*, 92 Ga. 619, 19 S. E. 253, 44 Am. St. Rep. 100; *West. U. Tel. Co. v. Fatman*, 73 Ga. 285, 54 Am. Rep. 877; *West. U. Tel. Co. v. Cline*, 8 Ind. App. 364, 35 N. E. 564. See, also, *West. U. Tel. Co. v. Smith* (Tex. Civ. App.) 26 S. W. 216.

<sup>54</sup> *West. U. Tel. Co. v. Hopkins*, 49 Ind. 223.

<sup>55</sup> *Reliance Lumber Co. v. West. U. Tel. Co.*, 58 Tex. 394, 44 Am. Rep. 620.

<sup>56</sup> *West. U. Tel. Co. v. Hines*, 94 Ga. 430, 20 S. E. 349, disapproving and limiting *Cincinnati, etc., R. Co. v. Disbrow*, 76 Ga. 253. But see *West. U. Tel. Co. v. Thompson*, 18 Tex. Civ. App. 279, 44 S. W. 402.

<sup>57</sup> *Newsom v. Jackson*, 26 Ga. 241, 71 Am. Dec. 206; *Boynton v. Rees*, 8 Pick. (Mass.) 329, 19 Am. Dec. 326; *Johnson v. Arnwine*, 42 N. J. Law, 451, 36 Am. Rep. 527.

<sup>58</sup> *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547.

<sup>59</sup> *Phillipson v. Bates*, 2 Mo. 116, 22 Am. Dec. 444.

mission of secondary evidence of the contents of documents generally apply to the admission of secondary evidence of the contents of a telegraph message. Thus the contents of a telegram cannot be proved by testimony of the person to whom it is sent, without producing the original or accounting for its absence.<sup>60</sup>

§ 699. **Proof of absence of the original.**—As was said, in order to produce secondary evidence of the contents of a message, it must be shown by sufficient proof that the original has been lost, destroyed or is otherwise not obtainable. It is not an easy matter to make a fixed rule by which the admission of such evidence is to be governed, but the circumstances of each particular case must be considered in making such rule. There must be sufficient proof adduced by the party offering such evidence that the original is beyond the jurisdiction of the court, or has been lost or destroyed, and that he has made diligent efforts to find same.<sup>61</sup> Thus, where the employé of the company testified that he worked at the office at which the telegram was received, that the message could not be found there, and that under the rules of the company messages were sent to the head offices to be destroyed after remaining at the receiving office for six months, this is sufficient to show the impossibility of obtaining the original.<sup>62</sup> It is not competent, however, for the messenger of the receiving office to testify from information that the message filed with him had been destroyed by the employés of the head offices.<sup>63</sup> When the employé, who, at the time

<sup>60</sup> McCormick v. Joseph, 83 Ala. 401, 3 South. 796; Whilden v. Merchants', etc., Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1; Yavapai County v. O'Neill, 3 Ariz. 363, 29 Pac. 430; West. U. Tel. Co. v. Hines, 94 Ga. 430, 20 S. E. 349; West. U. Tel. Co. v. Hopkins, 49 Ind. 223; Williams v. Brickell, 37 Miss. 682, 75 Am. Dec. 88; Yeiser v. Cathers, 5 Neb. (Unof.) 204, 97 N. W. 840; Prather v. Wilkens, 68 Tex. 187, 4 S. W. 252; West. U. Tel. Co. v. Williford (Tex. Civ. App.) 27 S. W. 700; Durkee v. Vermont Cent. R. Co., 29 Vt. 127; Cairo, etc., Ry. Co. v. Mahoney, 82 Ill. 73, 25 Am. Rep. 299; Brownlee v. Reiner, 147 Cal. 641, 82 Pac. 324; Nickerson v. Spindell, 161 Mass. 25, 41 N. E. 105; Barons v. Brown, 25 Kan. 410; Blair v. Brown, 116 N. C. 631, 21 S. E. 434; Hallet v. Aggergaard, 21 S. D. 554, 114 N. W. 696, 14 L. R. A. (N. S.) 1251; Cobb v. Glenn Boom, etc., Co., 57 W. Va. 49, 49 S. E. 1005, 110 Am. St. Rep. 734.

<sup>61</sup> Barons v. Brown, 25 Kan. 410; Whilden v. Merchants' Bank, 64 Ala. 1, 38 Am. Rep. 1; Elwell v. Mersick, 50 Conn. 272; West. U. Tel. Co. v. Smith (Tex. Civ. App.) 26 S. W. 216; Hallet v. Aggergaard, 21 S. D. 504, 114 N. W. 696, 14 L. R. A. (N. S.) 1251; Flint v. Kennedy (C. C.) 33 Fed. 820.

<sup>62</sup> Riordan v. Guggerty, 74 Iowa. 688, 39 N. W. 107; West. U. Tel. Co. v. Collins, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515, note; Smith v. Easton, 54 Md. 138, 39 Am. Rep. 355; Oregon Steamship Co. v. Otis, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221, 14 Abb. N. C. (N. Y.) 388. See, also, People v. Hammond, 132 Mich. 422, 93 N. W. 1084; Ward v. Ry. Co. (Tenn. Ch. App.) 57 S. W. 193; West. U. Tel. Co. v. Kemp, 55 Ill. App. 583; Flint v. Kennedy (C. C.) 33 Fed. 820.

<sup>63</sup> American U. Tel. Co. v. Daugherty, 89 Ala. 191, 7 South. 660.



of testifying, but not at the time of receipt, had possession of the papers and books of the office from which the message was transmitted, testified that none of the messages forwarded from the office on the day on which the message was sent were in the office, and that he supposed all such messages had been destroyed, as it was the custom to destroy them after six months, the destruction of same is not established by the testimony of such employé.<sup>64</sup> While the testimony of such employé may prove the absence of the message from the office, yet it would not establish the destruction of it, which could only be done by the officer causing the destruction.<sup>65</sup> It was held in one case that the addressee might testify to the contents of a message where the sender, who was a party to the action, did not deny having sent it and where the contents are set out in the declaration.<sup>66</sup> This is not the rule where the original is not accounted for, but was admitted on the ground of its harmlessness.

§ 700. **Notice to produce.**—In order that secondary evidence may be admitted to prove the contents of a telegram, the rule is that the party offering to produce such evidence should, if the original is in the possession or under the control of the adverse party to the suit, give him sufficient notice to produce it.<sup>67</sup> If the telegram is in the possession of a stranger to the action, and who is not legally bound to produce it, the person offering to produce secondary evidence of its contents must have served a *subpœna duces tecum* upon such stranger. Where the telegram is alleged to have been lost or destroyed, it must be shown, as said, that diligent search has been made for the original.<sup>68</sup> This is the rule where the telegraph company is not made a party to the action, for the rule does not apply where the original message is the foundation of the action, and the adverse party must know from the very nature of the case that it is charged with the possession of it. For instance, in an action against a company for the breach of a contract to communicate a message, the plaintiff need not give the defendant notice to produce that message; he may immediately resort to parol evidence to prove the contents.<sup>69</sup> This rule has been contradicted,<sup>70</sup> but we think that it was wrongly so.

<sup>64</sup> *Barons v. Brown*, 25 Kan. 410.

<sup>65</sup> 1 Greenl. Ev. § 84, note.

<sup>66</sup> *Williams v. Brickell*, 37 Miss. 682, 75 Am. Dec. 88. See, also, *Oregon Steamship Co. v. Otis*, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221.

<sup>67</sup> *Brownlee v. Reiner*, 147 Cal. 641, 82 Pac. 324; *West. U. Tel. Co. v. Kapp*, 35 Tex. Civ. App. 663, 80 S. W. 840. See, also, *Hallet v. Aggergaard*, 21 S. D. 554, 114 N. W. 696, 14 L. R. A. (N. S.) 1251.

<sup>68</sup> *Stephen's Dig. of Ev. arts.* 67, 68; *Matteson v. Noyes*, 25 Ill. 591.

<sup>69</sup> *Reliance Lumber Co. v. West. U. Tel. Co.*, 58 Tex. 394, 44 Am. Rep. 620.

<sup>70</sup> *West. U. Tel. Co. v. Hopkins*, 49 Ind. 223.

§ 701. **What evidence admissible as secondary.**—When it is sufficiently shown that the original telegram cannot be produced to prove its contents, the question which then presents itself is, What evidence should be produced as being the next best evidence? As said elsewhere, when the original or best evidence cannot be produced, the next accessible evidence to prove such fact must be produced.<sup>71</sup> If the company preserves letterpress or other copies of the original telegram which it receives and delivers, it seems that this would be the next best evidence.<sup>72</sup> The office book of these companies is not, however, a shop book or an account book, or any record recognized by law as evidence, and where it only contains a memorandum of the terms of the original message, it can only be used to refresh the memory of the witness, where such usage is the practice. If a copy of the message is kept by authority of the company at either end of the line, or by a connecting company, it seems that it would be admissible as secondary evidence. A telegram written at one end of the line may be introduced as evidence at the other end, it seems, in two different ways: It may be introduced as the original, and when this is the case it must be proved to be the original;<sup>73</sup> or, where the contents of the message delivered to the addressee are at issue,<sup>74</sup> it may be introduced as a fact relative to the fact in issue. It is part of the contract of transmission that the message will be transmitted and delivered in the exact words in which it was received from the sender; and when the issue arises on the incorrectness of the transmission, the original message must be introduced to prove such incorrectness. It was held in one case that, on proof of the destruction of the original telegram, an uncertified copy was admissible on a trial of forgery to show that the respondent at a certain time knew of a material fact therein stated.<sup>75</sup> Where the issue is as to whether the message was ever delivered at all to the addressee, the receipt of the message by such person is the best evidence.

§ 702. **Late improvements in telegraphy.**—We do not think that the late improvements made in telegraphy will change the law heretofore discussed, in any particular, and especially do we think this is true with respect to the rules of evidence herein treated. Of course, in some instances the company will not be liable for errors

<sup>71</sup> *Philipson v. Bates*, 2 Mo. 116, 22 Am. Dec. 444.

<sup>72</sup> *Anglo-American Packing, etc., Co. v. Cannon* (C. C.) 31 Fed. 313.

<sup>73</sup> *Barons v. Brown*, 25 Kan. 410; *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355.

<sup>74</sup> *Com. v. Jeffries*, 7 Allen (Mass.) 548, 83 Am. Dec. 712.

<sup>75</sup> *State v. Hopkins*, 50 Vt. 316.

made in the transmission by means of the late improvements, where it would otherwise be, should the message have been transmitted by the old method. What we mean is this: There is a late invention on the method of transmitting news over telegraph lines, by means of which the sender, instead of the operator, virtually sends or transmits the message himself. In other words, he writes the message himself, and, at the same time, by means of an electric connection of the pencil used by him with another at the receiving office, an exact copy is reproduced at the latter office. A still later improvement is where typewriters are connected instead of an electric connection. Now where these instruments are in good working order, or when the company is not negligent in keeping them in suitable condition, it will not be liable for errors made in the transmission of news, when the sender voluntarily operates the machine himself. The wireless telegraphy is operated wholly by experienced employés of the company and the same liabilities are imposed on them for errors made as those imposed on the ordinary wire telegraph companies.

§ 703. **Same continued—secondary evidence.**—With respect to the proof of the contents of telegrams sent by means of the wireless telegraph, the same rule of evidence is applicable as in the proof of telegrams sent by the ordinary telegraphic method. When it is sent by one of the other methods discussed in the preceding section, the original is the telegram written by the sender at the transmitting office, when the contents of the telegram delivered to the company are attempted to be shown. If this cannot, however, be produced, the next best evidence to prove such fact, as we believe, would be the reproduced copy at the other end of the line. If, however, it is required that a copy of the telegram be kept at the transmitting office, there is a doubt in our minds as to whether this or the reproduced copy at the other end of the line would be the best evidence; but we are inclined to think that, if the contents of the telegram as delivered for transmission are at issue, the copy at the transmitting office would be the best evidence to prove such fact.<sup>76</sup> In other respects, the admission of telegrams as evidence is the same as the admission of such as are sent in the ordinary ways, and which has already been discussed.

§ 704. **Testimony of witnesses.**—When the original cannot be produced, the addressee of the telegram may testify that it was received by him; however, if it is not shown by the admission of such person that he did receive it, such fact must be shown, either by his

<sup>76</sup> See cases in note 41, *supra*.



written receipt for the delivery—if he gave one—or by the oral testimony of some one present when it was delivered. But if there is proof that the message was properly placed upon the wires, and that the person to whom the message was sent was present at the place of destination, it has been held that a presumption of delivery then arises.<sup>77</sup> This presumption is not conclusive, however, but the burden is cast upon the plaintiff to show that it was not delivered to him. This may be proved by parties who were with him when he was in the office, and who could have seen the delivery if such had been made.

§ 705. **Secondary evidence of unstamped contracts.**—It has been held that if a written instrument which is the foundation of the action is not stamped, and is excluded as evidence for that reason, the contract evidenced by such written instrument cannot be proved by parol.<sup>78</sup> We presume the same rule would apply to actions upon which telegrams are the foundation. In an Alabama case it was held that the company would not be liable for negligently transmitting an unstamped telegram.<sup>79</sup> But if the telegram, not being the foundation of the action, is offered in evidence by a person not a party to it, as an admission of the adverse party touching a matter at issue, the fact that it is not stamped is no ground for objecting to its admission.<sup>80</sup> If suit is brought upon the original consideration for which an unstamped note is given, the note is admissible in evidence to explain the testimony of a witness in reference to the date of a settlement between the parties, and the amount found due,<sup>81</sup> and an unstamped telegram containing such facts may be admitted to prove such. This discussion is of little importance just now, as the revenue stamp law has been repealed.<sup>82</sup>

§ 706. **When telegram need not be produced.**—Where a written instrument is only an evidence of a fact in issue, it need not be produced, nor need its absence be satisfactorily accounted for before other evidence of that fact is admissible.<sup>83</sup> Thus a payment of money may be proved by oral testimony, without accounting for the absence of the written receipt.<sup>84</sup> Applying this rule to tele-

<sup>77</sup> *Com. v. Jeffries*, 7 Allen (Mass.) 548, 83 Am. Dec. 712; *U. S. v. Babcock*, 3 Dill, 571, Fed. Cas. No. 14,485. See, also, *State v. Hopkins*, 50 Vt. 316; *Greenl. on Ev.* § 40.

<sup>78</sup> *Mobile, etc., R. Co. v. Edwards*, 46 Ala. 267.

<sup>79</sup> *West. U. Tel. Co. v. Young*, 138 Ala. 240, 36 South. 374.

<sup>80</sup> *Reis v. Hellman*, 25 Ohio St. 180.

<sup>81</sup> *Israel v. Redding*, 40 Ill. 362.

<sup>82</sup> Act Cong. June 13, 1898, c. 448, 30 Stat. 448, and Act March 2, 1901, c. 806, 31 Stat. 938.

<sup>83</sup> *Greenl. on Ev.* § 90; *Taylor on Ev.* (7th Ed.) §§ 415, 416.

<sup>84</sup> *Jacobs v. Lindsey*, 1 East, 460.

graphic messages, it follows that, when the message is merely an evidence of a fact in issue, it need not be produced nor its absence accounted for, before oral testimony may be admitted to prove such fact. Thus, as has been seen, the contents of the telegram delivered to the company for transmission may be proved by oral testimony only when its absence has been satisfactorily accounted for,<sup>85</sup> yet the absence of such message need not be satisfactorily accounted for before the introduction of oral testimony of the genuineness or authorization of the sender. So the delivery of a telegram to the person addressed may be proved orally without accounting for the written receipt for that delivery. So also, where the action is for a delay in the delivery of a message, oral testimony may be introduced to show such delay, without accounting for the message actually delivered, and upon which is noted the exact time of delivery.<sup>86</sup> When a telegram has been altered in transmission, whereby the sender suffers an injury, he may prove by oral testimony that the authorized message was not delivered without accounting for the message as delivered, but if the addressee should institute the action for injuries sustained by acting on a misinformation, he should produce the altered message, or give good reasons for its absence.<sup>87</sup>

<sup>85</sup> See cases in note 60, *supra*.

<sup>86</sup> Where the telegram is not itself the foundation of the action, but the failure to transmit and deliver it within a reasonable time is the gist of the controversy, the fact that the message was delivered for transmission is a substantive fact necessary to be proved, and the last rule does not apply, and parol evidence is not secondary, but primary. *West. U. Tel. Co. v. Cline*, 8 Ind. App. 364, 35 N. E. 564. Where copies of telegrams relating to a matter about which there is no controversy have been filed on a notice, it is proper to permit the operator who received the telegram to state them, when such statement does not materially differ from the copies filed. *International, etc., R. Co. v. Prince*, 77 Tex. 560, 14 S. W. 171, 19 Am. St. Rep. 795; *International, etc., R. Co. v. Cock (Tex.)* 14 S. W. 242.

<sup>87</sup> *Gray on Tel.* § 134. The author gives the following for the reason of the rule: "The delivery of an altered message by a telegraph company causes at times two distinctly different losses. It injures the sender, in depriving him of the benefit that he would have derived through the due and correct communication of his message; it injures the receiver, in causing him to act to his detriment upon an altered message. In an action for the former injury, the fact that the authorized message was not delivered may be proved by oral testimony, without accounting for the absence of the delivered message, showing the exact alteration. In an action for the latter injury, however, the delivered message must be produced or its absence satisfactorily accounted for before oral testimony is admissible. This distinction is due to the following cause: In the former action, the question in issue is whether the correct message was delivered; in the latter, what was the correct message delivered. In the former, the contents of the delivered message, whatever they may be, are simply evidence that the correct message was not delivered; in the latter, they are themselves to be proved, since the action is

§ 707. **Declaration of employés subsequently employed.**—The general rule of agency is that the representations and admissions of agents bind the principal only when they are made while the agent is acting within the actual or apparent scope of his authority.<sup>88</sup> It is also well settled that the declarations concerning a fact in dispute are admissible as part of the *res gestæ* only when they explain and are contemporaneous with such fact and are made without any preparation.<sup>89</sup> In accordance with this rule, where a telegraph company is being sued for a breach of contract, the subsequent acts and declarations of the company's agent, unconnected with the performance of the contract, are not admissible.

§ 708. **Notice by telegram.**—Where a statute requires notice to be given in writing, it has been held that such notice, sent by means of a telegram, was a sufficient compliance with such statute.<sup>90</sup> Thus, where the clerk adjourns court in accordance to an order, sent by means of a telegram, it may be held a sufficient compliance with a statute requiring notice to be in writing.<sup>91</sup> But a notice conveyed by means of a telephone is a verbal one, and is therefore insufficient under a statute requiring notice to be in writing.<sup>92</sup> This is the holding both in the state and federal courts, and is also the ruling in the English courts.<sup>93</sup>

§ 709. **Telephone communication as evidence.**—Conversations carried on by means of a telephone do not differ in their essential characteristics from those carried on verbally.<sup>94</sup> The only apparent difference is that the parties conversing are further apart; there

based upon the exact difference between the contents of the message delivered and those of the message authorized."

<sup>88</sup> Story on Agency, §§ 134-137.

<sup>89</sup> Best on Ev. (7th Ed.) § 495.

<sup>90</sup> *Georgia*.—West. U. Tel. Co. v. Bailey, 115 Ga. 725, 42 S. E. 89, 61 L. R. A. 933, note, notice of writ of certiorari.

*Illinois*.—Morgan v. People, 59 Ill. 58.

*Indiana*.—Kaufman v. Wilson, 29 Ind. 504.

*Iowa*.—State v. Holmes, 56 Iowa, 588, 9 N. W. 894, 41 Am. Rep. 121.

*New Jersey*.—Cape May, etc., R. Co. v. Johnson, 35 N. J. Eq. 422.

*United States*.—Schofield v. Horse Springs Cattle Co. (C. C.) 65 Fed. 433.

*England*.—Haywood v. Wait, 18 W. R. 205; Tomkinson v. Cartledge, 22 Alb. L. J. 1231; In re Bryant, 4 Ch. D. 98, 35 L. 7 U. S. 489, 25 W. R. 230; Ex. p. Langley, 13 Ch. D. 110, 28 W. R. 174.

<sup>91</sup> State v. Holmes, 56 Iowa, 588, 9 N. W. 894, 41 Am. Rep. 121.

<sup>92</sup> Schofield v. Horse Springs Cattle Co. (C. C.) 65 Fed. 433, testing statute U. S. Rev. St. § 672.

<sup>93</sup> Ex parte Apeler, 35 S. C. 417, 14 S. E. 931; South Carolina Code Civ. Proc. 1902, § 408; Schofield v. Horse Springs Cattle Co. (C. C.) 65 Fed. 433.

<sup>94</sup> Young v. Seattle Transfer Co., 33 Wash. 225, 74 Pac. 375, 99 Am. St. Rep. 942, 63 L. R. A. 988. See Jenderson v. Hansen, 50 Mont. 216, 146 Pac. 473; Clough v. West. U. Tel. Co., 99 S. C. 484, 83 S. E. 916.



is generally no difference in the tone of their voices. The telephone is merely a medium by which they are brought together in voice, although far apart in person. The rule of evidence with respect to the admission of oral statements made in an ordinary conversation is generally applicable to conversations of this nature.<sup>95</sup> Such conversations are not rendered incompetent because communications of that character are uncertain, unreliable and easily manufactured. These facts merely affect the weight of the evidence.<sup>96</sup> So a party against whom a telephonic conversation is used may show that the person answering the telephone was a fraud or im-

<sup>95</sup> *Globe Printing Co. v. Stahl*, 23 Mo. App. 451; *People v. Ward*, 3 N. Y. Cr. R. 483; *Young v. Seattle Transfer Co.*, 33 Wash. 225, 74 Pac. 375, 99 Am. St. Rep. 942, 63 L. R. A. 988; *Shawyer v. Chamberlain*, 113 Iowa, 742, 84 N. W. 661, 86 Am. St. Rep. 411. See, also, *Galt v. Woliver*, 103 Ill. App. 71; *Dannemiller v. Leonard*, 8 O. C. D. 735, 15 Ohio Cir. Ct. R. 686; *Southwark Nat. Bank v. Smith*, 21 Pa. Co. Ct. R. 1, 7 Pa. Dist. R. 182; *Wolfe v. Mo. Pac. Ry. Co.*, 97 Mo. 473, 11 S. W. 49, 10 Am. St. Rep. 331, 3 L. R. A. 542; *Mo. Pac. Ry. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861; *Barrett v. Magner*, 105 Minn. 118, 117 N. W. 245, 127 Am. St. Rep. 531. In *Wolfe v. Mo. Pac. Ry. Co.*, supra, the court said: "The courts of justice do not ignore the great improvement in the means of intercommunication which the telephone has made. Its nature, operation and ordinary uses are facts of general scientific knowledge, of which the courts will take judicial notice as part of public contemporary history. When a person places himself in connection with a telephone system through an instrument in his office, he thereby invites communication, in relation to his business, through that channel. Conversations so held are admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be to the relations there carried on. The fact that the voice at the telephone was not identified does not render the conversation inadmissible. The ruling here announced is intended to determine merely the admissibility of such conversations in such circumstances, but not the effect of such evidence after its admission." *West. U. Tel. Co. v. Saunders*, 164 Ala. 234, 51 South. 176, 137 Am. St. Rep. 35; *Gilliland v. So. Ry.*, 85 S. C. 26, 67 S. E. 20, 137 Am. St. Rep. 861, 27 L. R. A. (N. S.) 1106; *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556, 69 Atl. 405, 16 L. R. A. (N. S.) 746; *Willner v. Silverman*, 109 Md. 341, 71 Atl. 962, 24 L. R. A. (N. S.) 895; *Wilson v. Minn., etc., Ry. Co.*, 31 Minn. 481, 18 N. W. 291; *Oskamp v. Gadsden*, 35 Neb. 7, 52 N. W. 718, 37 Am. St. Rep. 428, 17 L. R. A. 440; *Lippitt v. St. Louis Dressed Beef Co.*, 27 Misc. Rep. 222, 57 N. Y. Supp. 747; *Guest v. Hannibal, etc., R. Co.*, 77 Mo. App. 258, may show person answering the telephone was a fraud or imposter; *St. Louis, etc., R. Co. v. Kennedy* (Tex. Civ. App.) 96 S. W. 653; *Fitzgerald v. Benner*, 219 Ill. 485, 76 N. E. 709. In *C. C. Thompson, etc., Co. v. Appleby*, 5 Kan. App. 680, 48 Pac. 933, it was held that ordinarily telephonic communications are considered as binding as if the telegraph or mail was used, notwithstanding that there is no proof that the person receiving the message is the identical person for whom it was intended, provided that it be shown that both telephones were connected with the central telephone office, that the proper number was called for, connections made, and response received from the call. But see *Planters' Cotton Oil Co. v. West. U. Tel. Co.*, 126 Ga. 621, 55 S. E. 495, 6 L. R. A. (N. S.) 1180.

<sup>96</sup> *Shawyer v. Chamberlain*, 113 Iowa, 742, 84 N. W. 661, 86 Am. St. Rep. 411.

poster.<sup>97</sup> Consequently, where one party testifies that a conversation took place over the telephone and the other that no such conversation ever took place, a question of fact for the jury arises as in other cases.<sup>98</sup> Therefore the effect of evidence of communication over the telephone on the issue of the case is a matter for the jury, which may be entitled to little or much weight in the estimation of the jury according to their views of its credibility and of the other testimony in support or in contradiction of it.<sup>99</sup> The same general rules obtain in respect to the admissibility of telephonic conversations in criminal cases as obtain in respect to civil cases.<sup>100</sup>

§ 710. **Identity of person—when essential.**—When a person is connected by telephone with a place of business, or with one with whom he desires to converse, and is answered by some one assuming to be such a person, it will be presumed that he is such person. However, when the communication is of such a nature as to require identification of the individual, there must be evidence of such identity, in addition to the mere fact that the witness asked for a connection with his place of business, and that when the connection was made some one who claimed or assumed to be such person responded.<sup>101</sup> While the identification of the voice of the party responding at the phone has, in many cases, been held sufficient to establish identification *prima facie*, it does not follow that the recognition of the voice is the exclusive means of identifying the party. Surrounding circumstances may be taken into account. This question occasionally arises where an effort is made to bind a person in consequence of a telephone conversation carried on with his employé who is, at the time of such conversation, in the former's place of business. So it has been held that a conversation made by

<sup>97</sup> *Guest v. Hannibal, etc., R. Co.*, 77 Mo. App. 258.

<sup>98</sup> *Galt v. Woliver*, 103 Ill. App. 71; *McCarthy v. Peach*, 186 Mass. 67, 70 N. E. 1029, 1 Ann. Cas. 801.

<sup>99</sup> *Godair v. Ham Nat. Bank*, 225 Ill. 572, 80 N. E. 407, 116 Am. St. Rep. 172, 8 Ann. Cas. 447; *Conkling v. Standard Oil Co.*, 138 Iowa, 596, 116 N. W. 822; *Wolfe v. Mo. Pac. R. Co.*, 97 Mo. 473, 11 S. W. 49, 10 Am. St. Rep. 331, 3 L. R. A. 539.

<sup>100</sup> *Vaughn v. State*, 130 Ala. 18, 30 South. 669; *State v. Usher*, 136 Iowa, 606, 111 N. W. 811; *People v. Ward*, 3 N. Y. Cr. R. 483; *People v. McKane*, 143 N. Y. 455, 38 N. E. 950; *People v. Strollo*, 191 N. Y. 42, 83 N. E. 573; *State v. Nelson*, 19 R. I. 467, 34 Atl. 990, 61 Am. St. Rep. 780, 33 L. R. A. 559; *Stepp v. State*, 31 Tex. Cr. R. 349, 20 S. W. 753. See *Hopkins v. State*, 9 Okl. Cr. 104, 130 Pac. 1101, Ann. Cas. 1915B, 736, self-serving declarations inadmissible.

<sup>101</sup> *Barrett v. Wagner*, 105 Minn. 118, 117 N. W. 245, 127 Am. St. Rep. 531; *Wolfe v. Mo. Pac. Ry. Co.*, 97 Mo. 473, 11 S. W. 49, 10 Am. St. Rep. 331, 3 L. R. A. 539; *Gilliland v. So. Ry. Co.*, 85 S. C. 26, 67 S. E. 20, 137 Am. St. Rep. 861, 27 L. R. A. (N. S.) 1106.

telephone between the plaintiff and a person in the office of the defendant is not admissible to bind the latter in the absence of the identification of such person and evidence that he had at least apparent authority to act for the defendant in the transaction. However, it may be admitted to show that it was held with some one in the office of the defendant in the same manner as would be in case a similar conversation was had face to face with an unknown employé in his office.<sup>102</sup> This is based to a certain extent on the theory that the telephone company has given proper connections with the party desired.<sup>103</sup>

§ 711. **Same—effect of, with unknown persons—agency.**—There are many business matters transacted over the telephone between parties who are entirely unknown to each other; and, when one of these parties is acting in the capacity of agency, in the particular transaction, for some third person, it sometimes becomes very difficult to establish this agency, especially where the voice of the alleged agent is unknown to the party on the other end of the line. But when a person places himself in connection with a telephone system through an instrument in his office, he thereby invites communication in relation to his business through that channel; and, on the ground of necessity, conversations carried on through such

<sup>102</sup> *Kimbark v. Ill. Car, etc., Co.*, 103 Ill. App. 632; *Godair v. Ham Nat. Bank*, 225 Ill. 572, 80 N. E. 407, 116 Am. St. Rep. 172, 8 Ann. Cas. 447. In the case last cited a telephone conversation between a bank cashier and some one in the business office of a commission house about a business matter, and as to whether certain drafts would be paid, together with a reply in the affirmative, was admitted in evidence, although the cashier did not know with whom he was talking. But in a homicide case testimony of a witness to the effect that on the night of the homicide he received a telephonic message purporting to come from the deceased is not admissible where the witness did not know or recognize the voice of the person telephoning. Such evidence is merely hearsay. *Vaughn v. State*, 130 Ala. 18, 30 South. 669. But where a witness in a criminal case, testifying to statements made by the defendant over the telephone, testifies that he knew and distinguished the defendant's voice, the evidence is admissible. *Stepp v. State*, 31 Tex. Cr. R. 349, 20 S. W. 753. Likewise admissions of a defendant made over the telephone are admissible, even though the witness did not at the time know defendant or recognize his voice, where there is other evidence proving the conversation. *People v. McKane*, 143 N. Y. 455, 38 N. E. 850. But in an action by a wife for alienation of her husband's affection, where declarations of the defendant over the phone are not identified as having been made by the defendant, they are not admissible, since the identity of the declarant is essential. *Dunham v. McMichael*, 214 Pa. 485, 63 Atl. 1007. Where the surrounding circumstances leave no doubt concerning the identity of the persons communicating by telephone and are their authority in the matter under discussion, the evidence is admissible. *Harri-son Granite Co. v. Pa. Ry. Co.*, 145 Mich. 712, 108 N. W. 1081.

<sup>103</sup> *Guest v. Hannibal, etc., R. Co.*, 77 Mo. App. 258.



medium are generally admissible.<sup>104</sup> Furthermore, when a person is placed in telephonic connections with the place of business of one with whom he desires to converse, and is answered by some one assuming to be this person, it will be presumed that he is such person, although the former is not acquainted with his voice;<sup>105</sup> however, this presumption may be overcome by proof to the contrary.<sup>106</sup> So, where a person is placed, by request, in telephonic connection with an office and discusses business matters there with a person who claims to have authority to act therein, the fact that he did not remember who spoke to him through the telephone, nor could state the name of such person, or whether he was an agent of the person with whom he desired to transact business, does not affect the competency of the testimony when he recognized the voice of the person answering at the time as an employé with whom he had previously transacted business by telephone at such office.<sup>107</sup> In other words, such conversation is similar to an interview of the same character with an unknown person found in charge of a place of business.<sup>108</sup> It may be observed that conver-

<sup>104</sup> *Globe Ptg. Co. v. Stahl*, 23 Mo. App. 451; *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556, 69 Atl. 405, 16 L. R. A. (N. S.) 746.

<sup>105</sup> *Guest v. Hannibal, etc., R. Co.*, 77 Mo. App. 258; *Gilliland v. So. Ry. Co.*, 85 S. C. 26, 67 S. E. 20, 137 Am. St. Rep. 861, 27 L. R. A. (N. S.) 1106.

<sup>106</sup> *Globe Ptg. Co. v. Stahl*, 23 Mo. App. 451. See *Planters' Cotton Oil Co. v. West. U. Tel. Co.*, 126 Ga. 621, 55 S. E. 495, 6 L. R. A. (N. S.) 1180.

<sup>107</sup> *Mo. Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861; *Knickerbocker Ice Co. v. Gardiner Co.*, 107 Md. 556, 69 Atl. 405, 16 L. R. A. (N. S.) 746.

<sup>108</sup> *West. U. Tel. Co. v. Rowell*, 153 Ala. 295, 45 South. 73. In *General Hospital Soc. v. New Haven Rendering Co.*, 79 Conn. 581, 65 Atl. 1065, 118 Am. St. Rep. 173, 9 Ann. Cas. 168, a conversation over telephone between a hospital employé, who was in charge of telephone calls, and a person purporting to be connected with the defendant asking for the dispatch of an ambulance to defendant's place of business for two men who had been severely hurt, was offered in evidence. The court, in admitting the evidence, said: "This testimony was plainly admissible. A conversation by telephone between an agent of the plaintiff at its office with a person in the office of the defendant speaking for defendant, unaccompanied by evidence that the person speaking for the defendant was authorized to use the defendant's telephone for the purpose of communicating messages from the office of the defendant, other than a presumption arising from the use of the defendant's telephone in the defendant's office and a course of business and experience necessarily involved in the use of this instrumentality for communication, is *prima facie* permissible for any purpose that a conversation with a person at the office of the defendant, who is apparently in charge of the office as the defendant's representative, would be admissible. *Rock Island, etc., Ry. Co. v. Potter*, 36 Ill. App. 590; *Reed v. Burlington, etc., R. Co.*, 72 Iowa, 166, 2 Am. St. Rep. 243, 33 N. W. 451; *Wolfe v. Mo. Pac. Ry. Co.*, 97 Mo. 473, 11 S. W. 49, 10 Am. St. Rep. 331, 3 L. R. A. 539. The fact that a person in the defendant's office, apparently in charge as its representative, told the plaintiff to send an ambulance, as testified, is a fact relevant to the issues raised

sations conducted by means of the telephone with unknown parties claimed to be agents are admissible when such unknown person assumes to act in this capacity, but when such fact is not acknowledged or assumed, the courts do not agree whether the mere conversation is sufficient evidence of agency to make it relevant to the issue in the case. Some of the courts will allow the introduction of such conversations, while others require evidence of strong circumstances showing a customary course of dealing or some ratification of the acts of the person so assuming to act as agent. Some of the courts have refused such conversations to be admitted under circumstances where they would, under the rule followed in most courts, have been allowed.<sup>109</sup> It does not seem, however, that the rule of evidence in establishing agency in cases of this kind should be different from that in any other form of communication, except that it may be more difficult to be proved in the case of a telephonic conversation with an unknown person.

**§ 712. Same—what constitutes sufficient proof of identity—burden of proof.**—When material to the issues in the case, communications through the medium of the telephone may be shown in the same manner, and with like effect, as conversations had between individuals face to face, but the identity of the party sought to be charged with a liability must be established by some testimony, either direct or circumstantial. It is not always necessary that the voice of the party answering, or of either party, for that matter, be recognized by the other in such conversations, but the identity of the person or persons holding the conversation, in order to fix a liability upon them or their principals, must in some manner be shown. To hold parties responsible for answers made by unidentified persons, in response to calls at the telephone from their offices or places of business concerning their affairs, opens the door for fraud and imposition, and establishes a dangerous precedent, which is not sanctioned by any rule of law or principle of ethics. A party relying or acting upon a communication of that character takes the risk of establishing the identity of the person conversing with him

by the pleadings." *Lincoln Mill Co. v. Wissler*, 4 Neb. (Unof.) 675, 95 N. W. 857, when both the plaintiff and defendant testify that there was but one conversation over the telephone between them, and agree as to the substance of it, but not as to its date, it is immaterial that the party offering the conversation in evidence could not identify the employé of the other party who answered his telephone call. *Godair v. Ham Nat. Bank*, 225 Ill. 572, 80 N. E. 407, 116 Am. St. Rep. 172, 8 Ann. Cas. 447.

<sup>109</sup> *Obermann Brewing Co. v. Adams*, 35 Ill. App. 540; *Conkling v. Standard Oil Co.*, 138 Iowa, 596, 116 N. W. 822; *Wolfe v. Mo. Pac. Ry. Co.*, 97 Mo. 473,

at the other end of the line.<sup>110</sup> But the mere fact that a conversation is by means of a telephone does not place any greater burden of proof on the party introducing it than that involved in any other oral contract.<sup>111</sup> The case may be made out by direct or circumstantial evidence, and it is not necessary that the voice of either person be recognized, but if the identity of the person conversing be shown, this will be sufficient.<sup>112</sup> The identity of the person may

11 S. W. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331; *Rock Island, etc., R. Co. v. Potter*, 36 Ill. App. 590; *Planters' Cotton Oil Co. v. West. U. Tel. Co.*, 126 Ga. 621, 55 S. E. 495, 6 L. R. A. (N. S.) 1180; *Eastlick v. So. R. Co.*, 116 Ga. 48, 42 S. E. 499; *Young v. Seattle Transfer Co.*, 33 Wash. 225, 74 Pac. 375, 99 Am. St. Rep. 942, 63 L. R. A. 988.

<sup>110</sup> *Young v. Seattle Trans. Co.*, 33 Wash. 225, 74 Pac. 375, 99 Am. St. Rep. 942, 63 L. R. A. 988.

<sup>111</sup> *Herendeen Mfg. Co. v. Moore*, 66 N. J. Law, 74, 48 Atl. 525.

<sup>112</sup> In *Young v. Seattle Transfer Co.*, 33 Wash. 225, 74 Pac. 375, 99 Am. St. Rep. 945, 63 L. R. A. 988, the court said: "When material to the issue, communication through the medium of the telephone may be shown in the same manner, and with like effect as conversations had between individuals face to face, but the identity of the party sought to be charged with a liability must be established by some testimony, either direct or circumstantial. It is not always necessary that the voice of the party answering, or of either party, for that matter, be recognized by the other in such conversations, but the identity of the person or persons holding the conversation, in order to fix a liability upon them or their principals, must in some manner be shown. To hold parties responsible for answers made by unidentified persons in response to call at the telephone from their offices or places of business concerning their affairs opens the door for fraud and imposition, and establishes a dangerous precedent, which is not sanctioned by any rule of law or principle of ethics of which we are aware. A party relying or acting upon a communication of that character takes the risk of establishing the identity of the person conversing with him at the other end of the line." *Wolfe v. Mo. Pac. R. Co.*, 97 Mo. 473, 11 S. W. 49, 10 Am. St. Rep. 331, 3 L. R. A. 539; *Godair v. Ham Nat. Bank*, 225 Ill. 572, 80 N. E. 407, 116 Am. St. Rep. 172, 8 Ann. Cas. 447; *Gen. Hospital Soc. v. New Haven Rendering Co.*, 79 Conn. 581, 65 Atl. 1065, 118 Am. St. Rep. 173, 9 Ann. Cas. 168; *Shawyer v. Chamberlain*, 113 Iowa, 742, 84 N. W. 661, 86 Am. St. Rep. 411. Where a witness testifies that he conversed with a certain person over the telephone, it clearly implies that he recognized his voice. *Galt v. Woliver*, 103 Ill. App. 71; *State v. Usher*, 136 Iowa, 606, 111 N. W. 811. The testimony of a witness that he recognized defendant's voice over the telephone is sufficient identification to justify admission of the conversation in evidence. *Lord Electric Co. v. Morrill*, 178 Mass. 304, 59 N. E. 807. In *Murphy v. Jack*, 142 N. Y. 215, 36 N. E. 882, 40 Am. St. Rep. 590, the court said: "There would be no objection to the information having been conveyed through the medium of the telephone, if it had been made to appear that the affiant was acquainted with the plaintiff, and recognized his voice, or if it had appeared in some satisfactory way that he knew it was the plaintiff who was speaking with him. None of these facts, however, were averred. There was absolutely nothing upon which the judge could pass to show that it was the plaintiff who was speaking and not some undisclosed person, who, in the plaintiff's name, furnished to the attorney the information made use of. The perfection to which the invention of the telephone has been brought has immensely facilitated the intercommunication of individuals at distant points,



be shown by a person who had a previous conversation with him in any similar manner;<sup>113</sup> but the plaintiff cannot, in support of

and inasmuch as the voice of the speaker is heard in most, if not in all, cases, the identification of the speaker should be possible, the very faculty of communication and identification, and therefore imposes a duty upon the party who invokes judicial action upon the strength of information so received to state his knowledge, or his grounds for believing, that it actually came from the party who furnished it." *Conkling v. Standard Oil Co.*, 138 Iowa, 596, 116 N. W. 822, telephonic conversation may be repeated in evidence where otherwise admissible. The surrounding circumstances may be taken into consideration. *Godair v. Ham Nat. Bank*, 225 Ill. 572, 80 N. E. 407, 116 Am. St. Rep. 172, 8 Ann. Cas. 447; *Barrett v. Magner*, 105 Minn. 118, 117 N. W. 245, 127 Am. St. Rep. 531; *Wolfe v. Mo. Pac. R. Co.*, 97 Mo. 473, 11 S. W. 49, 10 Am. St. Rep. 331, 3 L. R. A. 539; *People v. McKane*, 143 N. Y. 455, 38 N. E. 950. Thus, where it was understood that the agent of the plaintiff would call up defendant over the telephone regarding certain transactions in a few days, and in a few days he was called up by some one in relation to the matter who, in a subsequent personal conversation held pursuant to the telephonic one, admitted he was the party who had telephoned, the identification is sufficient. *Deering v. Shumpik*, 67 Minn. 348, 69 N. W. 1088; *Kansas City Star P. Co. v. Standard Warehouse Co.*, 123 Mo. App. 13, 99 S. W. 765. Where a witness seizes telephonic connection with a place of business of a party and some one answers stating that the individual wanted is outside, but will be called in, and very soon thereafter another voice answered and a conversation takes place concerning a business transaction of the same tenor as one which occurred a few days previous in a personal conversation between the same parties, the evidence is admissible. *Barrett v. Magner*, 105 Minn. 118, 117 N. W. 245, 127 Am. St. Rep. 535; *People v. Strollo*, 191 N. Y. 42, 83 N. E. 573, evidence admitted although the witness was not acquainted at the time with the defendant's voice, but became so subsequently. But, contrary to the last case, see *Dunham v. McMichael*, 214 Pa. 485, 63 Atl. 1007.

<sup>113</sup> In the case of *Globe Print. Co. v. Stahl*, 23 Mo. App. 451, the court said: "The sole question which arises upon the record is whether the court erred in admitting evidence of a conversation heard through a telephone between the plaintiff's bookkeeper and a person who answers to the defendant's name. The bookkeeper testifies that he called up by telephone to the general office of the Bell Telephone Company for the defendant's number, and was, by the central office, connected therewith; that the list of the telephone company showed that the defendant had two telephones, one at his undertaking establishment on Franklin avenue, in the city of St. Louis, and the other at his livery stable, on Olive street; that witness was not certain which number he called, but that his best recollection was that it was the Olive street number; that there was an answer from the defendant's number to the telephone call; that he (the witness) did not know whose voice it was, and does not know; that the witness did not know the defendant's voice and did not know the defendant, but that he asked, through the telephone, if that was Stahl (the defendant), and the answer was 'Yes.' The witness was then asked to give the conversation then had through the telephone with the party answering the call. In response to this question the witness testified, against the objection of the defendant, 'that he asked why defendant did not pay the bill for which this suit was brought, and that the party answering said, "All right; I will attend to the matter about the first of the month."' A previous witness had testified for the plaintiff to a conversation through the telephone in a similar manner with the defendant, whose voice the former witness identified." The court ruled that the testimony was admissible.

his statement of such conversation, prove that he repeated at the time to a third person the answer received over a telephone.<sup>114</sup> It is true that a party may be misled by a conversation over a telephone. The acts and expressions of the person talking may be often followed in ascertaining what he means, and this, of course, cannot be considered while communicating by means of the telephone. But, in an ordinary and natural conversation, the identity of the person may be established by means of hearing such person talk, or other circumstances, quite as readily, though possibly not as certainly as if he had seen such person.<sup>115</sup> The fact that the witness, who testifies to a conversation between himself and another, did not recognize the other's voice does not affect the admissibility of his evidence but only its weight.<sup>116</sup> The same rule applies to a case where the witness, in an action against a carrier, testifies that he demanded the goods in question from the defendant's agent, through the telephone, but that he did not remember the name of the agent on whom he made the demand,<sup>117</sup> or at which office, where the defendant had two, he had called.<sup>118</sup>

§ 713. *Testimony of bystanders.*—Where it is admitted that a conversation was had over a telephone at a certain time, a bystander, at one end of the line, hearing what was said by the party at that place, but not hearing the replies thereto, nor knowing who was talking at the other end of the line, may testify as to what he heard.<sup>119</sup> But a statement made by this party to him or to another

<sup>114</sup> *German Savings Bank v. Citizens' Nat. Bank*, 101 Iowa, 530, 70 N. W. 769, 63 Am. St. Rep. 399. See, also, *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861; *Cent. U. Tel. Co. v. Falley*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 135.

<sup>115</sup> *Shawyer v. Chamberlain*, 113 Iowa, 742, 84 N. W. 661, 86 Am. St. Rep. 411; *Wolfe v. Missouri Pac. R. Co.*, 97 Mo. 473, 3 L. R. A. 539, 10 Am. St. Rep. 331, 11 S. W. 49; *Sullivan v. Kuykendall*, 82 Ky. 483, 56 Am. Rep. 901. See *German Savings Bank v. Citizens' Nat. Bank*, 101 Iowa, 530, 70 N. W. 769, 63 Am. St. Rep. 399.

<sup>116</sup> *Wolfe v. Missouri Pac. R. Co.*, 97 Mo. 473, 11 S. W. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331; *Globe Print. Co. v. Stahl*, 23 Mo. App. 451. See *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556, 69 Atl. 405, 16 L. R. A. (N. S.) 746.

<sup>117</sup> *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861. See, also, *Rock Island, etc., R. Co. v. Potter*, 36 Ill. App. 590.

<sup>118</sup> *Globe Print. Co. v. Stahl*, 23 Mo. App. 451.

<sup>119</sup> *Miles v. Andrews*, 153 Ill. 267, 38 N. E. 644. In *McCarthy v. Peach*, 186 Mass. 67, 70 N. E. 1629, 1 Am. Cas. 801, the court said: "We think that the evidence was rightly admitted. The analogies furnished by conversations between parties through an interpreter, and conversations in a loud tone by one party and a whisper by the other, are not altogether complete. In such cases the third party who testifies to more or less of a conversation, as the case may be, is in the presence of the persons whose conversation he undertakes to repeat, and therefore has personal knowledge in respect to the

bystander in his presence of what was said by the other party at the other end of the line would be hearsay evidence, and therefore inadmissible. It is possible, however, that the bystander heard also the party at the other end of the line, and if he did, what was said would be admissible, even though he could not identify the person or his voice.<sup>120</sup>

§ 714. **When operator or third person converses.**—Where two parties desire to communicate by means of a telephone, but on account of inexperience in the use of a phone, or on account of atmospheric hindrance, one of them is unable to carry on his part of the conversation, whereby an operator in the employ of the company or some third person at the other end of the line is called on to carry on the conversation, he is deemed the agent of the party who invokes his aid and is competent to prove the message or conversation by his principal.<sup>121</sup> If such operator or third person has

parties of the conversation, though he may not hear or understand all that is said by the principals. In the present case the witness had no personal knowledge as to the identity of the other party to the alleged conversation, or that there was any other party, or, if there was, that he heard what the plaintiff purported to say to him. It is not contended that the mere fact that the conversation was over a telephone rendered what the witness testified to incompetent. *Lord Elec. Co. v. Morrill*, 178 Mass. 304, 59 N. E. 807. The evidence that was admitted cannot be regarded as hearsay evidence, or declarations made by the plaintiff in his own interests, simply because the witness did not know, of his own knowledge, that the other party of the alleged conversation was the defendant, or that there was any other party or that defendant heard what purported to be said to him. If the alleged conversation took place as the plaintiff testified it did, then what the plaintiff said was admissible as part of it. Whether it did take place as alleged, or was fictitious, was a question of fact for the jury. It could not be ruled, as matter of law, that there was no evidence of a conversation between the plaintiff and defendant of which what was testified to by the witness constituted a part." See *Clough v. West. U. Tel. Co.*, 99 S. C. 484, 83 S. E. 916.

<sup>120</sup> *German Savings Bank v. Citizens' Bank*, 101 Iowa, 530, 70 N. W. 769, 63 Am. St. Rep. 399. See *Willner v. Silverman*, 109 Md. 341, 71 Atl. 932, 24 L. R. A. (N. S.) 895.

<sup>121</sup> *Sullivan v. Kuykendall*, 82 Ky. 483, 56 Am. Rep. 901. In this case the parties did not have a conversation directly with each other over the telephone, but the conversation was conducted by an operator in charge of a public telephone station at one end of the line. It was held that the conversation was admissible in evidence and that it was competent for the person receiving the message to state what the operator at the time reported as being said by the sender. The court in the opinion says: "When using the telephone, if he knows that he is talking to the operator, he also knows that he is making him an agent to repeat what he is saying to another party; and, in such a case, certainly the statements of the operator are competent, being the declarations of the agent, and made during the progress of the transaction. If he is ignorant whether he is talking to the person with whom he wishes to communicate or with the operator, or even any third party, yet he does it with the expectation and intention on his part that in case he is not talking with the one for whom the information was intended it will



forgotten what was said in the conversation, it may be proved by witnesses who heard him when the statements were made to the party for whom he was conversing.<sup>122</sup> It seems that the identity of the person at the other end of the line may be proven by such operator or third person whether he was acting as agent in such conversation, or whether his voice was recognized in a casual way, while such person was conversing with the party at the place at which the operator was stationed.

**§ 715. Operator as interpreter.**—It is a general rule that where one, through an interpreter, makes statements to another, the interpreter's statements, made at the time, of what was said, are competent evidence against the party. The interpreter need not be called to prove it, but his statements made at the time may be proved by third persons who were present and heard it.<sup>123</sup> The reason of the rule is that the interpreter is the agent of both parties and acting at the time within the scope of his authority. So it has been held that, when an operator at some intermediate point on the line volunteers to aid and assist two parties to converse over the line where they are prevented from talking themselves, each to each, by atmospheric hindrances, such operator acts in the capacity of interpreter or as the agent for both parties, and statements made by one of such parties to such operator may be used against the other.<sup>124</sup> Such statements are not given as hearsay evidence, but are competent because it is the declaration of an agent made during the progress of a transaction in which he represents his principal.<sup>125</sup>

**§ 716. Bills and notes—presentment by telephone.**—A great majority of the cases hold that a presentment of the bill or note, or other commercial paper, and demand of payment should be made by an actual exhibition of the instrument itself, in order to effect

be communicated to that person; and he thereby makes the person receiving it his agent to communicate what he might have said. This certainly should be the rule as to an operator, because the person using the telephone knows there is one at each station whose business it is to so act; and we think that the necessities of a growing business require this rule, and that it is sanctioned by the known rules of evidence." *Conkling v. Standard Oil Co.*, 138 Iowa, 596, 116 N. W. 822; *Neb. Nat. Bank v. Burke*, 44 Neb. 234, 62 N. W. 452; *Herendeen Mfg. Co. v. Moore*, 66 N. J. Law, 74, 48 Atl. 525. See, contra, *Wilson v. Coleman*, 81 Ga. 297, 6 S. E. 693.

<sup>122</sup> *Sullivan v. Kuykendall*, 82 Ky. 483, 56 Am. Rep. 901.

<sup>123</sup> *Camerlin v. Palmer Co.*, 10 Allen (Mass.) 539; *Schearer v. Harber*, 36 Ind. 536; 1 Greenl. Ev. § 183; 1 Phill. Ev. 519.

<sup>124</sup> *Oskamp v. Gadsden*, 35 Neb. 7, 52 N. W. 718, 37 Am. St. Rep. 428, 17 L. R. A. 440, note.

<sup>125</sup> *West. U. Tel. Co. v. Wells*, 50 Fla. 474, 39 South. 838, 2 L. R. A. (N. S.) 1072, 111 Am. St. Rep. 129, 7 Ann. Cas. 531; *Oskamp v. Gadsden*, 35 Neb. 7, 52 N. W. 718, 37 Am. St. Rep. 428, 17 L. R. A. 440, note.

its dishonor, notice of which the holder should give in order to charge those secondarily liable; or, at least, the demand of payment should be accompanied by some clear indication that the instrument is at hand ready to be delivered.<sup>126</sup> So it has been held that a demand by telephone of the maker for payment of a note which is payable at his residence is not a sufficient presentment to charge the indorser thereon, although the one making the demand has the instrument in his possession at the time the demand is made.<sup>127</sup>

<sup>126</sup> *Citizens' Bank v. First Nat. Bank*, 135 Iowa, 605, 113 N. W. 481, 13 L. R. A. (N. S.) 303; *Bank v. Cameron*, 7 Barb. (N. Y.) 143; *Musson v. Lake*, 4 How. 262, 11 L. Ed. 967; *Farmers' Bank v. Duvall*, 7 Gill & J. (Md.) 78; *Peet v. Dougherty*, 7 Rob. (La.) 85; *Union Bank v. Lea*, 7 Rob. (La.) 76, 41 Am. Dec. 275; *Freeman v. Boynton*, 7 Mass. 483; *Shaw v. Reed*, 12 Pick. (Mass.) 132; *Fisher v. Beckwith*, 19 Vt. 31, 46 Am. Dec. 174; *Waring v. Betts*, 90 Va. 46, 17 S. E. 739, 44 Am. St. Rep. 890; *Porter v. Thom*, 40 App. Div. 34, 57 N. Y. Supp. 479, affirmed in 167 N. Y. 584, 60 N. E. 1119.

Acceptance of draft by telegram may be done. See *First National Bank v. Muskogee Pipe Line Co.*, 40 Okl. 603, 139 Pac. 1136, L. R. A. 1916B, 1021.

<sup>127</sup> *Gilpin v. Savage*, 201 N. Y. 167, 94 N. E. 656, Ann. Cas. 1912A, 861, 34 L. R. A. (N. S.) 417; *State Nat. Bank v. Kennedy*, 145 App. Div. 669, 130 N. Y. Supp. 412. The court, in the first case cited, reverses the conclusion reached in the same case in 60 Misc. Rep. 605, 112 N. Y. Supp. 802, affirmed in 132 App. Div. 948, 118 N. Y. Supp. 1108. He said: "Was the note in this case presented at No. 507 Prospect avenue, the place of payment named in the note, within the reasonable meaning of the statute? We think it was. At the time of the conversation between the maker and the bank officials over the telephone, the maker was actually at the place of payment. The talk was immediately between him and the holder of the note. For every purpose of demand and refusal, it was just as effective as though the conversation had taken place between the parties when all were within the walls of the house itself. The maker knew perfectly well that a demand was, then and there, made upon him for the payment of the note in question, and he was then and there called upon to act. He did act, and treated it as a demand for payment and declined to pay. He did not question the mode or manner of payment, but declared his inability to meet the note, and made claim to some arrangement for its renewal. Of course, the maker had the right to have insisted on the exhibition of the note to him, as evidence of the banker's authority to collect. That right was a right, however, personal to the maker, and, by not demanding its production, he waived it. If, on demand of payment, exhibition of commercial paper is not asked, and a party to whom demand is made declines to pay on other grounds, a mere formal presentation by actual exhibition of the paper will be considered waived." And then, upon the validity of a telephonic presentation, the same learned justice continued: "It seems to the court that all the essentials of a good presentation were met. It was made on the day of the maturity of the note. The note was described to the maker in a conversation with the maker at the place of payment; payment was asked and declined. So far as the maker was concerned, all that he required was done. The indorser could not well demand more for his own actual protection. All that remains to the indorser is the purely technical ground of a failure to produce the note itself at the house, \* \* \* which would have resulted in the same refusal of payment made over the telephone. \* \* \* The telephone is simply an instrument by which two persons may talk directly to each other. Suppose the

§ 717. **Oaths admissible by means of telephone.**—Conversations can be carried on by means of the telephone almost as easily as if the parties were together, face to face. Of course, there may be some hindrances to prevent this, but as a usual thing, where the lines are in good working order, communication can be as easily effected by this means as by personal conversation; and where the identity of either or both of the parties is known, there is no reason why the same business and legal transactions—where it is not necessary for the same to be in writing—may not be conducted by this means as easily as if the parties were together in person. For instance, in cities and towns, as is known, orders, sales, purchases, and many other business transactions are made almost exclusively by the telephone. Orders of the court—where it is not necessary for them to be in writing—may be made through this means. We see no reason why an oath may not be administered by means of the telephone, where the identity of the party making same is known; and it has been held that an acknowledgment of a deed made to a notary over a telephone followed by a certificate in proper form was good under all circumstances unless vitiated by fraud.<sup>128</sup> If,

holder of a note should call to the maker from across the street, as the maker stood in his doorway, and notified him that he had his note and asked payment. Would not such a demand be deemed in law a proper presentment, although the streets separated the person holding the note and the actual place of payment? Can it make any substantial difference because the person holding the note happens to be some blocks away, provided he is able to reach the maker over the telephone and talk directly to him in that way? The law simply requires substantial compliance in reference to proper presentment, and will not strain to find grounds for releasing and indorsing, where there has been such a substantial compliance, and any omission to observe the more technical rules does not work to the prejudice of the endorser." See *C. C. Thompson & Co. v. Appleby*, 5 Kan. App. 680, 48 Pac. 933. See, also, *West. U. Tel. Co. v. Louissell*, 11 Ala. App. 563, 66 South. 839.

<sup>128</sup> In *Banning v. Banning*, 80 Cal. 271, 22 Pac. 210, 13 Am. St. Rep. 156, the validity of an acknowledgment was questioned upon the ground that at the time the deed was acknowledged by the defendant, who was "not visibly, and, therefore, not personally, present before the notary at the time he took her acknowledgment through a telephone, she then being three miles distant from him." To this objection the court said: "It is admitted that the certificate of the notary is in due form; and it is not alleged or pretended by the defendant that she did not voluntarily sign and deliver the deeds; nor that she did not voluntarily, and without the hearing of her husband, acknowledge the execution of them through the telephone, after having been informed by the notary of their contents; nor that any deception or fraud was practiced to induce her to execute the deeds; nor even that the plaintiff had notice of the manner in which it is alleged that she acknowledged the execution through the telephone. These particulars are not stated for the purpose of maintaining that, under any circumstances, an acknowledgment of a deed may be taken through a telephone, but for the sole purpose of showing that there is no pretense of fraud, duress, or mistake." The court held that the acknowledgment in the case at bar was valid.



however, it should be necessary for the party to attach his signature to the instrument of writing at the time the acknowledgment is taken, or if the statute under which the oath is administered requires the personal presence of the affiant, the rule would be otherwise.<sup>129</sup>

**§ 718. Telephonic communication as basis for affidavit—discharge of jury.**—It seems to be a general rule that an affidavit in support of an attachment, whether made by the creditor himself or by his agent, must allege in positive terms the grounds for the attachment, and that information and belief cannot supply the place of such positive allegation. The affiant, in such cases, is not, however, required to have a personal knowledge of the facts required to

<sup>129</sup> *Wester v. Hurt*, 123 Tenn. 508, 130 S. W. 842, Ann. Cas. 1912C. 329, 30 L. R. A. (N. S.) 358. In *Sullivan v. First Nat. Bank*, 37 Tex. Civ. App. 228, 83 S. W. 421, it was held that an oath required by statute to be made by the affiant in the personal presence of the officer could not be administered over the telephone, although the officer recognized the voice of the affiant. The court said: "The law requires the affiant to be in the personal presence of the officer administering the oath; and to the end that the officer may know him to be the person he represented himself to be, for it is not required that the affiant be identified or introduced, or to be personally known to the officer, but to the end that he be certainly identified as the person who actually took the oath." And then, in considering the question with relation to a possible prosecution for perjury, the court continued: "It may be true that the officer, when he takes the affidavit of one well known to him, might recognize his voice over the telephone, and therefrom be able to testify that he took the oath and made the affidavit in issue. But it must be borne in mind that the law does not require the clerk or notary to be acquainted with one who becomes an affiant before them; a stranger may appear, sign an affidavit, and demand that the officer swear him and affix his jurat. In that case the officer certifies and can swear to no more than that the man who affixed the name to the affidavit swore to its truth. The name he signed may have been fictitious, but the individual swore to it, as the clerk or notary certified, and he would be subject under that name, or its true one take for perjury. Now, if the contention of appellant is sound (personal presence of affiant was not required), the rule must be laid down broadly, and whoever might demand the official jurat by his personal presence might also demand it over the telephone. Had it not so happened in this case that the clerk was acquainted with Sullivan and identified him by his voice, he could have done no more than certify that a man whom he did not know, out who represented himself to be Sullivan, authorized the name of Sullivan to be signed to the affidavit and swore its contents were true. The clerk could not possibly identify him as the one making the affidavit if the question should afterwards arise. In a prosecution for perjury, much testimony on the part of the clerk would not even raise an issue against the unknown affiant. So we hold that not only is the personal presence of the affiant required to the end that by appropriate form and ceremony his conscience may be bound, but that it is required \* \* \* that the officer may see and know that the man who signs also swears. No modern business necessity requires the broadening of these rules. To allow the contention of appellant would be to open a broad door for fraud and imposition, and hold out to the perpetrators a tempting chance for immunity of discovery and identification."

be stated; but it is essential that his information must appear to have been completely derived. So it has been held that an affidavit for attachment made on information and belief is not sufficient to support an attachment where such information or belief of the affiant is based upon the statement of the plaintiff and his attorney to him over the telephone, unless it appears that the affiant was acquainted with the plaintiff, and recognized his voice, or it appears in some satisfactory way that he knew it was the plaintiff speaking to him.<sup>130</sup> So also, in a question somewhat similar to the above, it was held that a report made by an officer in attendance upon the court over the telephone of the illness of a juror, and his inability to proceed with the trial is not sufficient evidence of this fact to warrant the court in discharging a jury in a criminal case and to thereby preserve to the defendant his constitutional rights.<sup>131</sup>

**§ 719. Serving subpoena by telephone.**—Where the statute prescribing the method by which subpoenas shall be served clearly indicates that there must be a personal service, a subpoena served by reading it over the telephone will be insufficient.<sup>132</sup> If, however,

<sup>130</sup> *Murphy v. Jack*, 142 N. Y. 215, 36 N. E. 882, 40 Am. St. Rep. 590.

<sup>131</sup> *State v. Nelson*, 19 R. I. 467, 34 Atl. 990, 61 Am. St. Rep. 780, 33 L. R. A. 559.

<sup>132</sup> *S. Lowman & Co. v. Ballard*, 168 N. C. 16, 84 S. E. 21, L. R. A. 1915D, 427. In *Ex parte Terrell* (Tex. Cr. App.) 95 S. W. 536, the petitioner sought and obtained his discharge from a commitment for contempt in not obeying a subpoena served on him by reading it over the telephone to him. The court in discharging the petitioner said: "Applicant insists that the action of the court is without authority of law, in that under the facts stated the court had no power to render the judgment nisi, adjudging him guilty of contempt of court, much less make said judgment final. This involves the question: First, whether the service of a subpoena could be made over the telephone; and, second, concede that such service is authorized by our statute, judgment against applicant could not be made final in the first instance. When our statutes were passed on the subject of subpoenas and their service, it was before the invention of telephones—at least before their use in this state. Of course, the law originally contemplated personal service. The statute, in article 515, Code of Criminal Procedure of 1895, says: 'A subpoena is served by reading the same in the hearing of the witness, and the officer having the subpoena shall make due return thereof,' etc. There are other statutes in connection with this showing that the officer is entitled to fees for service, and certain fees for mileage traveled in making the service. Indeed, all of our statutes on this subject appear to contemplate a personal service, not only by reading the process in the hearing, but in the presence of the witness. However, it is urged that service by phone is within the letter and spirit of our statutes on the subject of serving process. If this were clearly true, then the law might be applied to the new invention, or the new invention applied to the law. But we do not think so. In such case service by phone, the party served being without the view, could only be identified by the voice of the party on whom the service should be made, and this could only apply to but few cases, only to such as the officer making the service could know and recognize the voice, and this would be a rather unsatisfactory method

the statute does not require a personal service, there should be no good reason why service may not be made over the telephone if the officer is acquainted with and can identify the party served as being the one to be subpoenaed.<sup>133</sup>

of identification at best. The best means of identification would be recognition of the person on whom the service was made; such recognition based on personal view of the witness by the officer. Accordingly we hold that service by phone is not contemplated or embraced within our statutes on the subject of service of subpoena by an officer as a witness. *Clay v. State*, 40 Tex. Cr. R. 593, 51 S. W. 370; *Tooney v. State*, 5 Tex. App. 163; *Sullivan v. First Nat. Bank*, 37 Tex. Civ. App. 228, 83 S. W. 421. None of these cases are exactly in point, but they are illustrative of the question here before the court."

<sup>133</sup> See dissenting in *S. Lowman & Co. v. Ballard*, 168 N. C. 16, 84 S. E. 21, L. R. A. 1915D, 427. In this case it was said: "This system of serving summons and subpoenas is a great saving of expense and of time. It has been much resorted to in the courts and now to hold it illegal may jeopardize the validity of many legal proceedings which have been based upon such service. In a practical age there is no reason why the courts should not avail themselves of the same conveniences which business men, and indeed all others, customarily use and have found to be safe and reliable, as well as convenient. No statute forbids it, and the courts in actual practice have recognized and used it."



## CHAPTER XXVIII

## TELEGRAPH MESSAGES IN RELATION TO THE STATUTE OF FRAUDS

## § 720. Evidence.

721. Subject-matter to which statute applies.

722. How statute may be satisfied.

723. Company—agent of sender.

724. Message delivered to company—effect of under statute of frauds.

725. Telegram delivered to addressee—effect under statute.

726. What telegram should contain.

727. Time of delivery with respect to making of contracts.

728. Written contracts adopted.

§ 720. Evidence.—It is not the intention to give the history of the statute of frauds, or to discuss the laws in general applicable thereto, as this is a subject foreign to his work, but to discuss only telegraphic messages as evidence, in relation to such statutes. The English statutes of frauds was enacted in 1676, under the title, "An act for preventing of frauds and perjuries,"<sup>1</sup> and has been adopted, in substance, in most, if not all, the American states. The fourth and seventeenth sections of this statute affect contracts of sale, the former applying to "lands, tenements, and hereditaments, or any interest in or concerning them," and the latter to the sale of personal property, or, in the language of the English statute, "any goods, wares, or merchandise, for the price of ten pounds sterling or upwards." It is these two sections which are of special importance in connection with telegraph messages.<sup>2</sup>

<sup>1</sup> 29 Car. 2. c. 3.

<sup>2</sup> The English statute of frauds and perjuries, 29 Car. 11, c. 3, whose provisions have generally been adopted in the United States, contains two sections—the fourth and seventeenth—of especial importance in connection with telegraph messages. The fourth section provides, in effect, that no action shall be brought to charge an executor or administrator upon any special promise to answer out of his own estate, or to charge the defendant upon any special promise to answer for the debts, defaults or miscarriage of another, or to charge any person upon an agreement made in consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized. The seventeenth section enacts, in effect, that no contract for the sale of any goods, wares, or merchandise, for the price of ten pounds sterling, or upwards, shall be allowed to be good unless, among other exceptions, some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized.

§ 721. **Subject-matter to which statute applies.**—Prior to the enactment of the statute of frauds, all freehold estates in corporeal hereditament could be created by livery of seisin, and all estates less than freehold by parol. The statute changed the law so that all such freehold estates created merely by livery of seisin, and all estates less than freehold, except leases for terms not exceeding three years whereon a rent of not less than two-thirds the full improved value was reserved, created merely by parol, have the effect only of estates at will, unless they are put in writing and signed by the grantor. The written instrument required by the statute must be a deed in the case of a freehold estate,<sup>3</sup> but in the case of estates less than freehold, the instrument need not be made under seal;<sup>4</sup> and a written agreement for a lease signed but not sealed has been held to amount to a lease unless it is otherwise intended by the parties.<sup>5</sup> Where the subject-matter is concerning “goods, wares, or merchandise,” a contract made in regard to same “shall not be allowed to be good” except upon one of three conditions, namely: (1) The buyer shall accept part of the goods so sold, and actually receive the same; (2) or give something in earnest to bind the bargain, or in part payment; (3) or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.<sup>6</sup>

§ 722. **How statute may be satisfied.**—The statute may be satisfied either by a written contract or by a sufficient memorandum evidencing the existence of an antecedent parol contract. There is a distinction between the contract itself and the “note or memorandum” evidencing its existence, and it is only when the contract is oral that it is necessary that there be a written memorandum. When the contract is oral and is to be evidenced by a memorandum,

<sup>3</sup> Jackson v. Wood, 12 Johns. (N. Y.) 73; Stewart v. Clark, 13 Metc. (Mass.) 79. Some of the states have abolished the requirement of a seal.

<sup>4</sup> Lake v. Campbell, 18 Ill. 106; Mayberry v. Johnson, 15 N. J. Law, 116; Hill v. Woodman, 14 Me. 38; Allen v. Jaquish, 21 Wend. (N. Y.) 628.

<sup>5</sup> Baxter v. Brown, 2 W. Bl. 973; Goodlittle v. Way, 17 R. 735. See, also, Harrison v. Parmer, 76 Ala. 157.

*Contract not capable of performance within year—part performance.*—A parol contract between a telephone company and an electric light company for the use of the poles of either company by the other for its wires and appliances is within the statute of frauds (Ky. St. § 470), where there is no intimation that the performance of the contract depends on any contingency that could take place within a year, and a contract is unenforceable unless there has been part performance. East Tenn. Tel. Co. v. Paris Electric Co., 156 Ky. 762, 162 S. W. 530, Ann. Cas. 1915C, 543.

<sup>6</sup> Langdell's Select Cases on Sales, 1032, 1033.

the latter must contain all the material and express terms of the contract, and must be signed by the party to be charged, or by a person or agent thereunto lawfully authorized by him.<sup>7</sup>

§ 723. **Company—agent of sender.**—With reference to contracts entered into by an agent, the principal will be bound by any act made within the apparent limit of the agent's authority, without regard to the violation of any instructions, private in their nature, which the principal may have given the agent as to the manner of executing his authority. Such is the undoubted rule, and is sustained by almost all the authorities.<sup>8</sup> The principal is bound by all the agent's acts. So, with respect to the making of a contract for said principal, all acts done in his behalf will be charged to the principal. It has been seen heretofore that contracts may be made between two persons by the medium of the telegraph, and while the telegraph company may be considered, in a certain light, an independent contractor with respect to said contract, yet it is very generally held that it acts as agent for the party employing its services, or the one suggesting these means to consummate such contract. Therefore, this being the general rule, any act of the company in carrying out such contract will be binding on the sender or the company's principal.

§ 724. **Message delivered to company—effect of under statute of frauds.**—While an oral message may be delivered to a company to be transmitted and delivered, yet the general regulations of these companies require the message to be written and signed. Such regulations, as has been seen, are reasonable and enforceable. The question which presents itself under this subject is whether a written message, concerning a contract and containing all the material and express terms of the contract, is a sufficient memorandum, when delivered to the company for transmission, to satisfy the statute of frauds. It has been so held.<sup>9</sup> A memorandum is in the na-

<sup>7</sup> Langdell's Select Cases on Sales, 1032, 1033.

<sup>8</sup> Louisville Coffin Co. v. Stokes, 78 Ala. 372; Liddell v. Sahline, 55 Ark. 627, 17 S. W. 705; Hamill v. Ashley, 11 Colo. 180, 17 Pac. 502; Paine v. Tillinghost, 52 Conn. 532; Lattomus v. Farmers' Mut. F. Ins. Co., 3 Houst. (Del.) 404; Lake Shore, etc., R. Co. v. Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319; Austrian v. Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350; Potter v. Springfield Milling Co., 75 Miss. 532, 25 South. 259; Gerhardt v. Boatman's Sav. Inst., 38 Mo. 60, 90 Am. Dec. 407; Whaley v. Duncan, 47 S. C. 139, 25 S. E. 54.

<sup>9</sup> McBlain v. Cross, 25 L. T. U. S. 804; Trevor v. Wood, 36 N. Y. 307, 93 Am. Dec. 511; Smith v. Easton, 54 Md. 138, 39 Am. Rep. 358; Watson v. Baker, 71 Tex. 739, 9 S. W. 867; Little v. Dougherty, 11 Colo. 103, 17 Pac. 292; Ex parte Brown, 7 Mo. App. 487. In the case of McBlain v. Cross, above cited, B., having contracted with C., defendant's brother, for the sale of hay, brought an



ture of an admission by the party to be charged, and it is not necessary, therefore, for it to be delivered to the other party in order for the contract to become effective.<sup>10</sup> The fact that the telegram is written in accordance to the regulations of the company, does not affect its validity as a memorandum. The act of employing the company, and, consequently, the act of writing the message in compliance with the regulation of the company, is a voluntary act,<sup>11</sup> and is not an act done under duress.

**§ 725. Telegram delivered to addressee—effect under statute.**—The next question which presents itself in considering this subject is whether a telegram delivered by the company to the addressee satisfies the statute, if it contains the material and express terms of the contract and the signature of the sender—the party to be charged—written by the company. If the telegraph company is the agent of the sender, which may be the case, as stated in a preceding section and which will be further considered, a delivery of

action against defendant for not accepting. At the trial the judge admitted letters and telegrams signed by C., as evidence against defendant, and the jury found for plaintiff. Held, that there was sufficient evidence of the authority, and that the two telegrams, of which one was signed in C.'s name, and in the other the name of the defendant was not mentioned as buyer, together constituted a sufficient memorandum of the contract to satisfy the statute of frauds, on the ground that the defendant be treated as the undisclosed principal of C., who appeared on the telegrams to be liable as principal.

So also a telegram sent in pursuance of a previous correspondence by letter may constitute "an unconditional promise in writing to accept a bill before it is drawn," and amounts to an actual acceptance under the statute, so as to preclude the necessity of presentment for acceptance or payment. *Whilden v. Merchants', etc.*, Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1; *Donovan v. Schoenhofen Brewing Co.*, 92 Mo. App. 341; *Whaley v. Hinchman*, 22 Mo. App. 483; *Bank v. Oppenheim*, 133 App. Div. 586, 118 N. Y. Supp. 297, insufficient in form; *Taylor v. Scott & Co.*, 178 Ill. App. 487, insufficient; *Fait Co. v. Anderson*, 76 Ark. 237, 88 S. W. 905, not sufficient. See, also, *Turner v. Provost*, 17 Can. S. Ct. 283.

The memorandum is adequate, although the telegram is addressed to the sender's agent. *Spangler v. Danforth*, 65 Ill. 152; *Warfield v. Wisconsin Cranberry Co.*, 63 Iowa, 312, 19 N. W. 224; *Everman v. Herndon* (Miss.) 11 South. 652; *Cunningham v. Williams*, 43 Mo. App. 629; *Barnett v. McCree*, 76 Hun, 610, 27 N. Y. Supp. 820; *Williamston, etc., R. Co. v. Battle*, 66 N. C. 540; *Lee v. Cherry*, 85 Tenn. 707, 4 S. W. 835, 4 Am. St. Rep. 800; *Singleton v. Hill*, 91 Wis. 57, 64 N. W. 588, 51 Am. St. Rep. 868; *Inv. Co. v. Bank*, 47 Wash. 566, 92 Pac. 380. But compare *Jordan v. Mahoney*, 109 Va. 133, 63 S. E. 467, or a third person; *Moss v. Atkinson*, 44 Cal. 3; *Nicholson v. Doyer*, 145 N. C. 18, 58 S. E. 444, 13 L. R. A. (N. S.) 167; *Beckwith v. Clark*, 188 Fed. 171, 110 C. C. A. 207; *Miller v. Kansas City, etc., R. Co.*, 58 Kan. 189, 48 Pac. 853; *Hollis v. Burgess*, 37 Kan. 487, 15 Pac. 536; *Moore v. Mountcastle*, 61 Mo. 424; *Gibson v. Holland*, L. R. 1, C. P. 1, 1 H. & R. 1, 11 Jor. N. S. 1022, 35 L. J. C. P. 5, 13 L. T. Rep. N. S. 293, 14 Wkly. Rep. 86.

<sup>10</sup> Brown on Statute of Frauds, § 354a.

<sup>11</sup> Brown, Ex parte, 7 Mo. App. 484.

such telegram by it will be a sufficient compliance with the statute. But, on the other hand, if the company is not operating in the capacity of agent for the sender, the rule would be otherwise. It is presumed that a telegraph company has written out the telegram at the place to which it was delivered in the exact words in which it was delivered to such company for transmission, and when the latter is deemed the agent of the sender in delivering any, as distinguished from certain, messages, the message delivered, if it contain the material and express terms of the contract, will satisfy the statute, although the message has been altered in its transmission. But if the company is only representing the sender as agent in delivering the message which it receives from him, the statute will be satisfied so long as the message has not been altered, or when it conforms to the message which the company received. We shall hereafter speak more fully of contracts made through the medium of the telegraph, and how the statute of frauds is affected thereby.

**§ 726. What telegram should contain.**—Whether or not a telegram, delivered to or by a telegraph company, contains sufficient memoranda of a contract to satisfy the statute of frauds, must be determined by the law applicable to the subject in general. Thus, generally speaking, the memorandum should contain, in substance, all the material parts of the contract, including the names, or a description, of both parties;<sup>12</sup> the subject-matter, which must be correctly stated;<sup>13</sup> the price, if actually agreed upon by the parties;<sup>14</sup> the stipulations as to credit, and the time and place of payment, if such there be;<sup>15</sup> and any other terms and conditions which

<sup>12</sup> *Cooper v. Smith*, 15 East, 103; *Allen v. Bennett*, 3 Taunt. 169; *Lincoln v. Erie Preserving Co.*, 132 Mass. 129; *McElroy v. Seery*, 61 Md. 397; *Anderson v. Harold*, 10 Ohio, 399.

<sup>13</sup> *Hazard v. Day*, 14 Allen (Mass.) 487, 92 Am. Dec. 790; *May v. Ward*, 134 Mass. 127; *McElroy v. Buck*, 35 Mich. 434.

A defective memorandum of sale cannot be helped out by a telegram from one of the parties with which the other is in no wise connected. *J. K. Armsby Co. v. Eckerly*, 42 Mo. App. 299.

So also telegrams between a sheriff and a third person are inadmissible to show an agreement between a sheriff and a county in relation to their subject-matter. *Yavapie County v. O'Niel*, 3 Ariz. 363, 29 Pac. 430.

Telegrams concerning the sale of property are not sufficient memorandum under the statute, where it is impossible to tell from them exactly what property is intended to be included and the parties disagree as to what property is meant. *Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. 179.

<sup>14</sup> *Smith v. Arnold*, 5 Mason, 416, Fed. Cas. No. 13,004; *Phelps v. Stillings*, 60 N. H. 505; *Soles v. Hickman*, 20 Pa. 180; *O'Niel v. Crain*, 67 Mo. 250.

<sup>15</sup> *Wright v. Weeks*, 25 N. Y. 158; *Norris v. Blair*, 39 Ind. 90, 10 Am. Rep. 135; *Williams v. Robinson*, 73 Me. 186, 40 Am. Rep. 352.

are a part of the contract.<sup>16</sup> In accordance with this rule, a telegram properly addressed and signed, in the following words, "You may come on at once at a salary of two thousand dollars, conditional only upon satisfactory discharge of business," was held to be insufficient as a memorandum to satisfy the statute, since it fixed no time for the continuance of the employment and did not even mention the nature of the employment itself.<sup>17</sup> Telegrams which are signed by a person and relate to a contract, but do not state its terms or conditions, are not sufficient to take the contract out of the statute, and a defective memorandum of sale cannot be helped out by a telegram from one of the parties with which the other is in no wise connected. So also telegrams between a sheriff and a third person are inadmissible to show an agreement between a sheriff and a county in relation to the subject-matter. An agreement for the purchase of land may be made by telegrams or letters and telegrams if they are so connected by reference, express or implied, showing on their face the essentials of a contract relating to land,<sup>18</sup> but telegrams concerning the sale of lands are not a sufficient memorandum under the statute, where it is impossible to tell from them exactly what property is intended to be included, and the parties disagree as to what property is meant.<sup>19</sup>

<sup>16</sup> *Riley v. Farnsworth*, 116 Mass. 223; *Oakman v. Rogers*, 120 Mass. 214.

<sup>17</sup> *Palmer v. M. P. Rolling Mill Co.*, 32 Mich. 274.

<sup>18</sup> *Welsh v. Brainerd*, 95 Minn. 234, 103 N. W. 1031; *Watson v. Baker*, 71 Tex. 746, 9 S. W. 867; *Underwood v. Stack*, 15 Wash. 497, 46 Pac. 1031.

<sup>19</sup> A telegram signed by the vendee is insufficient as a memorandum under the statute of frauds where it does not describe, mention, or refer to the subject-matter of the contract otherwise than by showing the terms of payment and directing the agent of the vendor to draw up a contract accordingly. *Hazard v. Day*, 14 Allen (Mass.) 487, 92 Am. Dec. 790. And where a telegram asking, "Will you take \$400.00 and let them take it, or will you take it at \$13,-400.00?" was sent to one who had a parol contract to purchase the premises at \$13,000.00, and who replied by telegraph, "I will take \$400.00 and let them have the farm," it was held that he could not recover the \$400.00 mentioned in the telegrams where the other parties did not take the premises. *Miller v. Nugent*, 12 Ind. App. 348, 40 N. E. 282.

The telegraph correspondence must, however, fully complete the transaction. Thus, in *Robinson v. Weller*, 81 Ga. 704, 8 S. E. 447, it was said: "It is true that a contract can be made by correspondence through the mail or by telegrams, as well as when the parties are together, and the same rules will apply in either case, but in order to make any sort of contract the offer of the seller must be accepted by the purchaser unequivocally, unconditionally, and without variance of any sort. There must be a mutual consent of the parties thereto, and they must assent to the same thing in the same sense. An absolute acceptance of a proposal, coupled with a condition, will not be a complete contract, because there does not exist the requisite mutual assent to the same thing in the same sense. Both parties must assent to the same thing, in order to make a binding contract between them. Applying these principals



§ 727. Time of delivery with respect to making of contracts.— It is not essential that the memorandum should be made at the

to the facts of this case, we find: (1) An advertisement in the newspaper by Mrs. Weller of a certain house and lot for sale; (2) a postal card addressed to Mrs. Weller by the plaintiff, inquiring as to her price and terms; (3) a letter from Mrs. Weller, the defendant, stating her price and terms; (4) a telegram from the plaintiff to the defendant saying, 'Offer accepted. Money ready; send deeds at once,' and a letter of the same date amplifying the telegram, and stating the same thing in substance, as will be seen by reading the above correspondence. It will be observed from this correspondence that Robinson, the plaintiff, resided in Rome, Ga., and Mrs. Weller, the defendant, in Chattanooga, Tenn. When, therefore, she wrote to Robinson that she would accept \$2,000 for the property, one-third cash, and the balance on time, her offer meant that she would accept the cash at her place of residence in Chattanooga and that she would make the deeds to the purchaser in Chattanooga. That was the legal intent and purpose of her offer. She was not compelled to make the deeds and send them to Rome, Ga., nor go to Rome, Ga., and when Robinson wrote accepting her offer, and saying that money was ready at Rome and directed her to send the deeds to him, it was not a full acceptance of the offer which she had made, and therefore was not a complete contract, and the court did not err in non-suiting the plaintiff. The description of the property must be sufficiently definite to admit of its identification. Thus a telegraph offer stating, "I will give you \$2,000.00 for your lot, if accepted to-night," to which the addressee responded, "Will accept your offer," is too indefinite to admit of parol evidence to identify the lot in a suit for specific performance. *Farthing v. Rochelle*, 131 N. C. 563, 43 S. E. 1. "The writing itself should afford the means whereby the identification may be made complete by parol evidence." Consequently the telegram, "I will take your house at \$3,000.00. Answer," with reply, "See J. B. Williams; if not sold you can have it," is an insufficient description to comply with the statute of frauds. *Whaley v. Hinchman*, 22 Mo. App. 483. And where the agent of the owner telegraphed him, "I am offered seventy thousand for balance of Merced town property, five thousand on Tuesday next; balance in thirty days. This is in accordance to our proposition. Telegraph me at Fresno your answer," to which he replied, "Accept the seventy thousand dollars offered for Merced town property," whereupon the agent telegraphed to the purchaser, "Mr. Crocker has telegraphed me as follows: 'Accept the seventy thousand dollars offered for the Merced town property,'" the court decided that the telegrams were an insufficient memorandum because it could not be ascertained from them who the buyer was nor whose property was the subject-matter. *Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. 179. With respect to leases, it was held in *Hastings v. Weber*, 142 Mass. 232, 7 N. E. 846, 56 Am. Rep. 671, that where an agent sent a description of a store and the rental asked for five years, to his principal, telegraphed him, "If basement included at \$4,000.00 secure five years' lease," the oral acceptance by the landlord of the terms on being handed the telegram by the agent was an insufficient memorandum under the statute of frauds, since it disclosed only instructions to the agent, and not authority to make a contract. But it has been also held that a telegram signed by the tenant and sent to his agent, in response to an offer in a letter by the agent, stating the terms upon which the landlord would make a lease to which the telegram refers, is a sufficient memorandum under the statute of frauds. *Gaines v. McAdam*, 79 Ill. App. 201, *Kingsley v. Siebrecht*, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486. Where all the conditions and stipulations for a lease are embodied in letters and telegrams, it is a sufficient memorandum, notwithstanding that it was con-

same time as the contract;<sup>20</sup> nor is it necessary that all the terms of the contract should be noted at one time, or in one piece of paper; but it will suffice if the whole contract be in substance contained on separate pieces, and these memoranda make such reference to each other as to show that they are parts of one whole.<sup>21</sup> So, applying the rule to telegrams, it is not necessary that they be delivered at the time the contract was made, nor is it necessary that all of the facts should be embraced in one message, but if they are made out properly on different telegraph blanks or on several letters and telegrams relating to the subject-matter of the contract<sup>22</sup> and signed by the sender,<sup>23</sup> it is a sufficient compliance with the statute.

templated that a formal lease was to be thereafter drawn. *Post v. Davis*, 7 Kan. App. 217, 52 Pac. 903.

<sup>20</sup> *Bird v. Munroe*, 66 Me. 347, 22 Am. Rep. 571.

<sup>21</sup> *Peck v. Vandemark*, 99 N. Y. 29, 1 N. E. 41; *Jelks v. Barrett*, 52 Miss. 315; *Fisher v. Kuhn*, 54 Miss. 480.

<sup>22</sup> *Alabama*.—*Paris v. Johnson*, 155 Ala. 403, 46 South. 642.

*California*.—*Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. 179; *Elbert v. Los Angeles Gas Co.*, 97 Cal. 244, 32 Pac. 9.

*Colorado*.—*Little v. Dougherty*, 11 Colo. 103, 17 Pac. 292; *Beckwith v. Talbot*, 2 Colo. 639.

*Connecticut*.—*Grant v. Mfg. Co.*, 85 Conn. 421, 83 Atl. 212.

*Georgia*.—*Brooks v. Miller*, 103 Ga. 712, 30 S. E. 630.

*Indiana*.—*Jennings v. Shertz*, 45 Ind. App. 120, 88 N. E. 729; *Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279. See *Porter v. Patterson*, 42 Ind. App. 404, 85 N. E. 797.

*Kentucky*.—*Smith v. Theobald*, 86 Ky. 141, 5 S. W. 394, 9 Ky. Law Rep. 444.

*Maine*.—*Weymouth v. Goodwin*, 105 Me. 512, 75 Atl. 61; *Kingsley v. Siebrecht*, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486.

*Massachusetts*.—*Williams v. Smith*, 161 Mass. 248, 37 N. E. 455.

*Minnesota*.—*Welsh v. Brainard*, 95 Minn. 234, 103 N. W. 1031; *Sanborn v. Nockin*, 20 Minn. 178 (Gil. 163); *Olson v. Sharpless*, 53 Minn. 91, 55 N. W. 125. See *O'Donnell v. News Co.*, 119 Minn. 378, 138 N. W. 677.

*Missouri*.—*Leesley v. Fruit Co.*, 162 Mo. App. 195, 144 S. W. 138; *Cunningham v. Williams*, 43 Mo. App. 629; *Greeley-Burnham Gro. Co. v. Capen*, 23 Mo. App. 301.

*Nebraska*.—*Heenan v. Parmele*, 80 Neb. 514, 118 N. W. 324; *Vindquest v. Perky*, 16 Neb. 284, 20 N. W. 301.

*New Hampshire*.—*Abbott v. Shepherd*, 48 N. H. 14.

*New Jersey*.—*Wheaton v. Collins* (Ch.) 84 Atl. 271.

*New York*.—*Peck v. Vandemark*, 33 Hun, 214, affirmed in 99 N. Y. 29, 1 N. E. 41; *Poel v. Brunswick, etc., Co.*, 78 Misc. Rep. 311, 139 N. Y. Supp. 602.

*Oklahoma*.—*Atwood v. Rose*, 32 Okl. 355, 122 Pac. 929.

*South Carolina*.—*Allen v. Burnett*, 92 S. C. 95, 75 S. E. 368; *Neufville v. Stuart*, 1 Hill, Eq. 159.

*Texas*.—*Gulf, etc., R. Co. v. Settegast*, 79 Tex. 256, 15 S. W. 228; *Kearby v. Hopkins*, 14 Tex. Civ. App. 166, 36 S. W. 506.

*United States*.—*Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819; *Ryan v. U. S.*, 136 U. S. 68, 10 Sup. Ct. 913, 34 L. Ed. 447, *Lindsey v. Hum-*

<sup>23</sup> See note 23 on following page.

§ 728. **Written contracts adopted.**—The statute of frauds is not affected by the parties mutually accepting a written contract, as this is considered, under such statute, a contract in writing. Such contract cannot be varied by oral testimony, unless it was created by both written and oral communication. In the latter instance, it is clear that the parties did not intend to create the contract by their mutual adoption,<sup>24</sup> and in such cases oral testimony should be admissible to prove the intent of the parties. In accordance with this rule, oral testimony of the terms of a contract to let a canal boat was admitted, although the message which finally completed the contract was in the following words: "You may have barge Globe for \$400, until October 1. Rent payable half 1st July, and half 1st October."<sup>25</sup> A message of this description is not sufficient as a memorandum to satisfy the statute and does not contain the terms of the oral contract; and oral testimony should be admissible in such instances to show the meaning of the written communication.<sup>26</sup>

brecht (C. C.) 162 Fed. 548; Beckwith v. Clark, 188 Fed. 171, 110 C. C. A. 207; Land, etc., Co. v. Inv. Co. (D. C.) 201 Fed. 752. See, also, § 747.

<sup>23</sup> A telegram signed by the party to be charged, or his agent, is a memorandum in writing within the statute of frauds. *Watson v. Baker*, 71 Tex. 739, 9 S. W. 867. A telegram accepting an offer by telegram to sell, together with a letter of the same date signed by the same party and to the same effect, affords sufficient evidence of the subscription by the party to take the case out of the statute of frauds. *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511.

<sup>24</sup> *Beach v. R. & D. B. Rd. Co.*, 37 N. Y. 457.

<sup>25</sup> *Beach v. R. & D. B. Rd. Co.*, 37 N. Y. 457.

<sup>26</sup> *McElroy v. Buck*, 35 Mich. 434.

In deciding whether several telegrams constitute a contract within the statute of frauds, it was said in *Brewer v. Horst & Lachmund Co.*, 127 Cal. 643, 60 Pac. 418, 56 L. R. A. 240, that: "The court is permitted to interpret the memorandum (consisting of the two telegrams) by the light of all circumstances under which it was made, and if, when the court is put into possession of all knowledge which the parties to the transaction made at the time, it can be plainly seen from the memorandum who parties to the contract were, what the subject of the contract was, and what were its terms, then the court should not hesitate to hold the memorandum sufficient. Oral evidence may be received to show in what sense figures or abbreviations were used; and their meaning may be explained as it was understood between the parties. *Mann v. Higgins*, 83 Cal. 66, 23 Pac. 206; *Berry v. Kolwalsky*, 95 Cal. 134, 30 Pac. 202, 29 Am. St. Rep. 101; *Callahan v. Stanley*, 57 Cal. 476. Also: 'Oral evidence is always admissible to explain the surrounding circumstances, and situation and relations of the parties at and immediately before the execution of the contract, in order to connect the description with the only thing intended, and thereby to identify the subject-matter and to explain the terms and phrases used in a local or special sense.' *Preble v. Abrahamis*, 88 Cal. 245, 26 Pac. 99, 22 Am. St. Rep. 301; *Towle v. Carmelo, etc., Co.*, 99 Cal. 397, 33 Pac. 1126."



## CHAPTER XXIX

## TELEGRAPH MESSAGES AS PRIVILEGED COMMUNICATIONS

## § 729. Introduction.

- 730. Same continued—in hands of telegraph companies.
- 731. Postal law not applicable to telegraph messages.
- 732. Same continued—would assist in illegal purposes.
- 733. Statutes forbidding disclosure of telegrams.
- 734. Same continued—not protected by postal laws.
- 735. When may be privileged communications.
- 736. Steps to obtain telegrams—in general.
- 737. Same continued—how further obtained—court inspection.
- 738. Rule for describing message in writ.
- 739. Same continued—illustrations—valid services.
- 740. Same continued—when invalid.

§ 729. **Introduction.**—Having treated, in preceding chapters, of the manner of proving the contents of a telegraphic message, and when such satisfies the statute of frauds, we shall now speak of such as privileged communications. In discussing the subject, we shall attempt to treat it under two different views with respect to the person from whom a divulgence of the message is sought; that is, whether the message is in the hands of the sender or addressee, or whether it is in the hands of the company. With respect to the first of these—whether a message in the hands of the sender or addressee is privileged communication—we shall be very brief, since this question depends entirely upon the laws relating to privileged communications in general, and the fact that the communication was made by telegraph instead of some other way does not change the rule. The mode of communication has never been held to determine the question of privilege.

§ 730. **Same continued—in hands of telegraph companies.**—It has been a very mooted question whether a message in the hands of the telegraph company was a privileged communication. It was held in England, before the government got control of these companies, that it was not;<sup>1</sup> since that time the earlier cases held that they were privileged communications,<sup>2</sup> but the latter decisions hold them not to be privileged.<sup>3</sup> This question has been more thor-

<sup>1</sup> The Coventry Case, 1 O'M. & H. 97, 104; The Bridgewater Case, 1 O'M. & H. 112.

<sup>2</sup> The Tampston Case, 2 O'M. & H. 66; The Stroud Case, 2 O'M. & H. 107, 110.

<sup>3</sup> The Bolton Case, 2 O'M. & H. 138; The Horwich Case, 3 O'M. & H. 61, 62; Tomline v. Tyler, 44 L. T. N. S. 187.

oughly discussed in the courts of our country, and it has been very generally held that such communications were not privileged.<sup>4</sup> Those who urge that the messages, in the hands of the telegraph company, are privileged communications, do not attempt to support their reasons upon the relationship of the parties, or the subject-matter of the messages, or upon the confidential nature of the communication. They base their reasons either upon the ground of public policy which sustain those legal statutes of the United States, which, in effect, give inviolability to postal communications, or upon particular statutes giving inviolability to telegraph messages in the hands of telegraph companies. We shall treat these briefly in separate sections.

§ 731. **Postal law not applicable to telegraph messages.**—Able writers have taken the position that the law which protects the contents of communications made through the United States mail should apply to communications made by the medium of telegraphy, as the communications made by the latter means were oftener as great in importance as those sent by mail.<sup>5</sup> Granting this to be the case, it is a question to be settled by the legislative and not by the judicial branch of the government.<sup>6</sup> As seen, the

<sup>4</sup> *Woods v. Miller*, 55 Iowa, 168, 7 N. W. 484, 39 Am. Rep. 170; *State v. Litchfield*, 58 Me. 267; *Ex parte Brown*, 72 Mo. 83, 37 Am. Rep. 428; *Id.*, 7 Mo. App. 484; *People v. Webb* (Sup.) 5 N. Y. Supp. 855; *Henisler v. Freedman*, 2 Pars. Eq. Cas. (Pa.) 274; *Ex parte Gould*, 60 Tex. Cr. R. 442, 132 S. W. 364, 31 L. R. A. (N. S.) 835; *Nat. Bank v. Nat. L. Bank*, 7 W. Va. 544; *In re Storrer* (D. C.) 63 Fed. 564; *U. S. v. Hunter* (D. C.) 15 Fed. 712; *U. S. v. Babcock*, 3 Dill. 566, Fed. Cas. No. 14,484; *In re Smith*, L. R. 7 Ir. 286; *Tomline v. Tyler*, 44 L. T. Rep. (N. S.) 187; *Re Dwight*, 15 Ont. 148; *Leslie v. Hervey*, 15 L. C. Jur. 9.

<sup>5</sup> In 18 Am. L. Reg. 65 et seq., Mr. Cooley discusses the subject and contends for a rule opposed to that of the text. He announces, in conclusion, that the doctrine that telegraph authorities may be required by legal process to produce private messages upon the application of third persons is objected to on the following grounds:

"1. That it defeats the policy of the law, which invites free communication, and to the extent that it may discourage correspondence, it operates as a restraint upon industry and enterprise, and, what is of equal importance, upon intimate social and family correspondence.

"2. It violates the confidence which the law undertakes to render secure, and makes the promise of the law a deception.

"3. It seeks to reach a species of evidence which, from the very course of the business, parties are interested to render blind and misleading, and which, therefore, must often present us with error in the guise of truth, under circumstances which precludes a discovery of the deception.

<sup>6</sup> In *Ex parte Brown*, 72 Mo. 91, 37 Am. Rep. 426, the court said: "The fact that railroad trains orders are generally communicated by telegraph, that a vast amount of trade and traffic is transacted through this medium, that it has become of almost equal importance in the commerce of this country with the postal system, and that in a business sense men are compelled

government has control of the postal system, and, for this reason, it has legislated upon the subject, and it is not, therefore, an assumption of a legislative power for the courts to consider questions arising under this subject; but it would be if they should consider a subject not embraced in the postal laws. There is also a difference in the amount of information derived from the communications sent by these two instrumentalities of news communicators, and this should be a reason for not permitting communications sent by telegraph to be protected by the postal laws. All the information obtained from the contents of a communication sent by mail is such as may be seen from the wrapper or envelope, while, on the other hand, a telegraph company acquires full knowledge of the contents of messages intrusted to it for transmission. If a court desires to obtain information of certain communications sent by telegraph, it may secure this from the company without exposing other communications, but the same information could not be obtained from the United States mail without divulging, perhaps, many other communications whose secrecy, immaterial for any purposes of justice, might be of the utmost importance to the parties.

§ 732. **Same continued—would assist in illegal purposes.**—As we all know, and as it has often been stated at other places in this work, telegraph companies have become great factors in the commercial world, and the news transmitted by means of those instrumentalities concern matters of almost every description. It is the quickest way of accomplishing business transactions at distant points. If, then, communications sent by means of telegraphy were allowed to be privileged communications, many criminal acts would be consummated by means of these companies. The criminal would communicate the news concerning his crime, knowing at the time that the company could not divulge the same.<sup>7</sup> Of course, the company could refuse, as has been seen, to transmit news concerning illegal purposes, but it is not every time that the company

to communicate by telegraph, are for the consideration of the legislative branch of the government in determining the propriety of placing telegraph communications on the same footing with correspondence by mail, or declaring them privileged; but the annunciation of such a doctrine by the court would be an assumption of power which belongs to the legislative department."

<sup>7</sup> In *State v. Litchfield*, 58 Me. 269, the court said: "Nor can telegraphic communications be deemed any more confidential than any other communications. They are not to be protected to aid the robber or assassin in the consummation of their felonies, or to facilitate their escape after the crime has been committed. Telegraphic companies cannot rightfully claim that the messages of rogues and criminals, which they may innocently or ignorantly



knows of the illegal nature of the communication. While the same criminal object may be accomplished by communications through the mail, yet other secrets and communications would be divulged, as stated elsewhere, if the courts should attempt to obtain the information concerning this particular charge from mail matters. This view, however, has been assailed by Mr. Cooley in a very able discussion on the subject.<sup>8</sup>

§ 733. **Statutes forbidding disclosure of telegrams.**—There are statutes in some of the states which forbid, under penalty, the disclosure of telegrams by telegraph companies.<sup>9</sup> It seems, however, from a perusal of most of the statutes on this subject, that there are few which prohibit the disclosure of the contents of telegrams while in the hands of the telegraph company. While there is a difference between some of these statutes, yet there is a similarity in them all; and, for the reason that there is a difference in some of them in some respect, it would be difficult to lay down a rule which would be applicable to all. So we would therefore suggest that the statute under which the cause arises be consulted. In some of these the provision of the statute is against a disclosure of the contents of such telegrams, except to a court of justice. In a great number of them the provision is against a willful or intentional or an unlawful disclosure of the contents of such telegrams, and the penalty is generally imposed on the person and not the company making the disclosure. In others the provision stands unqualified. It will be seen from a further perusal of these statutes that none of the provisions therein prohibit the company from disclosing the contents of such telegrams when legally summoned for that purpose into a court of justice. The first-mentioned statutes provided that they should not be disclosed except to a court of justice; this fact, then, does away with the question of privileged communication.

transmit, should be withheld whenever the cause of justice renders their production necessary."

In *Henisler v. Freedman*, 2 Pars. Eq. Cas. (Pa.) 274, it is said in ordering the production of a telegram: "The telegraph may be used with the most absolute security for purposes destructive to the well-being of society, a state of things rendering its usefulness at least questionable. The correspondence of the traitor, the murderer, the robber and the swindler, by means of which their crimes and frauds could be the more readily accomplished and their detection and punishment avoided, would become things so sacred that they could never become accessible to public justice, however deep might be the public interest involved in their production."

<sup>8</sup> 18 Am. L. Reg. 72. Cooley's Const. Lim. (6th Ed.) 371, note. See Stroud Election cases to O'M. & H. 107, 112. But see Wig. on Ev. vol. 4, p. 3191.

<sup>9</sup> Code of Tenn. 1896, §§ 1837, 1838; Ann. Code Miss. 1892, § 1301; Laws N. C. 1889, c. 41, p. 61; Pub. Acts Conn. 1889, c. 30, p. 18; Wisconsin Rev. Stat. 1878, § 4557; Iowa Code 1886, § 1328. See § 220.

Where a telegraph company discloses the contents of a telegram in a court, in obedience to a subpoena *duces tecum*, this would be a lawful and compulsory disclosure, and not an intentional, willful or unlawful disclosure as meant in the second mentioned statute. The same rule would apply when the provisions of the statute stand unqualified, since in the construction of such enactment, an exception in favor of due legal process is always implied.<sup>10</sup>

§ 734. **Same continued—not protected by postal laws.**—It has been said in a previous section that the contents of messages in the hands of telegraph companies were not, in the absence of statutes to that effect, protected under the principle of public policy similar to that which exists in favor of letters sent through the mail. While there is a difference of opinion on the subject, the better view is that these statutory provisions do not change the rule. "There is no such analogy between the transmission of communications by mail and their transmission by telegraph as would justify the application to the latter of the principles which obtain in respect to the former; and certainly penal statutes relating to the one cannot by the courts be declared applicable to the other."<sup>11</sup>

§ 735. **When may be privileged communications.**—The question which next presents itself is, Is a telegram in the hands of the telegraph company ever a privileged communication? It is very evident that a message which is not a privileged communication in the hands of the parties to it is not a privileged communication in the hands of a telegraph company;<sup>12</sup> but where a message is a privileged communication in the hands of the parties to it, the question is not quite so clear. In other words, communications between husband and wife, attorney and client, and physician and patient are privileged communications while such remain undisclosed; but as soon as there is a disclosure of such communications to a third person, the latter is under no obligation, with respect to the privilege accorded under this rule of law, to retain such. Then, when a disclosure of such a communication is made to a telegraph company for transmission, does such a disclosure fall under disclosures made to a third person as above stated? It very clearly does not. There is an exception to the above rule, and it is under

<sup>10</sup> Brown, Ex parte, 7 Mo. App. 484.

<sup>11</sup> Ex parte Brown, 72 Mo. 91, 37 Am. Rep. 426; Ex parte Brown, 7 Mo. App. 484; Woods v. Miller, 55 Iowa, 168, 7 N. W. 484, 39 Am. Rep. 170; Com. v. Jeffries, 7 Allen (Mass.) 548, 83 Am. Dec. 712; Henisler v. Freedman, 2 Pars. Eq. Cas. (Pa.) 274; Nat. Bank v. Nat. Bank, 7 W. Va. 546; In re Storrer (D. C.) 63 Fed. 564. See, also, U. S. v. Hunter (D. C.) 15 Fed. 712; U. S. v. Babcock, 3 Dill. 566, Fed. Cas. No. 14,484.

<sup>12</sup> Leslie v. Harvey, 15 L. C. Jur. 9.

this that the question can be negatively answered. Privileged communications do not lose their privilege in the hand of another who was informed of such merely as a necessary means of effecting them. Thus a privileged communication between attorney and client does not lose its privilege in the hands of an interpreter whose aid was necessary to effect it,<sup>13</sup> and it is under this exception that a privileged communication in the hands of a telegraph company, simply as a means of effecting its purpose, is a privileged communication, and cannot therefore be disclosed.<sup>14</sup>

§ 736. **Steps to obtain telegrams—in general.**—Having considered the question whether telegrams in the hands of telegraph companies are privileged communications, and showing that they are not so considered, we shall now proceed to discuss the subject as to how they may be obtained from these companies in order that their contents may be disclosed in a court of justice. There have been different methods pursued to obtain private writings or documents which are in the hands of others, for the purpose of producing them in courts as material evidence of an issue involved. In equity, it has been held that a bill of discovery was the proper method to obtain these writings; and at common law the plaintiff in a case could obtain an order to inspect the private documents in the hands of another for the purpose of preparing his pleadings.<sup>15</sup> He could also, under the common-law procedure, serve notice on the person in whose possession the documents were, to present such in court. Yet this method would not compel the person to protect such documents, but would only lay a ground for secondary evidence. The general and most common method pursued, where it is desired that the document shall be produced in court as evidence in the case at issue, is by summoning the person in whose possession the documents are, to come into court and bring such documents particularly described. The process is most generally a subpoena *duces tecum*. Where the documentary evidence is in the hands of one of the parties to the suit, whether such party is a telegraph company or some individual, the description of such document offers no peculiarity in their application to telegraph messages; but if such person, possessing these documents, is not a party to the suit and is compelled under a subpoena *duces tecum* to produce such in court, there is a peculiarity in its practical application to telegraph messages in the hands of telegraph companies. Under the first kind,

<sup>13</sup> *Bemberry v. Bemberry*, 2 Beor. 173; 1 Greenl. on Ev. § 239.

<sup>14</sup> 2 Br. Purd. Dig. §§ 2, 3.

<sup>15</sup> Wharton on Ev. § 742.



the description of the document in the subpoena *duces tecum* must be made with reasonable certainty but no greater degree of particularity will be required than is practicable under all the circumstances.<sup>16</sup> Under the latter rule it is different. 'Telegraph companies are in possession of innumerable documents and messages, and in order that matters irrelevant to the point at issue shall not be disclosed, the subpoena *duces tecum* should describe the message desired with the greatest degree of certainty.

§ 737. Same continued—how further obtained—court inspection.—To obtain documents in evidence, under a subpoena *duces tecum*, a description, if possible, of such document should be made with such reasonable certainty as will not necessitate the production of other documents in court not relevant to the matter at issue. This often becomes a difficult matter, especially with respect to telegrams in the hands of telegraph companies. As said, a telegram in the hands of the parties to it is as much their private writings as letters or other similar private documents; and because they are in the hands of the companies for transmission does not cause the privacies of these to be lost, and they can only be obtained by a proper legal process. They must therefore be relevant to the matter at issue before they can be obtained under a subpoena *duces tecum*. Documents in the hands of private persons or corporations may not be so difficult of description, but the number of telegrams in the hands of telegraph companies are generally so very numerous that a rule describing the certainty with which the documents in the hands of the first kind would doubtless be so comprehensive as to embrace many messages which would be irrelevant to the matter at issue; so the rule in this respect should therefore be more specific. It is true, as stated, that it is difficult to describe the documents or telegrams in the hands of telegraph companies with such accuracy every time as to prevent the production of some which are irrelevant, but the greatest degree of accuracy under the circumstances should be made; and if there should be some such produced with those relevant to the issue, the court, on inspection of same, should not admit their disclosure in evidence.<sup>17</sup>

<sup>16</sup> U. S. v. Babcock, 3 Dill. 566, Fed. Cas. No. 14,484; Lee v. Augas L. R. 2 Eq. 59; Morris v. Hermen, 1 C. & M. 29; 41 E. C. L. 22.

<sup>17</sup> In Ex parte Brown, 72 Mo. 83, 37 Am. Rep. 426. A subpoena *duces tecum* was issued by the clerk of the St. Louis Criminal Court commanding the petitioner to appear before the grand jury to testify in a certain matter pending before said inquest, and then and there produce any or all telegraphic despatches, or copies of the same, then in the office of the Western Union Telegraph Company at St. Louis, of which petitioner was manager, these despatches being between certain parties therein mentioned. Brown appeared

§ 738. **Rule for describing message in writ.**—This question is a matter of such great difficulty of comprehension that the courts are not at all harmonious in their opinions, and it has theretofore become almost impossible to lay down a fixed rule which would be applicable in every particular case, but each case must be considered somewhat alone. In nearly every case where the party who has the writ issued cannot specify with accuracy messages relevant to the matter at issue, yet he generally knows the names of the parties to the messages, the places from and to which they are sent, the subject-matter about which they have reference, and the time of sending. If, then, these writs contain with reasonable certainty these essential facts, the company will have sufficient notice as to what messages are desired, and can, therefore, be compelled to produce such in a court of justice. In accordance with this rule, the following illustrated cases may tend to further show when the specifications contained in these writs are valid and when invalid.

§ 739. **Same continued—illustrations—valid services.**—A writ of *duces tecum* served upon a telegraph company, containing the

Before the grand jury, but declined to produce the messages, and that court, invoking a provision of their Constitution with regard to search and seizure, held that the party was not in contempt, and that the District Court had no power to punish him for refusing to deliver the messages. The court said: "The section declares that the people ought to be secure, in their papers, from unreasonable searches, and whether a subpoena *duces tecum* for papers, or search warrant for chattels, be issued, the spirit of that section demands that, while in the latter case there must be probable cause supported by oath, or affirmation, with a description in the warrant of the place to be searched, or the thing to be searched for, in the other it shall, at least, give a reasonably accurate description of the paper wanted, either by its date, title, substance, or the subject it relates to, and that it shall be shown to the court, or authority issuing the process, that there is a cause pending in a court and that the paper is material as evidence in the cause. To permit an indiscriminate search among all the papers in one's possession for no particular paper, but some paper which may throw some light on some issue involved in the trial of some cause pending, would lead to consequences that can be contemplated only with horror, and such a process is not to be tolerated among a free people. A grand jury has a general inquisitorial power. They may ask a witness summoned before them without reference to any particular offense, which is a subject of inquiry, what he knows touching the violation of any section of the Criminal Code. Give such a body, in addition, the power to search any man's papers for evidence of some crime committed, and you convert it into a tribunal which soon becomes as odious to American citizens as the Star Chamber was to Englishmen or the Spanish Inquisition to the civilized world. Here communications, at different times within a period of fifteen months, sent or received by the parties named, are called for. The date, title, substance, or subject-matter of none of them is given, and it is utterly impossible that it could have been made to appear, without more, that any of the messages were material as evidence before the grand jury. Moreover, it not only called for all messages between the parties named, but for all which may have been sent or received by either of the parties to or

following demands for messages was deemed valid:<sup>18</sup> "Copies of all telegrams received through the office of the Western Union Telegraph Company at Long Branch, in the state of New Jersey, from June 15 to September 15, 1874, and from June 15 to September, 1875, addressed to General O. E. Babcock, signed John McDonald, John A. Joyce, John or J., with books showing the delivery of the same; all telegrams sent from Long Branch through said office during said months, signed O. E. Babcock, O. E. B., Bab., or B., addressed to John McDonald, or John A. Joyce, St. Louis, Mo., or Ripon, Wis.; all telegrams sent through the office of said company at the City of New York upon the 9th, 10th, or 12th days of December, 1874, signed John McDonald, John Mac, or Mc., addressed to John A. Joyce, St. Louis, Mo., or General O. E. Babcock, Washington, D. C.; also, copies of all telegrams received at the city of New York, from said city of St. Louis, on the 26th, 27th,

from any person on the face of the earth. A compliance with the order might have resulted in the production of confidential communications between husband and wife, client and attorney, confessor and penitent, parent and child. Matters which it deeply concerned the parties to keep secret from the world, and of no importance or value as evidence in any cause, might thus be disclosed to the annoyance and shame of the only persons interested. Incidents in the lives of members of families which the happiness and welfare of the household require to be kept secret might be exposed, and offenses not recognizable by law, long since committed and condoned, brought to light and hawked through the country by scandalmongers, to the disturbance of the peace of society, and the destruction of the happiness of whole households. It is no answer to this that the obligation of secrecy imposed by law on grand juries would prevent such exposure. It is enough to disturb and harass a man that twelve of his neighbors, though sworn to secrecy, have acquired knowledge diminishing their respect for him, which they had no right to obtain, and they may be the very twelve men with whom, above all others, he most desired to be in good repute." To the same effect, see *Ex parte Gould*, 60 Tex. Cr. R. 442, 132 S. W. 364, 31 L. R. A. (N. S.) 835. "In this case, the subpoena *duces tecum* was for all telegrams sent from the office at Baird, ordering intoxicating liquors; it did not specify whether the liquors ordered were unlawfully sent for; it said all intoxicating liquors. All intoxicating liquors are not under the ban of the law. What right had the grand jury to have exposed before them the messages sent indiscriminately by the citizenship of Baird in ordering intoxicating liquors? The demand made upon the witness was unreasonable and unwarranted. It was too general. It did not relate to any crime committed, nor to any person accused or suspected. It was not directed to the inquiry into any crime. It failed to show the purposes for which the telegrams were demanded, and was but a prying and fishing expedition that cannot be authorized by law. The protection of papers is as much secured under the provisions of the Bill of Rights as a man's house, and the same rules that apply to one apply to the other. The courts will not permit the exercise of an arbitrary power, where its tendency might be to disturb domestic relations, expose commercial secrets, to satisfy the idle curiosity of men. The Constitution holds too sacred the privacy of home to permit this."

<sup>18</sup> U. S. v. Babcock, 3 Dill. 566, Fed. Cas. No. 14,484.



28th, and 29th days of October, 1874, addressed to Mr. John A. Joyce, Mrs. Kate Joyce, Kate Joyce, or Kate M. Joyce, together with books showing delivery of same."

§ 740. **Same continued—when invalid.**—On the other hand, a writ containing the following demand for messages was held invalid: <sup>19</sup> "Dispatches between Dr. J. C. Nidelet and A. B. Wakefield, and William Ladd and J. C. Nidelet, and William Ladd and Dr. Nidelet, between Warren McChester and A. B. Wakefield, between Warren McChester and J. C. Nidelet, between the latter and John S. Phelps, between A. B. Wakefield and John S. Phelps, between the latter and William Ladd, and between George W. Anderson and A. B. Wakefield, sent or received by or between any or all of said parties, within fifteen months last past." Again, a writ containing a demand for all messages sent from or received at a certain telegraph office between the sixth and twentieth days, inclusive, of a certain month was deemed to be invalid.

<sup>19</sup> Brown, Ex parte, 72 Mo. 83, 37 Am. Rep. 426, overruling, 7 Mo. App. 484. A subpoena requiring the agent of a telegraph company to produce before the grand jury all messages sent from the town before a specified time, ordering intoxicating liquors, is too broad. Ex parte Gould, 60 Tex. Cr. R. 442, 132 S. W. 364, 31 L. R. A. (N. S.) 835.

## CHAPTER XXX

## CONTRACTS BY TELEGRAM

- § 741. In general.
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- 762. Telegraph company an independent contractor.
- 763. Same continued—may be sued.
- 764. Same—where message a mere step to negotiation.
- 765. Same—where message is a definite offer.
- 766. Same—acceptance of an offer.

§ 741. In general.—In creating a contract, the negotiations pertaining to same may be conducted by letter, as is very common in mercantile transactions.<sup>1</sup> The contract is complete when the answer, containing the acceptance of a distinct proposition, is dispatched by mail or otherwise, provided it is done with due diligence after the receipt of the letter containing the proposal, and before any intimation is received that the offer has been withdrawn. Mailing the answer containing the acceptance and thus placing it beyond the control of the party is valid as a constructive notice.<sup>2</sup> As has been seen, there is no material difference in communications carried on by telegraph and correspondence conducted through the mail; it is therefore generally held, that the same law is applicable to

<sup>1</sup> Kimbell v. Moreland, 55 Ga. 164; Dana v. Short, 81 Ill. 468; Thomas L. & T. Co. v. Beville, 100 Ind. 309; College Mill Co. v. Fidler (Tenn. Ch. App.) 58 S. W. 382; Patrick v. Bowman, 149 U. S. 411, 13 Sup. Ct. 811, 866, 37 L. Ed. 790.

<sup>2</sup> 2 Kent, Com. (12th Ed.) 477.

both.<sup>3</sup> These facts being true, there is no reason—and it is generally so held<sup>4</sup>—why contracts cannot be as easily negotiated by the medium of the telegraph as through the mail, and be governed by the same rules of law applicable to the latter.<sup>5</sup>

§ 742. **Alteration of telegram does not affect rule.**—It is true that the terms of a contract are more liable to be changed or altered

<sup>3</sup> *Illinois*.—Haas v. Myers, 111 Ill. 421, 53 Am. Rep. 634; Cobb v. Foree, 38 Ill. App. 255.

*Indiana*.—Miller v. Nugent, 12 Ind. App. 348, 40 N. E. 282.

*Kentucky*.—Calhoun v. Atchison, 4 Bush, 261, 96 Am. Dec. 299.

*Maine*.—True v. International Tel. Co., 60 Me. 9, 11 Am. Rep. 156.

*Maryland*.—Curtis v. Gibney, 59 Md. 131.

*Missouri*.—Whaley v. Hinchman, 22 Mo. App. 483.

*New Jersey*.—Hallock v. Commercial Ins. Co., 26 N. J. Law, 268.

*New York*.—Beach v. Raritan, etc., R. Co., 37 N. Y. 457; Schonberg v. Cheney, 3 Hun, 677; Trevor v. Wood, 41 Barb. 255, reversed in 36 N. Y. 307, 1 Trans. App. 248, 93 Am. Dec. 511; Marschall v. Eisen Vineyard Co., 7 Misc. Rep. 674, 28 N. Y. Supp. 62, 58 N. Y. St. Rep. 375.

*Tennessee*.—College Mill Co. v. Fidler (Ch. App.) 58 S. W. 382.

*United States*.—Minnesota Linseed Oil Co. v. Collier White Lead Co., 4 Dill. 431, Fed. Cas. No. 9,635.

*England*.—Stevenson v. McLean, 5 Q. B. D. 346, 49 L. J. Q. B. 701, 42 L. T. Rep. U. S. 897.

*Canada*.—Thorne v. Barwick, 16 U. C. C. P. 369; Marshall v. Jamison, 42 U. C. Q. D. 115.

<sup>4</sup> *Meinett v. Snow*, 3 Idaho (Hash.) 112, 27 Pac. 677; *Robinson Match Works v. Chandler*, 56 Ind. 575; *Richmond v. Sundburg*, 77 Iowa, 255, 42 N. W. 184; *Post v. Davis*, 7 Kan. App. 217, 52 Pac. 903; *Franklin Bank v. Lynch*, 52 Md. 270, 36 Am. Rep. 375; *Brauer v. Shaw*, 168 Mass. 198, 46 N. E. 617, 60 Am. St. Rep. 387; *Taylor v. The Robert Campbell*, 20 Mo. 254; *Hammond v. Beeson* (Mo.) 15 S. W. 1099; *Isaac Joseph Iron Co. v. Richardson*, 38 Wkly. Notes Cas. (Pa.) 487; *Eckert v. Schoch*, 155 Pa. 530, 26 Atl. 654; *Short v. Threadgill*, 3 Willson, Civ. Cas. Ct. App. (Tex.) § 267; *Dulde v. Batts*, 38 Tex. 312; *Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127; *Wells v. Milwaukee, etc., R. Co.*, 30 Wis. 605; *Saveland v. Green*, 40 Wis. 431; *Utley v. Donaldson*, 94 U. S. 29, 24 L. Ed. 54; *Alford v. Wilson* (C. C.) 20 Fed. 96; *Central Trust Co. v. Wabash, etc., R. Co.* (C. C.) 38 Fed. 561; *Garrettson v. Atchison Bank* (C. C.) 39 Fed. 163, 7 L. R. A. 428; (C. C.) 47 Fed. 867, affirmed 2 C. C. A. 145, 51 Fed. 168; *Schultz v. Phenix Ins. Co.* (C. C.) 77 Fed. 375; *Andrews v. Schreiber* (C. C.) 93 Fed. 367.

<sup>5</sup> *Haas v. Myers*, 111 Ill. 421, 53 Am. Rep. 634; *Cobb v. Foree*, 38 Ill. App. 255; *Miller v. Nugent*, 12 Ind. App. 348, 40 N. E. 282; *Calhoun v. Atchison*, 4 Bush (Ky.) 261, 96 Am. Dec. 299; *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *Curtis v. Gibney*, 59 Md. 131; *Whaley v. Hinchman*, 22 Mo. App. 483; *Hallock v. Commercial Ins. Co.*, 26 N. J. Law, 268; *Beach v. Raritan, etc., R. Co.*, 37 N. Y. 457; *Schonberg v. Cheney*, 3 Hun (N. Y.) 677; *Trevor v. Wood*, 41 Barb. (N. Y.) 255, reversed in 36 N. Y. 307, 93 Am. Dec. 511; *Marschall v. Eisen Vineyard Co.*, 7 Misc. Rep. 674, 28 N. Y. Supp. 62, 58 N. Y. St. Rep. 375; *Saveland v. Green*, 40 Wis. 431; *College Mill Co. v. Fidler* (Tenn. Ch. App.) 58 S. W. 382; *Minnesota Linseed Oil Co. v. Collier White Lead Co.*, 4 Dill. 431, Fed. Cas. No. 9635; *Stevenson v. McLean*, 5 Q. B. D. 346, 49 L. J. Q. B. 701, 42 L. T. Rep., N. L. 897, 28 Wkly. Rep. 916; *Thorne v. Barwick*, 16 U. C. C. P. 369; *Marshall v. Jamison*, 42 U. C. Q. B. 115; *Cage v. Black*, 97 Ark. 613, 134 S. W. 942; *Mitchell v. Wallace*, 87 S. W. 303, 27 Ky.



if conveyed by telegram than they would be should they be sent by mail. In the course of communication of news by telegram, there are many hindrances to be encountered which are often unavoidable. The wires of the company may often become heavily charged with electricity as a result of an abnormal atmospheric condition, and this fact always has the effect of disturbing the communication of news so as to prevent a correct transmission; the same effect will be produced as a result of the wires being covered with ice or sleet, or when they have become crossed. So also the communication conducted by the latter means is more often interfered with by acts of the public enemy, or by strikes of the company's employés. It is also a more difficult way of transmitting news, and unless the employés are skilled and experienced workmen, alterations or changes in the messages are more likely to be made than if the same had been communicated by mail. The fact that an alteration has been made does not, however, change the application of the law to these. The message as delivered to the addressee contains the terms of the contract upon which he must act, provided the same is done in good faith. While the sender of the message is bound by the terms of the contract as received, yet he may have recourse against the company for negligently transmitting the message.<sup>6</sup>

Law Rep. 967; *Bradley v. Bower*, 5 Neb. 542, 99 N. W. 490; *Sherrerd v. Tel. Co.*, 146 Wis. 197, 131 N. W. 341; *Sumner v. Cole*, 32 N. S. R. 179; *Heckla v. Cunard*, 37 N. S. R. 97; *Harty v. Gooderhan*, 31 U. C. Q. B. 18; *Goodall v. Smith*, 46 U. C. Q. B. 388; *Holcomb v. Linn*, 174 Ill. App. 419; *First National Bank v. Commercial Savings Bank*, 74 Kan. 606, 87 Pac. 746, 8 L. R. A. (N. S.) 1148, 118 Am. St. Rep. 340, 11 Ann. Cas. 281; *Cedar Rapids Lbr. Co. v. Fisher*, 129 Iowa, 332, 105 N. W. 595, 4 L. R. A. (N. S.) 177; *Lucas v. West. U.*, 131 Iowa, 669, 109 N. W. 191, 6 L. R. A. (N. S.) 1016; *Clark Mfg. Co. v. West. U.*, 152 N. C. 157, 67 S. E. 329, 27 L. R. A. (N. S.) 643; *Utey v. Donaldson*, 94 U. S. 29, 24 L. Ed. 54. Contracts required to be in writing may be made by means of written telegrams. *Western Twine Co. v. Wright*, 11 S. D. 521, 78 N. W. 942, 44 L. R. A. 438. Of course, where letters and telegrams are employed by the parties, there is no contract unless the minds of the parties meet at the same time on the same terms. *Sutter v. Raeder*, 149 Mo. 297, 50 S. W. 813. Where the contract consists wholly of letters and telegrams, the question whether they constitute a contract is one of law for the court. *James v. Marion Fruit, etc., Co.*, 69 Mo. App. 207. In other words, the use of telegrams as evidence of the contract of the parties is governed by the same general rules which are applied to other writings. *Saveland v. Green*, *supra*. There is, in fact, but little, if any, difference between the rules governing the negotiations of contracts by correspondence through the post office and communications by means of the telegram. *Minnesota Linseed Oil Co. v. Collier White Lead Co.*, *supra*; *Cobb v. Glenn Boom & Lbr. Co.*, 57 W. Va. 49, 49 S. E. 1005, 110 Am. St. Rep. 734.

<sup>6</sup> *West. U. Tel. Co. v. Shotter*, 71 Ga. 760; *Ayer v. West. U. Tel. Co.*, 79 Me.

§ 743. **Same continued—private institution—does not effect.**—The same law is applicable to the creation of contracts whether they have been negotiated by mail or by telegram, and this, too notwithstanding that the telegraph companies, unlike the post-office, are private institutions, owned and operated by private individuals.<sup>7</sup> As was said by an able text-writer on this subject: "This distinction is immaterial, it seems, upon the question whether either a telegraph company or the post office is the agent of a private individual to complete a contract in his behalf. A telegraph company is employed to communicate a certain message. It neither undertakes nor is authorized to go further, and effect as an agent the purposes for which the communication of that message is desired by the employer. It is simply a forwarder of messages."<sup>8</sup>

§ 744. **What must contain.**—In order that a contract may be negotiated through correspondence or by mail, the letters pertaining to such must contain sufficient matter to show that an offer has been made and accepted. When the cardinal points of a proposed contract are definitely agreed upon by letter, the mere fact that in the course of the correspondence reference has been made to a more formal agreement will not deter the court from considering the agreements arrived at by the letters as concluded. The same rule applies to contracts made by telegram. If the telegrams in regard to such contract contain sufficient elements to constitute a contract, and it is evident from these that the contract has been accepted, the parties will be bound by such contract,<sup>9</sup> although, during the communication, more formal contracts may have been referred to; and a court would not hesitate to consider the agreements arrived at by telegram as concluded.<sup>10</sup> It is presumed that

493, 10 Atl. 495, 1 Am. St. Rep. 353; *Magie v. Herman*, 50 Minn. 424, 52 N. W. 909, 36 Am. St. Rep. 660; *Saveland v. Green*, 40 Wis. 431.

<sup>7</sup> *Dickson v. Renters' Tel. Co.*, 2 C. P. D., 62, 19 Moak, 313, affirmed 3 P. C. D. 1, 30 Moak. 1.

<sup>8</sup> *Gray on Tel. par. 113.*

<sup>9</sup> *Calhoun v. Atchison*, 4 Bush (Ky.) 261, 96 Am. Dec. 299; *Cedar Rapids Lumber Co. v. Fisher*, 129 Iowa, 332, 105 N. W. 595, 4 L. R. A. (N. S.) 177.

<sup>10</sup> *Cayley v. Walpole*, 22 L. T. N. S. 900, 18 W. R. 782; *Johnson v. King*, 2 Bing. 270, 9 Moore, 482. But the telegrams or letters, or both, must contain sufficient matter to show that a contract was made and accepted. *Brewer v. Horst, etc., Co.*, 127 Cal. 643, 50 L. R. A. 240n, 60 Pac. 418. See, also, *Cox v. Maxwell*, 151 Mass. 336, 24 N. E. 50; *Short v. Threadgill*, 3 Willson, Civ. Cas. Ct. App. (Tex.) § 268; *Société Anonyme, etc., v. Old Jordan Min., etc., Co.*, 9 Utah, 483, 35 Pac. 492; *Lawrence v. Milwaukee, etc., R. Co.*, 84 Wis. 427, 54 N. W. 797; *Utey v. Donaldson*, 94 U. S. 29, 24 L. Ed. 54; *Central Trust Co. v. Wabash, etc., R. Co.* (C. C.) 38 Fed. 561; *Alford v. Wilson* (C. C.) 20 Fed. 96.

Where, in connection with prior oral negotiations, a telegram is sent to fix some details of the contract, the telegram is merely evidence to the point

if there are two conflicting contracts made by the same parties, at different times, in regard to the same subject-matter, the last made should be more valid and enforceable. Where, however, the contract is to be made out, partly by telegrams and partly by parol evidence, the whole becomes a question for the jury.<sup>11</sup>

§ 745. **When offer is complete.**—When an offer or proposition is made by mail or by telegram, it is not complete until it has been delivered to the sendee. The party making an offer—the same to be delivered by this means—appoint this agency to make the delivery. The postal system or telegraph being an agent of the sender, the offer is not complete so long as it remains in the hands of the agent, but so soon as it is delivered to the party to whom the offer is made, it then becomes complete. If there are any delays or mistakes made during the transmission of the offer, the party sending same must suffer the consequence.<sup>12</sup>

§ 746. **Order made by telegram.**—An order for goods or merchandise may be, and often is, made by telegram.<sup>13</sup> The question which we desire to discuss in this connection is, When does the order take effect or become a sale, where nothing is said in the message in this regard? If the message should request that a reply be given so as to notify the sender whether the order could be filled, there would be no doubt about when the order would take effect. The order, in this instance, would be filled when the reply was given to the telegraph company. The difficult question to be determined is, When will the sale be complete when nothing is said about a reply? If the goods are to be delivered to the carrier by

shown by it and does not constitute the contract. *Beach v. Raritan, etc., R. Co.*, 37 N. Y. 457. Thus, where the original negotiations were oral, a telegram stating: "I will take double-decked car hogs. Wm. C. Bryant will close contract"—was insufficient to constitute a contract, the court saying: "Standing by itself, the telegram contained none of the elements of a bargain except quantity, and it implied that there had been some communication previously in regard to terms, which would have to be appealed to, to explain the substance of the bargain. Moreover, it did not purport to be a note or memorandum of agreement at all, but only a simple notification of adhesion to an agreement which had been previously arranged therefor and the terms of which were assumed to be understood, and the facts showing that the previous arrangement so referred to was one which rested wholly in parol." *McElroy v. Buck*, 35 Mich. 434.

<sup>11</sup> *Blockow v. Seymour*, 17 C. B. U. S. 107. See, also, *Cox v. Maxwell*, 151 Mass. 336, 24 N. E. 50; *Short v. Threadgill*, 3 Willson, Civ. Cas. Ct. App. (Tex.) § 267; *Société Anonyme, etc., v. Old Jordan Min., etc., Co.*, 9 Utah, 483, 35 Pac. 492.

<sup>12</sup> *Averill v. Hedge*, 12 Conn. 424; *Mactier v. Fritch*, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; *Frith v. Lawrence*, 1 Paige (N. Y.) 434; *Adams v. Lendsell*, 1 B. & Ald. 681, 19 Rev. Rep. 415.

<sup>13</sup> See chapter XXI.



the party on whom the order is made, and the carrier is designated in the order, it seems that a delivery to the carrier or warehouse company would be a sufficient acceptance of the order. If, however, no carrier is mentioned in the order, but other goods which have been purchased by the same party were delivered to a certain carrier, it seems that the party on whom the order was made would be justified in delivering the goods to the same carrier, and the acceptance would then be complete. The circumstances of each particular case may be different, and, of course, under this state of facts the same rule would not apply to both.

§ 747. **Communication both by post and telegraph.**—In order to create a contract by means of correspondence, it is not necessary that all the negotiations should have been conducted by post nor by telegraph, but it may have been created both by correspondence by post, and by communications by telegraph.<sup>14</sup> In other words, some of the communications may have been made by mail and others by telegram.<sup>15</sup> And it seems that, if it is not necessary that the con-

<sup>14</sup> See cases in note 22, § 727.

<sup>15</sup> *Bissinger v. Prince*, 117 Ala. 480, 23 South. 67; *Calhoun v. Atchison*, 4 Bush (Ky.) 265, 96 Am. Dec. 299; *Cobb v. Glenn Boom, etc., Co.*, 57 W. Va. 49, 49 S. E. 1005, 110 Am. St. Rep. 734; *Olds v. East Tenn., etc., Co.* (Tenn. Ch. App.) 48 S. W. 333; *Utley v. Donaldson*, 94 U. S. 29, 24 L. Ed. 54; *Alford v. Wilson* (C. C.) 20 Fed. 96. But the telegrams and letters must be connected without the aid of parol. *Duff v. Hopkins* (D. C.) 33 Fed. 599. A person may bind himself by an offer to sell personal property, where the amount or quantity is left to be fixed by the person to whom the offer is made. *Moulton v. Kershaw*, 59 Wis. 316, 18 N. W. 172, 48 Am. Rep. 516. Thus a letter inquiring: "Have you any more northwestern mess pork, or prime mess, also extra mess? Telegraph price on receipt of this"—to which the dealer replied by telegraph: "Letter received. No light mess here, extra mess Twenty-eight, seventy-five (28.75)"—whereupon a telegram was sent reading: "Dispatch received. Will take two hundred extra mess, price named." The court held that the telegram stating the price of pork was a mere quotation of the market price of pork, and the reply telegram to it was a mere order for goods which dealer might accept or reject, at his pleasure, and which, until accepted, constituted no contract. *Beaupre v. Pacific, etc., Telegraph Co.*, 21 Minn. 155. But in *Eckert v. Schoch*, 155 Pa. 530, 26 Atl. 654, the following correspondence by letters and telegrams was held to constitute a contract, viz: The plaintiff wrote a letter to the defendant inquiring whether he had any wheat to sell. The defendant responded with a postal card, asking: "What can you pay for good Pa. wheat on track here? If you can pay 83½ on track here for prime Pa. wheat, will send you a sample. Please let me hear by return mail." Plaintiff replied by telegram, stating: "If good stock there, can place five cars, price named. Send sample quick"—and on the same day also wrote to defendant: "On receipt of your postal, I wired you that, if good stock, I thought I could use five cars of wheat at price quoted (83½). Send sample quick. Demand for wheat good and I think I can do some trading with you. The freight rate, I suppose, is about 13¢"—which was followed by a telegram on the same day stating, "Ship quick five cars of prime, red wheat to Stenton, as trial lot." This telegram was followed the next day by a letter stating:

tract should be in writing, as required by the statute of frauds, oral statements made when the contracting parties are together, or made by telephone, may be used in connection with the telegrams to prove the contract. As it has been elsewhere<sup>16</sup> discussed, to make some contracts binding, some written memorandum must have been kept, and also that a memorandum might be made by telegram. So, if there have been oral statements made respecting the creation of a contract which is required to be in writing, they may be considered in connection with such telegrams to explain the contract as made.

§ 748. **When contracts take effect.**—It is the rule of law that, when a contract is made by means of correspondence through the mail, the contract is complete upon the posting by one party of a letter addressed to the other, accepting the terms offered by the latter, although such letter may never reach its destination.<sup>17</sup> The reason of the rule is obvious. He who makes a proposition or an offer through the mail impliedly appoints the postal system his agent, and when the other party accepts the proposition or offer, and in accordance thereto delivers a properly addressed letter to said agent to be conveyed to the first party, the acceptance is sufficiently made. Applying the same rule to contracts negotiated by means of the telegraph, we find it is generally held that when an unconditional offer is made through this means, and a telegram containing an acceptance of the terms of such contract is delivered to the telegraph company by the offeree, the contract is completed, whether the message does or does not reach the other party.<sup>18</sup> And it has been held that an acceptance by telegram of

"I confirm purchase of five cars prime Penn'a. wheat at 83½. track. Silinsgrove. Mill all to Stemton, and get as low a rate as possible. Get them off at once. This is to be a sample lot and, if satisfactory, I hope to handle considerable of your wheat. Send me an average sample at once." If the correspondence and telegrams between the parties contain all details of a contract, it is enforceable, even though the telegrams show that their agreement should be formally expressed in a single paper, which, when signed, should be the evidence of what already has been agreed upon. *Nash v. Kreling*, 6 Cal. Unrep. Cas. 238, 56 Pac. 262; *Post v. Davis*, 7 Kan. App. 217, 52 Pac. 903; *Sanders v. Pottlitzer Bros. Fruit Co.*, 144 N. Y. 209, 39 N. E. 75, 43 Am. St. Rep. 757, 29 L. R. A. 431; *Phenix Ins. Co. v. Schultz*, 80 Fed. 337, 25 C. C. A. 453.

<sup>16</sup> See chapter XXVIII.

<sup>17</sup> *Blake v. Ins. Co.*, 67 Tex. 160, 2 S. W. 368, 60 Am. Rep. 15; *Butterfield v. Spencer*, 14 N. Y. Super. Ct. 1; *Mactier v. Frith*, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; *Vassar v. Camp*, 14 Barb. (N. Y.) 354.

<sup>18</sup> *Cobb v. Foree*, 38 Ill. App. 255. Compare *Maclay v. Harvey*, 90 Ill. 525, 32 Am. Rep. 35. See *Lucas v. West. U.*, 131 Iowa, 669, 109 N. W. 191, 6 L. R. A. (N. S.) 1017, holding that an acceptance by telegram of an offer by mail which does not specify any mode of acceptance does not complete the contract until the telegram is delivered to the sendee. See *Perry v. Mt. Hope Iron*

an offer by mail, which does not specify any mode of acceptance, does not complete the contract until the telegram is delivered to the sendee.<sup>19</sup> So, in accordance to this holding, the rule would apply to a converse case, i. e., where the offer is transmitted by telegraph and the acceptance by mail. Under this the question might arise as to when the contract would be completed if the offer were transmitted over the lines of one telegraph company and the acceptance over the lines of another. A rigid adherence to the rule would require that the same line be used, and the one selected by the offerer, otherwise the contract would not be completed until the acceptance had been actually delivered in person to the latter. This result, however, might perhaps be obviated by taking the position that, by sending the offer by telegraph, the party making it sanctions the employment of the telegraph generally as a means of transmitting the acceptance, and not merely the employment of the particular telegraph company employed by him.<sup>20</sup>

**§ 749. Offer and acceptance—must be definite and unconditional.**—There must be a distinct offer in order to form a basis for an acceptance in regard to telegraphic communication in the same manner as is necessary respecting correspondence by letter, since it is essential that there be a meeting of the minds of the parties upon all the terms of the contract.<sup>21</sup> Furthermore, the telegraphic acceptance of a proposition must be clear, definite,<sup>22</sup> and substan-

Co., 15 R. I. 380, 5 Atl. 632, 2 Am. St. Rep. 902. See, also, *West. U. v. Sights*, 34 Okl. 461, 126 Pac. 234, Ann. Cas. 1914C, 204, 42 L. R. A. (N. S.) 419; *Wester v. Casein Co.*, 206 N. Y. 506, 100 N. E. 488, Ann. Cas. 1914B, 377, holding, where a person makes an offer by letter or telegram, and the person to whom it is made accepts it in the same manner, the contract comes into existence when the acceptance is mailed, or sent, as the offerer gives the carrier of his message implied authority to receive the reply for him; *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *Wheat v. Cross*, 31 Md. 99, 1 Am. Rep. 28; *Squire v. West. U. Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157; *McCulloch v. Eagle Ins. Co.*, 1 Pick. (Mass.) 278; *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511; *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. 339. See *Elliott on Contracts*, § 45.

<sup>19</sup> *Lucas v. West. U.*, 131 Iowa, 669, 109 N. W. 191, 6 L. R. A. (N. S.) 1016. See *Elliott on Contracts*, § 45 et seq.

<sup>20</sup> See *Elliott on Contracts*, § 45 et seq.

<sup>21</sup> *Deshon v. Fosdick*, 1 Woods, 286, Fed. Cas. No. 3,819; *Goulding v. Hammond*, 54 Fed. 639, 4 C. C. A. 533; *Alexander v. West. U.*, 67 Miss. 386, 7 South. 280; *Ford v. Gebhardt*, 114 Mo. 298, 21 S. W. 818. See, also, *West. Union v. Way*, 83 Ala. 542, 4 South. 844; *Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. 179.

<sup>22</sup> "Telegram received. You can consider the coal sold. Will be in Cleveland and arrange particulars next week." is not sufficiently clear and definite to constitute a sale of the coal. *Martin v. Northwestern Fuel Co. (C. C.)* 22 Fed. 596. "You may consider that you have the contract" was used in a letter responding to a telegraphic inquiry insufficient. *Bissinger v. Prince*,



tially absolute.<sup>23</sup> The question whether certain acts or conduct constitute a definite proposal or acceptance upon which a binding contract may be predicated without any further action on the part of the person from whom it proceeds, or a mere preliminary step, which is not susceptible, without further action by such party, of being converted into a binding contract, depends upon the nature of the particular acts or conduct in question, and the circumstances attending the transaction; and it is impossible to formulate a general principle or criterion for its determination. All that can be usefully done is to call attention to individual cases which have passed upon the question under various states of facts,<sup>24</sup> it being remembered that the question for determination is not as to the general requisites of effect of a proposal or acceptance essential to completion of a contract, but merely whether certain acts or conduct of a person, relied upon as a proposal or acceptance, are in fact such, or, upon the other hand, constitute a mere preliminary step, looking eventually toward a proposal or acceptance by that party. It can be said, however, that where a contract is sought to be established by letters or telegrams, it must appear from the direct terms of the same that both sides have agreed to one and the same set of propositions. If any new matter is introduced into the answer, or anything is left by the offer to further determination, no contract has been entered into. If the reply does not in every particular comply with the offer, it will not make a contract.<sup>25</sup> For

117 Ala. 480, 23 South. 67. But where, in response to a telegram asking, "Will you extend note for thirty days? Answer at once," a bank replies by telegram, "Would prefer money, if you can raise it conveniently," the reply amounts to an offer to renew the note if the money cannot be raised conveniently. *Shobe v. Luff*, 66 Ill. App. 414. See *First National Bank v. Commercial Savings Bank*, 74 Kan. 606, 87 Pac. 746, 8 L. R. A. (N. S.) 1148, 118 Am. St. Rep. 340, 11 Ann. Cas. 281.

<sup>23</sup> But minor details of the transaction may be left for future settlement. *West. U. v. Valentine*, 18 Ill. App. 57. An offer is not accepted which accepts a proposition with a qualification attached to the acceptance, as where telegram reads, "Have sold the Rastel place for twenty-five. Answer," to which defendant responded, "Sell land, reserving crops." *Clay v. Ricketts*, 66 Iowa, 362, 23 N. W. 755. See, also, *Backer v. Holt*, 56 Wis. 100, 14 N. W. 8. "I accept offer thirty-three for all your stock, drawing three days' sight draft, with check attached. Answer promptly number of shares," is not an absolute acceptance, but one with a condition attached to it respecting the mode of payment. *Cameron v. Wright*, 21 App. Div. 395, 47 N. Y. Supp. 571; *Seley v. Williams*, 20 Tex. Civ. App. 405, 50 S. W. 399. A telegram to a bidder for public work, "You are low bidder. Come on morning train," does not conclude a contract with him. *Cedar Rapids Lbr. Co. v. Fisher*, 129 Iowa, 332, 105 N. W. 595, 4 L. R. A. (N. S.) 177.

<sup>24</sup> Whether or not the correspondence shows an agreement is always a question of construction. See cases cited in note 5, *supra*.

<sup>25</sup> *Phenix Ins. Co. v. Schultz*, 80 Fed. 337, 25 C. C. A. 453; 1 Chitty on

telegrams to constitute a valid contract they must not be indefinite, uncertain or ambiguous.<sup>26</sup>

§ 750. **Offer requiring actual receipt of acceptance.**—The rule that a letter or telegram of acceptance takes effect when it is mailed or delivered to the telegraph company does not apply, of course, where the offer requires actual receipt of the letter or telegram of acceptance; as where it says: "Unless I receive your answer by a certain time, I will not consider myself bound,"<sup>27</sup> or where the offerer requests an answer by telegraph, "yes" or "no," and states that unless he receives the answer by a certain day he will conclude "no." It was held in this case that the offer was made dependent

Contracts (11th Am. Ed.) 15; Parsons on Contracts (6th Ed.) 476; Edichal Bullion Co. v. Columbia Gold Min. Co., 87 Va. 641, 13 S. E. 100; Minneapolis, etc., Ry. Co. v. Columbus Rolling Mill Co., 119 U. S. 149, 30 L. Ed. 376, 7 Sup. Ct. 168; Va. Hot Spgs. Co. v. Harrison, 93 Va. 569, 25 S. E. 888; Goulding v. Hammond, 54 Fed. 639, 4 C. C. A. 533; Haas v. Myers, 111 Ill. 421, 53 Am. Rep. 634; Lewis v. Browning, 130 Mass. 173.

<sup>26</sup> Breckinridge v. Crocker, 78 Cal. 529, 21 Pac. 179; North v. Mendel, 73 Ga. 400, 54 Am. Rep. 879; Watt v. Wisconsin Cranberry Co., 63 Iowa, 730, 18 N. W. 898; Lincoln v. Erie Preserving Co., 132 Mass. 129; Hazard v. Day, 14 Allen (Mass.) 487, 92 Am. Dec. 790; Hastings v. Webber, 142 Mass. 232, 7 N. E. 846, 56 Am. Rep. 671; Palmer v. Marquett, etc., Co., 32 Mich. 274; Williams v. Brickell, 37 Miss. 682, 75 Am. Dec. 88; Alexander v. West. U., 67 Miss. 386, 7 South. 280; Rector Prov. Co. v. Sauer, 69 Miss. 235, 13 South. 623; Whaley v. Finchman, 22 Mo. App. 483; Marschall v. Eisen Vineyard Co., 7 Misc. Rep. 674, 28 N. Y. Supp. 62; Moulton v. Kershaw, 59 Wis. 316, 18 N. W. 172, 48 Am. Rep. 516. The court, in Watson v. Baker, 71 Tex. 739, 9 S. W. 867, in discussing the sufficiency of letters and telegrams to show a sale of land, said: "As in all other contracts in writing, parol testimony cannot add to their terms, yet it can show the circumstances. It cannot make the contract for the sale of land, but can apply a description to the property, if such application can be made, so that it be known that the particular object is found. Parol evidence cannot add to an imperfect contract a material part, in order to sustain it, but it can apply a description in it to the subject." Abbreviations may be used in making sales where they have a well-known meaning in the trade. Brewer v. Horst, etc., Co., 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240; Pepper v. West. Union, 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660. Cipher telegrams may be explained by parol evidence showing that the message was intelligible to the party receiving it. West. Union v. Way, 83 Ala. 542, 4 South. 844; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819. Thus it may be shown that a telegram reading, "Buy three May," meant "Buy 3,000 bushels of May wheat," the court saying that: "Ciphers play an important part in business affairs, and we see no reason why they are not as proper subjects for translation as foreign languages." Carland v. West. Union, 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280. Where message reads, "Sell grained star brand, evaporated apples, abstrusely delivered St. Louis, next week's shipment from Western New York," it is necessary to show that the receiver of the message understood the word "grained" to mean "one car-load," and the word "abstrusely" to mean "10%." J. K. Armsby Co. v. Eckery, 42 Mo. App. 299.

<sup>27</sup> Lewis v. Browning, 130 Mass. 173.

upon the actual receipt and not the mere sending of the telegram.<sup>28</sup> Such a condition may in some cases be implied from the nature and form of the previous negotiations.<sup>29</sup> Thus, where the message requested the offeree to answer "yes" or "no," this shows that it was in the contemplation of the parties that this telegram should not merely have been deposited for transmission, but that it should have been transmitted and been received before there could arise between the parties any complete contract.

§ 751. **Same continued—how request implied.**—The request or authorization to communicate the acceptance of the offer by telegraph may be implied in either of two ways, viz.: (1) The telegraph is used to make the offer, as where a person makes an offer to another by a telegraphic message and says nothing as to how the answer shall be sent; and (2) where the circumstances are such that it must have been in the contemplation of the parties that, according to the ordinary usage of such parties, the telegraph might be used as a means for such purposes.<sup>30</sup> Therefore, where an offer is made by post, it is presumed that the acceptance of the offer shall be made by post; but if the offer is made by telegram, it is presumed that the acceptance should be made by telegraph.<sup>31</sup>

§ 752. **Acceptance must be made within time.**—In order for an acceptance to be good, it must be made within the time allowed in the offer. If there is no such time specified, it should be made within a reasonable time after the receipt of the offer. An offer comes to an end at the expiration of the time given for its acceptance, a limitation of time within which an offer is to run being equivalent to the withdrawal of the offer at the end of the time named.<sup>32</sup> But when no time is fixed in the offer, it expires at the end of a reasonable time.<sup>33</sup> What is a reasonable time depends upon the nature of the offer and the circumstances of the particular

<sup>28</sup> Langdell on Contracts, pars. 6, 11, 15.

<sup>29</sup> Haas v. Myers, 111 Ill. 421, 53 Am. Rep. 634.

<sup>30</sup> Hawthorn v. Fraser, 2 Ch. 27, 61 L. J. Ch. 373, 66 L. T. Rep. U. S. 439, 40 Wkly. Rep. 434.

<sup>31</sup> See Lucas v. West. Union, 131 Iowa, 669, 109 N. W. 191, 6 L. R. A. (N. S.) 1016.

<sup>32</sup> Maclay v. Harvey, 90 Ill. 525, 32 Am. Rep. 35; Cannon River Mfg. Ass'n v. Rogers, 42 Minn. 123, 43 N. W. 792, 18 Am. St. Rep. 497; Mactier v. Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; Union Nat. Bank v. Mills, 106 N. C. 347, 11 S. E. 321, 19 Am. St. Rep. 538; Weaver v. Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.

<sup>33</sup> Sanford v. Howard, 29 Ala. 684, 68 Am. Dec. 101; Ferrier v. Storer, 63 Iowa, 484, 19 N. W. 288, 50 Am. Rep. 752; Mitchell v. Abbott, 86 Me. 338, 29 Atl. 1118, 41 Am. St. Rep. 559, 25 L. R. A. 503; Morse v. Bellows, 7 N. H. 549, 28 Am. Dec. 372. When a telegram making an offer and demanding an immediate acceptance is received at 10 o'clock Saturday night, the sender is



matter about which the offer is made.<sup>34</sup> Thus, if it should be in regard to the sale of land, it seems that it is not necessary that so prompt a time be exercised as it would in case it were concerning the sale of chattels, stocks or perishable property.<sup>35</sup> In a case bordering on this point, a person went west to purchase a drove of cattle. If there was an opportunity to purchase at a reasonable price he was to wire another person of same and the latter was to arrange for part of the payment at a certain time. The latter did not make such arrangement at the time, but came later and claimed his interest in the purchase. It was held that he was too late. "It was essential that he should have performed before. \* \* \* That he could not, after leading Myers to think that he did not want an interest in the purchase, and the latter and Martin raising and paying all the purchase money required, come in afterwards, though only the next day, and then offer to pay his share of the money, and demand the right of participation in the purchase. To have then admitted Haas into the purchase would have been but a matter of favor with Myers, not of obligation."<sup>36</sup>

**§ 753. Revocation of offer.**—It is a general rule that where an offer is made, not under seal, it may be revoked at any time before acceptance, unless there is a binding agreement to hold it open, but

not bound by an acceptance sent on the following Monday. *James v. Marion Fruit Jar, etc., Co.*, 69 Mo. App. 207.

*Question for jury.*—*Lucas v. West. Union Tel. Co.*, 131 Iowa, 669, 109 N. W. 191, 6 L. R. A. (N. S.) 1016.

<sup>34</sup> *Averill v. Hedge*, 12 Conn. 424; *Larmon v. Jordan*, 56 Ill. 204; *Morse v. Bellows*, 7 N. H. 549, 28 Am. Dec. 372.

Where the negotiations respect articles which fluctuate much in price, an acceptance must be immediate. *Minn. Linseed Oil Co. v. Collier White Lead Co.*, 4 Dill. 431, Fed. Cas. No. 9,635; *Horne v. Niver*, 168 Mass. 4, 46 N. E. 393. Where a telegram making an offer to sell fruit came read, "Wire instantly, or this is withdrawn," was delivered about 10 p. m., an acceptance delayed until Monday morning is so unreasonable as not to constitute a contract. *James v. Marion Fruit, etc., Co.*, 69 Mo. App. 207. Where a proposal by letter states, "This is for a wired acceptance on receiving this letter, or no trade," an acceptance wired the following day is insufficient. *Eagle Mill Co. v. Caven*, 76 Mo. App. 458. "Must have reply early to-morrow" is a stipulation for reply within that time. *Union Nat. Bank v. Miller*, 106 N. C. 347, 11 S. E. 321, 19 Am. St. Rep. 538. Where a person inquired by letter, "What is Cole's Scrip worth and soldier's additional homesteads now?" to which the addressee responded by letter, "I can furnish today Cole's Scrip at \$5.00 and additional eighties at \$3.00 per acre," a telegram the next day, after receipt of the reply, stating, "Send me two Soldier's additional eighties to-day," is too late. *Talbot v. Pettigrew*, 3 Dak. 141, 13 N. W. 576.

<sup>35</sup> *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775; *Park v. Whitney*, 148 Mass. 278, 19 N. E. 161; *Minnesota Linseed Oil Co. v. Collier White Lead Co.*, 4 Dill. 431, 17 Fed. Cas. No. 9,635.

<sup>36</sup> *Haas v. Myers*, 111 Ill. 421, 53 Am. Rep. 634.

it cannot be revoked after acceptance.<sup>37</sup> In order that the offer should be revoked, it is necessary that the same be communicated to the offeree before he accepts the offer.<sup>38</sup> Formal notice of such revocation is not always necessary. It is sufficient if the person making the offer makes some act inconsistent with it, as where he sells the property to another person, and the offeree knows of such sale before he accepts.<sup>39</sup> If an offer is sent by telegram, and, in accordance to the regulations of the company's office, the sender is unable to recall his telegram, he may do so by other means if possible before it is accepted;<sup>40</sup> as by a second telegram sent by the same means and delivered at the same time with the first telegram;<sup>41</sup> or by a telegram received by the offeree before he has delivered his telegram to the company accepting the offer.<sup>42</sup> But a revocation of an offer not actually communicated to the person to whom the offer is made, or which is communicated to him after the acceptance has been sufficiently made, is inoperative.<sup>43</sup> So it follows that a revocation of an offer made by telegram can have no effect, unless the same is communicated to the offeree before the acceptance.

§ 754. **Designation of parties.**—Where the transaction about which the telegrams relate is one between agents or brokers, the question whether the parties signing the telegrams are acting personally or merely as brokers often becomes material.<sup>44</sup> The gen-

<sup>37</sup> *Cooper v. Lansing Wheel Co.*, 94 Mich. 272, 54 N. W. 39, 34 Am. St. Rep. 341; *Ide v. Leiser*, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17; *Perry v. Mt. Hope Iron Co.*, 15 R. I. 380, 5 Atl. 632, 2 Am. St. Rep. 902; *Brauer v. Shaw*, 168 Mass. 198, 46 N. E. 617, 60 Am. St. Rep. 387.

<sup>38</sup> *Eskridge v. Glover*, 5 Stew. & P. (Ala.) 264, 26 Am. Dec. 344; *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775; *Dambmann v. Lorentz*, 70 Md. 380, 17 Atl. 389, 14 Am. St. Rep. 364; *Waterman v. Banks*, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 479.

<sup>39</sup> *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775; *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. 284, 6 Am. St. Rep. 417.

<sup>40</sup> *Newcomb v. De Roose*, 2 E. & E. 271, 6 Jur. U. S. 68, 29 L. J. Q. B. 4, 8 Wkly. 5, 105 E. C. L. 271; *Baker v. Holt*, 56 Wis. 100, 14 N. W. 8; *Harris v. Scott*, 67 N. H. 437, 32 Atl. 770, by telegram.

<sup>41</sup> *Sherwin v. Nat. Cash Reg. Co.*, 5 Colo. App. 162, 38 Pac. 392.

<sup>42</sup> *Re London, etc.*, 81 L. T. Rep. U. S. 512.

<sup>43</sup> *Wheat v. Cross*, 31 Md. 99, 1 Am. Rep. 28; *Brauer v. Shaw*, 168 Mass. 198, 46 N. E. 617, 60 Am. St. Rep. 387.

<sup>44</sup> "Telegraph how much corn you will sell, with lowest cash price, Buffalo." reply "Three thousand cases, one dollar five cents, open one week," to which this reply is made, "Sold corn; will see you to-morrow." The court, after holding that there was no sale to the broker, said: "Construing the first two telegrams together, the defendant says to the plaintiff that it will sell a certain quantity of corn on certain terms, and within a certain time; but it does not say that it will sell to the plaintiff. It says, in effect, that it will hold the corn for a week, for the plaintiff to find a purchaser. The plaintiff's reply

eral rule is that one who acts as agent for another, in order to release himself from liability should disclose his principal, because otherwise it would be presumed that he intended to bind himself personally. In other words, it is not the duty of one dealing with an agent to find out whether he is acting in the transaction in that capacity or as principal; but it is the duty of the agent, if he desires to relieve himself from personal liability, to disclose the name

confirms this construction, for he does not say that he will take the corn, but that he has sold it and will see the defendant the next day." *Lincoln v. Erie Preserving Co.*, 132 Mass. 129. "*Carlton & Moffat*, New York. At what price can you supply C. F. L. June, July delivery one million Standard Calcutta wheat bags: Terms, notes payable 1st day of November, 1st day of December; interest to begin 1st day of July. *E. L. G. Steele & Co.*" The defendant replied: "*E. L. G. Steel & Co.*, San Francisco: Calcutta offers, subject to immediate reply, one million centals March, April shipment, steamer 3 <sup>92</sup>/<sub>100</sub> cents, net cost, and freight. Must have a confirmed bankers credit on London, four months' sight. Subject to reply by 5 p. m. here today Thursday. *Carleton & Moffat*"—to which plaintiff's assignors replied: "*Carleton & Moffat*, 132 Front Street, New York: We accept, for our account, one million standard Calcutta bags, size twenty-two by thirty-six, weight twelve ounces, as per your telegram of today. Wire us, confirming this, and naming your correspondent in Calcutta, and instruct us regarding credit. *E. L. G. Steele & Co.*" The Court said: "It is insisted by the defendant that the fair reading of this telegram was that it was an offer made, not by him, but by somebody else, which he transmitted. As will be seen, the question upon the construction of the phrase 'Calcutta offers.' We think it would be straining the language used to assume that such phrase meant that somebody in Calcutta offered to sell. The more reasonable and natural view to take would be that, the plaintiff's assignors having asked the defendant if he would sell, the words 'Calcutta offers,' as used by the defendant, mean that, 'From advices received from Calcutta we offer you,' and then follow the terms which are different from the offer. This answer is signed, not by the defendant as agent, but in his firm name, and presumably, therefore, in his personal, and not in any representative, capacity. That this is a reasonable construction follows from the fact that the plaintiff's assignors were not asking the defendant what he could obtain from Calcutta, but the inquiry was what 'you' (meaning the defendant personally) would sell the bags for. Before answering the telegram, it might well be that the defendant needed advices from Calcutta as to the terms upon which he could get the bags, which would fully explain the phrase used, 'Calcutta offers.' It will also be noted that in his telegram the defendant requested an answer by 5 p. m. The only purpose of requesting that answer was to have the contract completed. There was no one suggested to whom the plaintiff's assignors could direct their answer, except to the defendant, and it was entirely immaterial from whom the bags were obtained, provided they were of the proper standard; but, as the bags were undoubtedly to come from Calcutta, the price and time of shipment from that place were important. To hold that these telegrams did not make a contract would necessarily assume that the reply which the defendant required was with no intention of binding either himself or any one else, because there is no suggestion of a dealing between the plaintiff's assignors and any person except the defendant. The latter does not intimate that he was acting in a representative capacity, or for an undisclosed principal, nor do we think any such inference is to be drawn from the fact that in the confirmatory telegram to the defendant



of his principal in the transaction.<sup>45</sup> So, where a contract is being made by means of the telegraph, the offerer, if he is acting in the capacity of agent or broker, should impart the information to the offeree. The contracting parties may be ascertained by means of a confirmatory telegram.<sup>46</sup> But it has been held that a statement in a telegram that a sale had been made to a certain person did not itself show that the sale was made to a firm of which the said person was a member.<sup>47</sup>

accepting the latter's offer we find a request for the defendant to name a 'correspondent in Calcutta.' We think it was an erroneous assumption on the part of the judge below to conclude from this that the senders of the telegram considered that they were dealing with the defendant as an agent, and that it was sent with a view of learning the name of the principal. It must be remembered that the defendant required, among other conditions, 'a confirmed banker's credit on London'; and it was necessary for plaintiff's assignors to know who was to receive this credit, as it was equally proper for them to know the name of the party who was to ship the bags. It would be placing too much importance upon such language to conclude that it was an inquiry for the name of defendant's principal, while the telegrams themselves show that all the essential dealings were immediately with the defendant. The plaintiff's assignors were not concerned with the question of how or from whom the defendant might obtain the bags; but, having made a contract with him to purchase them, it was, of course, proper that they should have the information, so that they might comply with the terms contained in the defendant's telegram in reference to credit, and the place from which the bags were to be shipped. If, however, the defendant was in fact acting as agent, we think he was still liable for failure to disclose the name of his principal. The general rule is that one who acts as agent for another, in order to release himself from liability, should disclose his principal, because otherwise it would be presumed that he intended to bind himself personally. In other words, it is not the duty of one dealing with an agent to find out whether he is acting in the transaction in that capacity or as principal; but it is the duty of the agent, if he desires to relieve himself from personal liability, to disclose the name of his principal in the transaction. The conclusion at which we have arrived, therefore, is that there was a direct inquiry to the defendant personally as to the price at which he would sell the bags, that, in reply, the defendant proposed the terms upon which he would sell, and that the final telegram of the plaintiff's assignors was an acceptance of the offer made, and completed the contract." *Crossett v. Carleton*, 23 App. Div. 366, 48 N. Y. Supp. 309.

<sup>45</sup> *Crossett v. Carleton*, 23 App. Div. 366, 48 N. Y. Supp. 309; *Cobb v. Glenn Boom, etc., Co.*, 57 W. Va. 49, 49 S. E. 1005, 110 Am. St. Rep. 734.

<sup>46</sup> "Horst & Lachmund Co., Santa Rosa, Cal. Bought thirteen at eleven five-eighths net you; confirm purchase by wire to Brewer, nineteen sixteen M. street, inspection on or before Saturday. Do you want fifteen at eleven quarter? C. A. Wagner"—who responded with the following telegram to the vendor: Reply: "Geo. Brewer, 1916 M. Street, Sacramento, Cal. We confirm purchase Wagner eleven five-eighths cents, like sample. Horst & Lachmund Co." The telegrams sufficiently disclosed the parties. *Brewer v. Horst & Lachmund*, 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240. See *Watt v. Wisconsin Cranberry Co.*, 63 Iowa, 730, 18 N. W. 898.

<sup>47</sup> *Watt v. Wisconsin Cranberry Co.*, 63 Iowa, 730, 18 N. W. 898.

§ 755. **Indorsement and acceptance by telegram—forged acceptance.**—A promise to indorse <sup>48</sup> commercial paper, or a valid acceptance <sup>49</sup> thereof, may be made by telegram. So a bank which receives from another a telegram promising to honor a draft has a right to use and present it to any one interested in the draft either as a holder or prospective purchaser, since it in law becomes a part of the draft as an acceptance.<sup>50</sup> But liability will not arise upon a claimed contract of indorsement or acceptance external to such paper, unless the language used clearly and unequivocally imparts an absolute promise to pay.<sup>51</sup> It has been held that a bank to

<sup>48</sup> *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355.

<sup>49</sup> *Coffman v. Campbell*, 87 Ill. 98; *Whilden v. Merchants', etc., Nat. Bank*, 64 Ala. 1, 38 Am. Rep. 1; *Flora First Nat. Bank v. Clark*, 61 Md. 400, 48 Am. Rep. 114; *Ravenswood Bank v. Reneker*, 18 Pa. Super. Ct. 192; *Bank v. Bank*, 74 Kan. 606, 87 Pac. 746, 8 L. R. A. (N. S.) 1148, 118 Am. St. Rep. 340, 11 Ann. Cas. 281; *Garrettsen v. North Atchison Bank (C. C.)* 39 Fed. 163, 7 L. R. A. 428, affirmed in (C. C.) 47 Fed. 867; *Wells v. West. Union*, 144 Iowa, 605, 123 N. W. 371, 24 L. R. A. (N. S.) 1045, 138 Am. St. Rep. 317; *Bank v. Bradstreet*, 89 Neb. 186, 130 N. W. 1038, 38 L. R. A. (N. S.) 747. See, also, *Henrietta Nat. Bank v. State Nat. Bank*, 80 Tex. 648, 16 S. W. 321, 26 Am. St. Rep. 773, holding that, where the holder telegraphed the drawee, "Will you pay E. F. and W. S. Ikard's check for eighteen hundred on presentation?" the reply telegram, "Yes, will pay the Ikard check," sufficiently identified the check to sustain an action for breach of the promise to pay.

*Countermanding check.*—A countermand of a check may be made by telegram, and if a bank is negligent in acting on a countermand, it will be liable. *Curtice v. London City, etc., Bank*, 1 B. R. C. 417, 1 K. B. 293, 77 L. J. K. B. (N. S.) 341, 98 L. T. (N. S.) 190, 24 Times L. R. 176.

<sup>50</sup> *Wells v. West. Union*, 144 Iowa, 605, 123 N. W. 371, 24 L. R. A. (N. S.) 1045, 138 Am. St. Rep. 317.

<sup>51</sup> Such a promise is not made by returning to the telegraph inquiry, "Is J. F. Donald's check on you Three hundred fifty good?" the telegraphic response, "J. F. Donald's check is good for sum named." *First Nat. Bank v. Coml. Savings Bank*, 74 Kan. 606, 87 Pac. 746, 8 L. R. A. (N. S.) 1148, 118 Am. St. Rep. 340, 11 Ann. Cas. 281. "If we can see a margin will authorize you to draw for the cost," a telegram stating, "Will advance cost if you buy strict, good, ordinary at sixteen," is an unconditional promise in writing to accept a bill before it is drawn. *Whilden v. Merchants', etc., Bank*, 64 Ala. 1, 38 Am. Rep. 1. "Will you honor draft drawn by A. Harper for \$2,300?" a reply telegram is sent stating, "Will pay A. Harper draft \$2,300 for stock," is an absolute undertaking to accept and pay the draft. *Coffman v. Campbell*, 87 Ill. 98. A telegram to a bank asking, "Will you pay James Tate's check on you, twenty thousand dollars? Answer," and the bank answers, "James Tate is good. Send on your paper," the telegram of the bank is a contract to pay the check on presentation. *North Atchison Bank v. Garrettsen*, 51 Fed. 168, 2 C. C. A. 145. "We will pay Clark & Goldby's draft, \$608.92," is not a contract to accept a draft for \$680.92. *Brinkman v. Hunter*, 73 Mo. 172, 39 Am. Rep. 492. "Will drafts for thirty-eight hundred, made by J. R. Snyder on you, be paid if presented Monday?" the bank replies, "Drafts named are good now," the reply does not constitute an acceptance, even though the holder of the drafts has telegraphed, "We have sent a man with drafts. Will be there before three o'clock." *Myers v. Union Nat. Bank*, 27 Ill. App. 254. In *Kahn v. Walton*, 46

which a forged telegram is delivered through the negligence of the telegraph company, agreeing to honor a draft, and which, on the faith thereof, cashes the draft to an insolvent, may maintain an action against the telegraph company for the loss thereby incurred.<sup>52</sup>

§ 756. **Contract—what law governs.**—It is the general law of contracts, as discussed elsewhere,<sup>53</sup> that the rights of the parties must be governed by the laws of the state where the property is situated and where the contract and conveyance are made, unless it is clearly shown that the conveyance was intended to take effect in another state.<sup>54</sup> Thus, where a Mississippi plantation was leased in a contract made by telegram to parties living in the state of Kentucky, and an action was brought in the latter state to recover the rent which was not stipulated as to when it should be paid, it was held that the time of payment must be determined by the laws and customs of the state where the land was situated, the contract was to be performed, the landlord lived, and where in legal contemplation the contract was made.<sup>55</sup> It may be said, however, that the same difficulty respecting the conflict of laws which occurs with respect to other contracts also occurs with respect to contracts made by telegram.<sup>56</sup>

§ 757. **Telegraph company ordinarily the agent of sender.**—An agent may be appointed by implication. Thus the appointment of an agent may be implied from the fact that a person is placed in a

Ohio St. 195, 20 N. E. 203, the inquiry was: "Are M. A. Walton's check for two thousand good?" The answer was: "Yes, sir." Acceptance not good. In *Springfield Bank v. First Nat. Bank*, 30 Mo. App. 271, the court said: "A parol representation by the bank upon which a check is drawn that the check is good is not equivalent to a certification, and does not bind the bank to pay it whenever presented until barred by limitation; nor does it release the holder from the duty of proper diligence in presentment for payment. It binds the bank to nothing more than the statement was true at the time it was made." "The bill shall have attention" is insufficient (*Rees v. Warwick*, 2 B. & Ald. 113, 2 Stark. 411), and a letter written by one to another saying, "I will accept and pay James Cusick's order for (20.00) twenty dollars," does not become an acceptance by the others endorsing the letter. *Allen v. Leavens*, 26 Or. 164, 37 Pac. 488, 46 Am. St. Rep. 613, 26 L. R. A. 620. See *State Bank v. Bradstreet*, 89 Neb. 186, 130 N. W. 1038, 38 L. R. A. (N. S.) 747, an unconditional acceptance.

<sup>52</sup> *Wells v. West. Union*, 144 Iowa, 605, 123 N. W. 371, 24 L. R. A. (N. S.) 1045, 138 Am. St. Rep. 317.

<sup>53</sup> See § 488 et seq.

<sup>54</sup> *Wyse v. Dandridge*, 35 Miss. 672, 72 Am. Dec. 149; *Young v. Harris*, 14 B. Mon. (Ky.) 556, 61 Am. Dec. 170; *Galliano v. Pierre & Co.*, 18 La. Ann. 10, 89 Am. Dec. 643, and note.

<sup>55</sup> *Calhoun v. Atchison*, 4 Bush (Ky.) 261, 96 Am. Dec. 299.

<sup>56</sup> *North Packing, etc., Co. v. West. Union Tel. Co.*, 70 Ill. App. 275; *Perry*



situation in which, according to ordinary usage, he would be understood to represent and act for another.<sup>57</sup> So it can, in general, be said that the manner in which a party treats one who apparently acts as his agent, and holds him out as such to third parties, will be a sufficient implication of agency.<sup>58</sup> It is a general rule that, when the post is used as a means of conveying news respecting a certain transaction, the party first selecting the post for such purpose impliedly appoints this instrumentality as an agency for consummating the transaction and it is therefore his agent. However, the extent of employment of such agent is merely to convey the letter and deliver it to the other party when called for. The same rule applies to telegraph companies, whereby they are ordinarily considered the agent of the party sending the message.<sup>59</sup> The effect of the rule, as has been seen, is that, when an offer has been made by telegraph, the contract is complete at the moment the acceptance is delivered to the company for transmission to the party making the offer.<sup>60</sup> If the acceptance is delayed or changed in any way in the transmission, the sender will be bound nevertheless.<sup>61</sup> He assumes responsibilities for errors both ways.<sup>62</sup>

*v. Mt. Hope Iron Co.*, 15 R. I. 380, 2 Am. St. Rep. 902, 5 Atl. 632; *Gist v. West Union Tel. Co.*, 45 S. C. 344, 55 Am. St. Rep. 763, 23 S. E. 143; *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 66 Am. St. Rep. 361, 36 L. R. A. 711; *Garrettson v. North Atchison Bank (C. C.)* 47 Fed. 867.

<sup>57</sup> *Evans on Agency* (Ewell's Ed.) 23.

<sup>58</sup> *South, etc., Alabama R. Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578; *Shaffer v. Sawyer*, 123 Mass. 294; *Hull v. Jones*, 69 Mo. 587; *Singer Mfg. Co. v. Holdford*, 86 Ill. 455, 29 Am. Rep. 43; *Haughton v. Maurer*, 55 Mich. 323, 21 N. W. 426; *Lovell v. Williams*, 125 Mass. 439.

<sup>59</sup> *Haubelt v. Rea, etc., Mill Co.*, 77 Mo. App. 672. See § 467, and cases cited. See, also, cases in note 98 under § 487.

<sup>60</sup> See § 748.

<sup>61</sup> *Alabama*.—*Linn v. McLean*, 80 Ala. 360; *Levisohn v. Waganer*, 76 Ala. 412; *Falls v. Gaither*, 9 Port. 605.

*Arkansas*.—*Kempner v. Cohn*, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775.

*Connecticut*.—*Averill v. Hedge*, 12 Conn. 424.

*Georgia*.—*West. Union v. Shotter*, 71 Ga. 760; *Bryant v. Booze*, 55 Ga. 438; *Levy v. Cohen*, 4 Ga. 1.

*Illinois*.—*Haas v. Myers*, 111 Ill. 421, 53 Am. Rep. 634; *Cobb v. Foree*, 38 Ill. App. 255; *Anheuser-Busch Brewing Ass'n v. Hutmacher*, 127 Ill. 652, 21 N. E. 626, 4 L. R. A. 575, affirmed 29 Ill. App. 316.

*Indiana*.—*Barr v. Ins. Co. of North America*, 61 Ind. 488; *Ky. Mut. Ins. Co. v. Jenks*, 5 Ind. 96. See *New v. Ins. Co.*, 171 Ind. 33, 40, 85 N. E. 703, 131 Am. St. Rep. 245.

*Iowa*.—*Hunt v. Higman*, 70 Iowa, 406, 30 N. W. 769; *Siebold v. Davis*, 67 Iowa, 560, 25 N. W. 778; *Ferrier v. Storer*, 63 Iowa, 484, 19 N. W. 288, 50 Am.

<sup>62</sup> *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511, reversing 41 Barb. (N. Y.) 255. See, also, *Magie v. Herman*, 50 Minn. 424, 52 N. W. 909, 36 Am. St. Rep. 660; *Wilson v. Minneapolis, etc., R. Co.*, 31 Minn. 483, 18 N. W. 291; *Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127.

§ 758. **Sender bound on message as received.**—If a message is delivered to a telegraph company containing an offer to sell merchandise at a certain price, and the company transmits it so as to

Rep. 752; *Moore v. Pierson*, 6 Iowa, 279, 71 Am. Dec. 409; *Lucas v. West*. Union, 131 Iowa, 669, 109 N. W. 191, 6 L. R. A. (N. S.) 1016.

*Kansas*.—*Trounstine v. Sellers*, 35 Kan. 447, 11 Pac. 441.

*Kentucky*.—*Calhoun v. Atchison*, 4 Bush, 261, 96 Am. Dec. 299; *Hutcheson v. Blakeman*, 3 Metc. 80; *Chiles v. Nelson*, 7 Dana, 281; *Cable Co. v. Oil Co.*, 140 Ky. 506, 131 S. W. 277; *Carter v. Hibbard*, 83 S. W. 112, 26 Ky. Law Rep. 1033. Compare *Ins. Co. v. Joseph*, 103 S. W. 317, 31 Ky. Law Rep. 714, 12 L. R. A. (N. S.) 439, acceptance not revoked by death after mailing.

*Maine*.—*Ayer v. West. Union*, 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353. See, also, *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156.

*Maryland*.—*Stockham v. Stockham*, 32 Md. 196; *Wheat v. Cross*, 31 Md. 99, 1 Am. Rep. 28.

*Michigan*.—*Wilcox v. Cline*, 70 Mich. 517, 38 N. W. 555.

*Minnesota*.—*Magie v. Herman*, 50 Minn. 424, 52 N. W. 909, 36 Am. St. Rep. 660; *Wilson v. Minn., etc., Ry. Co.*, 31 Minn. 481, 18 N. W. 291.

*Missouri*.—*Egger v. Nesbitt*, 122 Mo. 667, 27 S. W. 385, 43 Am. St. Rep. 596; *Lungstrass v. German Ins. Co.*, 48 Mo. 201, 8 Am. Rep. 10; *Lancaster v. Elliot*, 42 Mo. App. 503; *Greeley-Burnham Gro. Co. v. Capen*, 23 Mo. App. 301; *Whaley v. Hinchman*, 22 Mo. App. 483; *Noyes v. Phoenix Mut. L. I. Co.*, 1 Mo. App. 584; *Ashford v. Schoop*, 81 Mo. App. 539; *Haubelt v. Rea, etc., Mill Co.*, 77 Mo. App. 672; *Taylor v. Steamboat Robert Campbell*, 20 Mo. 254.

*Montana*.—*Long v. Needham*, 37 Mont. 408, 96 Pac. 731.

*New Hampshire*.—*Abbott v. Shepard*, 48 N. H. 14; *Howley v. Whipple*, 48 N. H. 487.

*New Jersey*.—*Hallock v. Coml. Ins. Co.*, 26 N. J. Law, 268, affirmed in 27 N. J. Law, 645, 72 Am. Dec. 379; *Potts v. Whitehead*, 20 N. J. Eq. 55.

*New York*.—*Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511; *Schönberg v. Cheney*, 3 Hun, 677; *Mactier v. Frith*, 6 Wend. 103, 21 Am. Dec. 262; *Brisban v. Boyd*, 4 Paige, 17; *Chesebrough v. Tel. Co.*, 76 Misc. Rep. 516, 135 N. Y. Supp. 583; *Dunning v. Roberts*, 35 Barb. 463; *Rose v. U. S. Tel. Co.*, 3 Abb. Prac. (N. S.) 408.

*Oregon*.—*Williams v. Burdick*, 63 Or. 41, 125 Pac. 844, 126 Pac. 603.

*Pennsylvania*.—*Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. 339; *Barney v. Clark*, 22 Pittsb. Leg. J. (O. S.) 69; *N. Y., etc., Print. Tel. Co. v. Dryburg*, 35 Pa. 298, 78 Am. Dec. 338.

*Rhode Island*.—*Perry v. Mt. Hope Iron Co.*, 15 R. I. 380, 5 Atl. 632, 2 Am. St. Rep. 902.

*Texas*.—*West. Union v. Edsall*, 74 Tex. 329, 12 S. W. 41, 15 Am. St. Rep. 835; *Tel. Co. v. Land Co. (Tex. Civ. App.)* 128 S. W. 1162.

*Vermont*.—*Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127.

*Wisconsin*.—*Washburn v. Fletcher*, 42 Wis. 152; *Saveland v. Green*, 40 Wis. 431.

*United States*.—*Patrick v. Bowman*, 149 U. S. 411, 37 L. Ed. 790, 13 Sup. Ct. 811; *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390, 13 L. Ed. 187; *Darlington Iron Co. v. Foote (C. C.)* 16 Fed. 646; *Minnesota Linseed Oil Co. v. Collier White Lead Co.*, 4 Dill. 431, Fed. Cas. No. 9,635.

*Canada*.—*Prosser v. Henderson*, 20 U. C. Q. B. 438; *Magann v. Auger*, 31 C. S. C. 186; *Heckla v. Cunard*, 37 Nova Scotia, 97. See *O'Donohoe v. Wiley*, 43 U. C. Q. B. 350, but see *Flynn v. Kelly*, 12 O. L. R. 410, 8 O. W. R. 120; *Underwood v. Maguire*, 6 Quebec Q. D. 237, 45 C. L. J. 383.

*England*.—*In re Imperial Land Co.*, L. R. 15 Eq. 18, 42 L. J. Ch. 372; *In re*

contain an offer at a less price, the sender is bound to furnish the merchandise at the latter price,<sup>63</sup> but he may recover from the company the damages sustained by complying with the order.<sup>64</sup> So also, if a land agent leaves a message directed to his principal, naming the price at which the property can be sold, and the company through error in the transmission raises the price, and the principal accepts the offer as received and executes a deed at that price, the agent is compelled to conclude the sale at the price first named by him,<sup>65</sup> yet the company would be liable to the vendor for the difference between the prices.<sup>66</sup> The reason why the sender is bound by the terms of the message as received is that the telegraph company is deemed his agent, and he is therefore bound by the acts of such company with respect to the transmission and delivery of the message.<sup>67</sup>

**§ 759. Within the meaning of the statute of frauds.**—We have commented at some length in a separate chapter<sup>68</sup> on the statute of frauds with respect to a written message, offered for transmission, being a sufficient writing to constitute a memorandum and one which would bind the parties under such statute. We shall therefore be very brief at this place in discussing the part telegraph

Imperial Land Co., L. R. 13 Eq. 148, 41 L. J. Ch. 198, 25 L. T. R. (N. S.) 692, 20 Wkly. Rep. 164. See, also, § 487, and cases cited thereunder. But see *Lewis v. Browning*, 130 Mass. 173; *McCulloch v. Eagle Ins. Co.*, 1 Pick (Mass.) 278. But see *Brauer v. Shaw*, 168 Mass. 198, 46 N. E. 617, 60 Am. St. Rep. 387.

<sup>63</sup> *West. U. Tel. Co. v. Flint River Lbr. Co.*, 114 Ga. 576, 40 S. E. 815, 88 Am. St. Rep. 36; *Reed v. West. U. Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609. See, also, *Hasbrouck v. West. U. Tel. Co.*, 107 Iowa. 160, 77 N. W. 1034, 70 Am. St. Rep. 181; *Rittenhouse v. Independent Line of Tel.*, 44 N. Y. 263, 4 Am. Rep. 673; *West. U. Tel. Co. v. Beals*, 56 Neb. 415, 76 N. W. 903, 71 Am. St. Rep. 682; *Hays v. West. U. Tel. Co.*, 70 S. C. 16, 48 S. E. 608, 67 L. R. A. 481, 106 Am. St. Rep. 731, 3 Ann. Cas. 424; *Pepper v. Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699; *West. U. Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109.

<sup>64</sup> *Id.* See, also, *Eureka Cotton Mills v. West. U.*, 88 S. C. 498, 70 S. E. 1040, Ann. Cas. 1912C, 1273; *Younker v. West. U.*, 146 Iowa, 499, 125 N. W. 577; *West. U. v. Fischer*, 133 Ky. 768, 119 S. W. 189; *West. U. v. Milton*, 53 Fla. 484, 43 South. 495, 125 Am. St. Rep. 1077, 11 L. R. A. (N. S.) 560; *West. U. v. Robertson*, 59 Tex. Civ. App. 426, 126 S. W. 629; *Pegram v. West. U.*, 100 N. C. 28, 6 S. E. 770, 6 Am. St. Rep. 557; *Bass v. Postal Tel. Cable Co.*, 127 Ga. 423, 56 S. E. 465, 12 L. R. A. (N. S.) 489; *Thorp v. West. U.*, 118 Mo. App. 398, 94 S. W. 554.

<sup>65</sup> See *Keller v. Meyer*, 74 Mo. App. 318; *Hasbrouck v. West. U.*, 107 Iowa, 160, 77 N. W. 1034, 70 Am. St. Rep. 181; *Reed v. West. U.*, 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492.

<sup>66</sup> See cases cited in note 64, *supra*.

<sup>67</sup> See cases cited in note 59, *supra*.

<sup>68</sup> Chapter XXVIII.



companies take in effecting such results. The fact of the telegraph company being the agent of the sender will bind him by any of the former's acts in this respect. Thus, when the telegram is written out by the operator at the receiving station and delivered to the addressee, the act of such operator in writing and delivering the telegram is the act of the sender.<sup>69</sup> The rule would not be changed if the sender fails to write the message. If he delivers it orally or communicates it by telephone to the company and it is written out by the operator, the statute will be sufficiently complied with. This is the holding both of the state and federal courts.<sup>70</sup>

**§ 760. Exception to the rule.**—There are some exceptions to the rule that the telegraph company is the agent of the sender in consummating business transactions through the means of such company.<sup>71</sup> There must be some intention shown, either express or implied, that the company is to act as the agent of the sender, since if there are any acts or indications on the part of the addressee that the company shall not be the sender's agent, it will be presumed that it acts as the agent for the former. So also, if there is a continued correspondence by telegraph, it is not presumed that the party making an offer or proposition has appointed the company his agent, but it is deemed the agent of the party who first makes it the medium of communication.<sup>72</sup> When this is the case, the party making the offer is not responsible for errors made in the transmission, and an acceptance of the offer is not complete until it has been actually delivered to the offerer.<sup>73</sup> As it has been seen, this is not the case when the company acts as the agent for the

<sup>69</sup> In *Howley v. Whipple*, 48 N. H. 487, the court said: "When a contract is made by telegraph, which must be in writing by the statute of frauds, if the parties authorize their agents, either in writing or by parol, to make a proposition on one side, and the other party accepts it through the telegraph, that constitutes a contract in writing under the statute of frauds, because each party authorizes his agents, the company, or the company's operator, to write for him; and it makes no difference whether that operator writes the offer, or who accepts in the person of his principal, and by his expressed direction, with a steel pen an inch long attached to an ordinary penholder, or whether his pen be a copper wire a thousand miles long. In either case the thought is communicated to the paper by the use of the finger resting upon the pen; nor does it make any difference that, in one case, common record ink is used, while in the other case a more subtle fluid, known as electricity, performs the same effect."

<sup>70</sup> *Howley v. Whipple*, 48 N. H. 487. See, also, chapter XXVIII.

<sup>71</sup> See § 467 et seq.

<sup>72</sup> *Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127. See, also, *Sullivan v. Kuykendall*, 82 Ky. 483, 56 Am. Rep. 901; *Culver v. Warren*, 36 Kan. 391, 13 Pac. 577. See, also, cases in note 98 under § 487.

<sup>73</sup> See *Lucas v. West. U.*, 131 Iowa, 669, 109 N. W. 191, 6 L. R. A. (N. S.) 1016.

party making the offer. Another exception to the rule that the telegraph company is the agent of the sender is where he uses such company to consummate the transaction at the suggestion of the addressee, or the party to whom the offer is made.<sup>74</sup>

§ 761. *English rule.*—The rule in England is different from that in the United States. It is held there that the company is not the agent of the sender,<sup>75</sup> and that he is not, therefore, liable for any errors made in transmission. The addressee may have incurred great expense and trouble by acting on an erroneous message, still he will be the party to lose.<sup>76</sup> The rule there is accounted for by the fact that the telegraph is part of the government service,<sup>77</sup> and yet it seems that this was not the case at the time the decisions above cited were rendered.<sup>78</sup> This rule has been followed by a few of our courts.

§ 762. *Telegraph company an independent contractor.*—A telegraph company, with respect to the transmission of news, is regarded as an independent contractor, and is liable to either party, the sender or the addressee, for its negligent transmission.<sup>79</sup> It must not be understood that this statement is in conflict or is inconsistent with the principles heretofore discussed, that it is the agent of the sender. It may be the agent of the sender in effecting a contract with the addressee, as has been said, and, at the same time, be an independent contractor with respect to the contract made for transmitting the necessary negotiations to effect the first contract. In other words, if the contract is negotiated by means of a telegraph company, the latter is deemed the agent of the party who first uses this means of effecting the contract, but, aside from this, there is another contract made by such party with the telegraph company, as the other contracting party, whereby it is agreed for a valuable consideration that the latter will transmit the news which effects the making of the former contract.<sup>80</sup> It is in this sense we consider the company an independent contractor; but it seems that this distinction is not observed by some.<sup>81</sup> It is the

<sup>74</sup> *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355; *Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127.

<sup>75</sup> See §§ 471, 472.

<sup>76</sup> *Herkell v. Pape* L. R. 6 Exch. 7, 40 L. J. Exch. 15, 23 L. T. Rep. U. S. 419, 19 Wkly. Rep. 106.

<sup>77</sup> *West. U. Tel. Co. v. Shotter*, 71 Ga. 760.

<sup>78</sup> 8 Joc. Fish. Dig. (Telegraph).

<sup>79</sup> See § 467 et seq.

<sup>80</sup> See § 467.

<sup>81</sup> *Mississippi*.—*Shingleur v. West. U. Tel. Co.*, 72 Miss. 1030, 18 South. 425, 48 Am. St. Rep. 604, 30 L. R. A. 444.

rule, as we have said elsewhere, that, where a contract is negotiated by means of the postal system, the latter is deemed the agent of the party who first selects this means of communication; and it is upon this theory that the telegraph company is considered the agent of the sender. We think that there is this distinction—however unimportant it may be—between these two means of communication with respect to the contract made for communicating such news: The postal system is under the control of the public service, and the contract made with it for delivering a letter to the addressee is not similar to that made with a telegraph company to transmit a telegram. In one the consideration—if it is deemed that any at all has been given—is made indirectly, as by means of public revenues; but in the other the consideration is given directly by the sender in the way of charges or fees for the transmission. Therefore, if it should be held that the postal system is not an independent contractor in this light, it is for the above reason.

§ 763. *Same continued—may be sued.*—It was discussed elsewhere that a telegraph company could be sued by the sender for failing to correctly transmit a telegram intrusted to its care, or, in other words, it may be sued for a breach of contract.<sup>82</sup> Then, how can it be sued in such a case unless there has been a contract made, and how can a contract be made unless it is an independent contractor in that particular instance? Where it acts as agent for the sender, it only acts as such to the extent of delivering the message in the words in which it was accepted for transmission; however, as between the sender and an innocent addressee, all losses caused by errors or mistakes in the transmission must be borne by the sender, yet he may recover his loss from the company.<sup>83</sup> The general rule is that the principal is bound by the acts of his agent while acting within the apparent scope of his authority. Then, when a person appoints a telegraph company as his agent to transmit and deliver a message, the duty of such agent is to transmit the message as received. If it has been altered in its transmission, it is

*North Carolina.*—Pegram v. West. U. Tel. Co., 100 N. C. 28, 6 S. E. 770, 6 Am. St. Rep. 557.

*Tennessee.*—Pepper v. West. U. Tel. Co., 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660.

See West. U. v. Sights, 34 Okl. 461, 126 Pac. 234, Ann. Cas. 1914C. 204, 42 L. R. A. (N. S.) 419, holding that an action for damages against a telegraph company is not on contract, but on its negligence in preventing the making of a contract.

<sup>82</sup> See chapter XVIII.

<sup>83</sup> Ayer v. West. U. Tel. Co., 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353. See § 387, and cases cited thereunder.



presumed that this, as delivered to an innocent addressee, is the correct message or the one which it was employed to deliver.<sup>84</sup> It has been held that the sender is bound by the contents of the telegram as received only so far as it is a faithful reproduction of what is sent.<sup>85</sup> But while the sender should not be bound to the company in such manner as to preclude him from maintaining a suit against it for a breach of its contract, yet he should be bound to an innocent addressee who has incurred great expense and trouble by acting on the erroneous message. Because, if either the sender or addressee must suffer for the negligence of the company, it should fall on the one first using the company to effect such transaction.<sup>86</sup> We think the rule, however, would be otherwise if either of the parties to the telegram were acting in the capacity of agent for the other. This fact has been fully discussed elsewhere,<sup>87</sup> and we therefore deem it unnecessary to say more about the subject.

§ 764. **Same—where message a mere step to negotiation.**—Parties very often before contracting exchange views and negotiate for terms by means of telegraphic messages. It is not unusual to invite persons through this means to enter into such negotiations without making or intending to make an offer. So a failure of a telegraph company to transmit or deliver a telegram which only amounts to such negotiations is not, as a matter of law, the proximate cause of the failure to make a binding contract.<sup>88</sup> In other

<sup>84</sup> *Pegram v. West. U. Tel. Co.*, 100 N. C. 28, 6 S. E. 770, 6 Am. St. Rep. 557; *Pepper v. West. U. Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660. See *Cobb v. Glenn Boom, etc., Co.*, 57 W. Va. 49, 49 S. E. 1005, 110 Am. St. Rep. 734.

<sup>85</sup> *Pepper v. West. U. Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660.

<sup>86</sup> *Ayer v. West. U. Tel. Co.*, 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353.

<sup>87</sup> See chapter XVIII.

<sup>88</sup> *Alabama*.—*West. U. Tel. Co. v. Bowman*, 141 Ala. 175, 37 South. 493.

*California*.—*Kenyon v. West. U. Tel. Co.*, 100 Cal. 454, 35 Pac. 75.

*Colorado*.—*Postal Tel. Cable Co. v. Barwise*, 11 Colo. App. 328, 53 Pac. 252.

*Georgia*.—*Wilson v. West. U. Tel. Co.*, 124 Ga. 131, 52 S. E. 153; *Bass v. Postal Tel. Cable Co.*, 127 Ga. 423, 56 S. E. 465, 12 L. R. A. (N. S.) 489; *Mondon v. West. U. Tel. Co.*, 96 Ga. 499, 23 S. E. 853; *Clay v. West. U. Tel. Co.*, 81 Ga. 285, 6 S. E. 813, 12 Am. St. Rep. 316; *Baldwin v. West. U. Tel. Co.*, 93 Ga. 692, 21 S. E. 212, 44 Am. St. Rep. 194.

*Iowa*.—*Bennett v. West. U. Tel. Co.*, 129 Iowa, 607, 106 N. W. 13.

*Maine*.—*Merrill v. West. U. Tel. Co.*, 78 Me. 97, 2 Atl. 847.

*Mississippi*.—*West. U. Tel. Co. v. Adams Mach. Co.*, 92 Miss. 849, 47 South. 412; *West. U. Tel. Co. v. Webb*, 48 South. 408; *West. U. Tel. Co. v. Pallotta*, 81 Miss. 216, 32 South. 310; *West. U. Tel. Co. v. Clifton*, 68 Miss. 307, 8 South. 746; *Johnson v. West. U. Tel. Co.*, 79 Miss. 58, 29 South. 787, 89 Am. St. Rep. 584.

*North Carolina*.—*Clark Mfg. Co. v. West. U. Tel. Co.*, 152 N. C. 157, 67 S. E. 329, 27 L. R. A. (N. S.) 643; *Cherokee Tanning Extract Co. v. West. U.*

words, if an opportunity for making a contract would have been given if the message had been promptly and correctly delivered, but which contract might have or might not have been made, and if made for work, the amount to have been made thereon would have been subject to several contingencies, damages claimed in consequence of a failure to transmit or deliver such message would not be the direct result of a breach of such contract,<sup>89</sup> and only nominal damages could be recovered therefor.<sup>90</sup> So, where the message merely inquires whether a certain price,<sup>91</sup> or position,<sup>92</sup> or employment<sup>93</sup> will be accepted, or where it requests a quotation of prices,<sup>94</sup> or a discontinuance of pending negotiations,<sup>95</sup> and such message is not delivered, only nominal damages could be recovered.

Tel. Co., 143 N. C. 376, 55 S. E. 777, 118 Am. St. Rep. 806; Walser v. West. U. Tel. Co., 114 N. C. 440, 19 S. E. 366.

*South Carolina.*—Bird v. West. U. Tel. Co., 76 S. C. 345, 56 S. E. 973; Mood v. West. U. Tel. Co., 40 S. C. 524, 19 S. E. 67; Harmon v. West. U. Tel. Co., 65 S. C. 490, 43 S. E. 959.

*Texas.*—West. U. Tel. Co. v. Connelly, 2 Willson, Civ. Cas. Ct. App. § 113. See, also, West. U. Tel. Co. v. Twaddell, 47 Tex. Civ. App. 51, 103 S. W. 1120.

<sup>89</sup> Johnson v. West. U. Tel. Co., 79 Miss. 58, 29 South. 787, 89 Am. St. Rep. 584; Bennett v. West. U. Tel. Co., 129 Iowa, 607, 106 N. W. 13; Walser v. West. U. Tel. Co., 114 N. C. 440, 19 S. E. 366; West. U. Tel. Co. v. Connelly, 2 Willson, Civ. Cas. Ct. App. (Tex.) § 113.

<sup>90</sup> Walser v. West. U. Tel. Co., 114 N. C. 440, 19 S. E. 366; Cherokee Tanning Extract Co. v. West. U. Tel. Co., 143 N. C. 376, 55 S. E. 777, 118 Am. St. Rep. 806; Clark Mfg. Co. v. West. U. Tel. Co., 152 N. C. 157, 67 S. E. 329, 27 L. R. A. (N. S.) 643; White v. West. U. Tel. Co., 153 App. Div. 684, 138 N. Y. Supp. 598. See, also, other cases cited in notes 88 and 89, *supra*.

<sup>91</sup> Bennett v. West. U. Tel. Co., 129 Iowa, 607, 106 N. W. 13.

<sup>92</sup> Walser v. West. U. Tel. Co., 114 N. C. 440, 19 S. E. 366.

<sup>93</sup> Johnson v. West. U. Tel. Co., 79 Miss. 58, 29 South. 787, 89 Am. St. Rep. 584; West. U. Tel. Co. v. Connelly, 2 Willson, Civ. Cas. Ct. App. (Tex.) § 113.

According to one line of authorities, the sendee of a telegram containing an offer of employment may recover compensatory damages for the failure of the telegraph company to deliver the message. West. U. Tel. Co. v. Sights, 34 Okl. 461, 126 Pac. 234, Ann. Cas. 1914C, 204, 42 L. R. A. (N. S.) 419; West. U. Tel. Co. v. Valentine, 18 Ill. App. 57; West. U. Tel. Co. v. Bowman, 141 Ala. 175, 37 South. 493; West. U. Tel. Co. v. Fenton, 52 Ind. 1; West. U. Tel. Co. v. McKibben, 114 Ind. 511, 14 N. E. 894; Stumm v. West. U. Tel. Co., 140 Wis. 528, 122 N. W. 1032. See, also, Kemp v. West. U. Tel. Co., 28 Neb. 611, 44 N. W. 1064, 26 Am. St. Rep. 363. On the other hand, other authorities deny this right. Merrill v. West. U. Tel. Co., 78 Me. 97, 2 Atl. 847; Larsen v. Postal Tel. Cable Co., 150 Iowa, 748, 130 N. W. 813; Jacobs v. Postal Tel. Cable Co., 76 Miss. 278, 24 South. 535; Walser v. West. U. Tel. Co., 114 N. C. 440, 19 S. E. 366; West. U. Tel. Co. v. Connelly, 2 Willson, Civ. Cas. Ct. App. (Tex.) § 113. Compare West. U. Tel. Co. v. Partlow, 30 Tex. Civ. App. 599, 71 S. W. 584. See, also, Wilson v. West. U. Tel. Co., 124 Ga. 131, 52 S. E. 153.

<sup>94</sup> Postal Tel. Co. v. Barwise, 11 Colo. App. 328, 53 Pac. 252.

<sup>95</sup> Fisher v. West. U. Tel. Co., 119 Wis. 146, 96 N. W. 545. See McMillan v. West. U. Tel. Co., 60 Fla. 131, 53 South. 329, 29 L. R. A. (N. S.) 891, liable for causing discontinuance of contract.

§ 765. **Same—where message is a definite offer.**—A telegram, in order to constitute an offer, must be made with the intention to form a legal obligation or relation, and not as a preliminary negotiation. It must be final, free from fatal ambiguity or indefiniteness, and sufficiently designate the parties. And in determining the liability of a telegraph company for failing to transmit or deliver a message relating to a contract, a distinction is recognized between those messages which relate to an offer and those containing an acceptance of an offer.<sup>96</sup> This distinction is based on the fact that an offer may, but an acceptance cannot, be subject to contingencies.<sup>97</sup> So, in accordance thereto, it has been held that, where a message containing an offer and not an acceptance is not transmitted or delivered as a result of the company's default, there cannot be a recovery of compensatory damages,<sup>98</sup> unless there is sufficient evidence to show that the offer would have been accepted,<sup>99</sup> or actual damage was sustained.<sup>100</sup> If, however, there is proof that the offer would have been accepted, such damages may be recovered,<sup>101</sup> provided the company had notice of the nature of the

<sup>96</sup> *Richmond Hosiery Mills v. West. U. Tel. Co.*, 123 Ga. 216, 51 S. E. 290; *Beaupré v. Pac., etc., Tel. Co.*, 21 Minn. 155.

<sup>97</sup> *Beatty Lbr. Co. v. West. U. Tel. Co.*, 52 W. Va. 410, 44 S. E. 309.

<sup>98</sup> *Richmond Hosiery Mills v. West. U. Tel. Co.*, 123 Ga. 216, 51 S. E. 290; *Kiley v. West. U. Tel. Co.*, 39 Hun (N. Y.) 158, affirmed in 109 N. Y. 231, 16 N. E. 75; *Beatty Lbr. Co. v. West. U. Tel. Co.*, 52 W. Va. 410, 44 S. E. 309; *Cherokee Tanning Extract Co. v. West. U. Tel. Co.*, 143 N. C. 376, 55 S. E. 777, 118 Am. St. Rep. 806; *Wilson v. West. U. Tel. Co.*, 124 Ga. 131, 52 S. E. 153; *Bass v. Tel. Cable Co.*, 127 Ga. 423, 56 S. E. 465, 12 L. R. A. (N. S.) 489; *West. U. Tel. Co. v. Adams Mach. Co.*, 92 Miss. 849, 47 South. 412; *West. U. Tel. Co. v. Webb (Miss.)* 48 South. 408; *Clark Mfg. Co. v. West. U. Tel. Co.*, 152 N. C. 157, 67 S. E. 329, 27 L. R. A. (N. S.) 643; *Kinghorne v. Montreal Tel. Co.*, 18 U. C. Q. B. 60; *West. U. Tel. Co. v. Lewis*, 203 Fed. 832, 122 C. C. A. 150, 49 L. R. A. (N. S.) 927; *West. U. Tel. Co. v. Patty Dry Goods Co.*, 96 Miss. 781, 51 South. 913; *McColl v. West. U. Tel. Co.*, 44 N. Y. Super. Ct. 487, 7 Abb. N. C. 151. See, also, *Bashinsky v. West. U. Tel. Co.*, 1 Ga. App. 761, 58 S. E. 91; *Hall v. West. U. Tel. Co.*, 59 Fla. 275, 51 South. 819, 27 L. R. A. (N. S.) 639. See other cases cited in note 90, supra. See, also, *Postal Tel. Cable Co. v. Barwise*, 11 Colo. App. 328, 53 Pac. 252; *Johnson v. West. U. Tel. Co.*, 79 Miss. 58, 29 South. 787, 89 Am. St. Rep. 584; *White v. West. U. Tel. Co.*, 53 App. Div. 684, 138 N. Y. Supp. 598; *Fulkerson v. West. U. Tel. Co.*, 110 Ark. 144, 161 S. W. 168, Ann. Cas. 1915D, 221.

<sup>99</sup> *Bass v. Postal Tel. Cable Co.*, 127 Ga. 423, 56 S. E. 465, 12 L. R. A. (N. S.) 489; *Beaupré v. Pac., etc., Tel. Co.*, 21 Minn. 155; *Fulkerson v. West. U. Tel. Co.*, 110 Ark. 144, 161 S. W. 168, Ann. Cas. 1915D, 221, employment at will, not presumed that employment would continue for given time so as to entitle to damages for this time.

<sup>100</sup> *Beatty Lbr. Co. v. West. Union Tel. Co.*, 52 W. Va. 410, 44 S. E. 309; *Beggs v. Tel. Cable Co.*, 159 Ill. App. 247.

<sup>101</sup> *West. U. Tel. Co. v. Love Banks Co.*, 73 Ark. 205, 83 S. W. 949, 3 Ann. Cas. 712; *Herron v. West. U. Tel. Co.*, 90 Iowa, 129, 57 N. W. 696; *Hoyt v. West. U. Tel. Co.*, 85 Ark. 473, 108 S. W. 1056; *Wallingford v. West. U. Tel.*



message<sup>102</sup> and the consequential damages which would arise from its nondelivery.<sup>103</sup> But, in the absence of such proof, actual damages may be recovered in certain cases.<sup>104</sup> It sometimes becomes difficult to establish the fact that the offer would have been accepted if the message had been properly transmitted and delivered; but this may be done by the admission of allegations in the declaration by demurrer,<sup>105</sup> or by evidence that an ordinarily prudent man would have accepted the offer under similar circumstances.<sup>106</sup> But in some cases it has been held that, where the action is by the sendee, it cannot be sufficiently shown by his testimony,<sup>107</sup> a distinction being made in this regard according to whether the action is brought by the sender or by the sendee,<sup>108</sup> it being held that where the action is by the sender the fact that the offer would have been accepted may be shown by the testimony of the sendee.<sup>109</sup>

Co., 53 S. C. 410, 31 S. E. 275; Tex., etc., Tel. Co. v. Mackenzie, 36 Tex. Civ. App. 178, 81 S. W. 581; West. U. Tel. Co. v. Nagle, 11 Tex. Civ. App. 539, 32 S. W. 707; Barker v. West. U. Tel. Co., 134 Wis. 147, 114 N. W. 439, 126 Am. St. Rep. 1017, 14 L. R. A. (N. S.) 533. See, also, Wallingford v. West. U. Tel. Co., 60 S. C. 201, 38 S. E. 443, 629; West. U. Tel. Co. v. Thompson Milling Co., 41 Tex. Civ. App. 223, 91 S. W. 307; Larsen v. Cable Co., 150 Iowa, 748, 130 N. W. 813; West. U. Tel. Co. v. Sights, 34 Okl. 461, 126 Pac. 234, Ann. Cas. 1914C, 204, 42 L. R. A. (N. S.) 419; West. U. Tel. Co. v. Biggerstaff, 177 Ind. 168, 97 N. E. 531; West. U. Tel. Co. v. Allen, 30 Okl. 229, 119 Pac. 981, 38 L. R. A. (N. S.) 348; McLeod v. Pac. Tel. Co., 52 Or. 22, 94 Pac. 568, 16 Ann. Cas. 1239, 15 L. R. A. (N. S.) 810, rehearing denied, 52 Or. 28, 95 Pac. 1009, 16 Ann. Cas. 1241, 18 L. R. A. (N. S.) 954; West. U. Tel. Co. v. Federolf (Tex. Civ. App.) 145 S. W. 314; West. U. Tel. Co. v. Williams (Tex. Civ. App.) 137 S. W. 148; West. U. Tel. Co. v. Kemp, 55 Ill. App. 583; Cain v. West. U. Tel. Co., 89 Kan. 797, 133 Pac. 874; Thorp v. West. U. Tel. Co., 118 Mo. App. 398, 94 S. W. 555; West. U. Tel. Co. v. Williams, 57 Tex. Civ. App. 267, 122 S. W. 280. Compare West. U. Tel. Co. v. True, 101 Tex. 236, 106 S. W. 315, reversing (Civ. App.) 103 S. W. 1180; McNeil v. Postal Tel. Cable Co., 154 Iowa, 241, 134 N. W. 611, 38 L. R. A. (N. S.) 727, Ann. Cas. 1914A, 1294; Hise v. West. U. Tel. Co., 137 Iowa, 329, 113 N. W. 819.

<sup>102</sup> McColl v. West. U. Tel. Co., 44 N. Y. Super. Ct. 487, 7 Abb. N. C. 151; West. U. Tel. Co. v. True, 101 Tex. 236, 106 S. W. 315, reversing (Civ. App.) 103 S. W. 1180.

<sup>103</sup> Wallingford v. West. U. Tel. Co., 53 S. C. 410, 31 S. E. 275.

<sup>104</sup> Lathan v. West. U. Tel. Co., 75 S. C. 129, 55 S. E. 134.

<sup>105</sup> Wallingford v. West. U. Tel. Co., 53 S. C. 410, 31 S. E. 275. See, also, Barker v. West. U. Tel. Co., 134 Wis. 147, 114 N. W. 439, 126 Am. St. Rep. 1017, 14 L. R. A. (N. S.) 533.

<sup>106</sup> Lathan v. West. U. Tel. Co., 75 S. C. 129, 55 S. E. 134.

<sup>107</sup> Beatty Lbr. Co. v. West. U. Tel. Co., 52 W. Va. 410, 44 S. E. 309; Richmond Hosiery Mills v. West. U. Tel. Co., 123 Ga. 216, 51 S. E. 290.

<sup>108</sup> See Elam v. West. U. Tel. Co., 113 Mo. App. 538, 88 S. W. 115; Richmond Hosiery Mills v. West. U. Tel. Co., 123 Ga. 216, 51 S. E. 290; Tex., etc., Tel. Co. v. Mackenzie, 36 Tex. Civ. App. 178, 81 S. W. 581.

<sup>109</sup> Tex., etc., Tel. Co. v. Mackenzie, 36 Tex. Civ. App. 178, 81 S. W. 581; Lucas v. West. U. Tel. Co., 131 Iowa, 669, 109 N. W. 191, 6 L. R. A. (N. S.) 1016; Elam v. West. U. Tel. Co., 113 Mo. App. 538, 88 S. W. 115; West. U.

It may be said, however, that contracts formed by telegraphic messages are governed, the same as all other contracts, by the general rules relative to offer and acceptance.

§ 766. **Same—acceptance of an offer.**—Where there has been a definite offer made, and the telegraph company has failed to transmit and deliver a message containing an unconditional acceptance thereof, thereby preventing the contract from being made, the loss of the contract is the proximate result of the company's negligence,<sup>110</sup> for which recovery may be had from the company<sup>111</sup> as agent of the offerer.<sup>112</sup> But, under the same circumstances, the offeree would have no cause of action, since a delivery of the message of acceptance to the company would be a delivery to the sender, and therefore binding on him, regardless of the default of the company.<sup>113</sup> As it may be seen, the acceptance must be unconditional; otherwise it may be nothing more than an offer and to be governed by the rules relating to the original offer.<sup>114</sup>

Tel. Co. v. Sights, 34 Okl. 461, 126 Pac. 234, Ann. Cas. 1914C, 204, 42 L. R. A. (N. S.) 419. But see *Kinghorne v. Montreal Tel. Co.*, 18 U. C. Q. B. 60; *Tel. Co. v. Wenger*, 55 Pa. 262, 93 Am. Dec. 751.

<sup>110</sup> *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844; *Dodd Gro. Co. v. Postal Tel. Co.*, 112 Ga. 685, 37 S. E. 981; *West. U. Tel. Co. v. Hoyt*, 89 Ark. 118, 115 S. W. 941; *West. U. Tel. Co. v. Kemp*, 55 Ill. App. 583; *Lucas v. West. U. Tel. Co.*, 131 Iowa, 669, 109 N. W. 191, 6 L. R. A. (N. S.) 1016; *Squire v. West. U. Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157; *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *Elam v. West. U. Tel. Co.*, 113 Mo. App. 538, 88 S. W. 115; *West. U. Tel. Co. v. Bowen*, 84 Tex. 476, 19 S. W. 554; *West. U. Tel. Co. v. Turner*, 94 Tex. 304, 60 S. W. 432; *Cable Co. v. Oil Co.*, 140 Ky. 506, 131 S. W. 277; *Construction Co. v. West. U. Tel. Co.*, 163 Cal. 298, 125 Pac. 242; *West. U. Tel. Co. v. Williams* (Tex. Civ. App.) 137 S. W. 148; *Purdom Naval Stores Co. v. West. U. Tel. Co.* (C. C.) 153 Fed. 327. See, also, *West. U. Tel. Co. v. Thompson Milling Co.*, 41 Tex. Civ. App. 223, 91 S. W. 307.

<sup>111</sup> See chapter XVIII.

<sup>112</sup> See §§ 467, 487, and 757.

<sup>113</sup> *West. U. Tel. Co. v. Burns* (Tex. Civ. App.) 70 S. W. 784. See *West U. Tel. Co. v. Turner*, 94 Tex. 304, 60 S. W. 432. See, also, §§ 467, 487.

<sup>114</sup> *West. U. Tel. Co. v. Burns* (Tex. Civ. App.) 70 S. W. 784; *Cherokee Tanning Extract Co. v. West. U. Tel. Co.*, 143 N. C. 376, 55 S. E. 777, 118 Am. St. Rep. 806. See, also, *Fisher v. West. U. Tel. Co.*, 119 Wis. 146, 96 N. W. 545; *Kinghorne v. Montreal Tel. Co.*, 18 U. C. Q. B. 60.

## CHAPTER XXXI

DISTRICT TELEGRAPH COMPANIES AND SUCH AS FURNISH  
"TICKERS"

- § 767. Introduction.  
768. Same continued—duties and liabilities of.  
769. Company furnishing "tickers."  
770. Same continued—duties and liabilities.  
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773. Protection against unfair competition.

§ 767. *Introduction.*—We shall very briefly discuss in this chapter district telegraph companies, and companies furnishing "tickers." District telegraph companies exist in most—if not all—of the large cities, and their business is principally, if not exclusively, to furnish messenger boys for the purpose of carrying parcels, messages and doing other errands when called upon at district stations of the company in the city. There is a distinction between the business purposes of these and ordinary telegraph companies. One is organized for the express purpose of transmitting and delivering news in general for the public, and the other is to transmit news for the public, but the news is generally in regard to employing a messenger of the company to perform message duties and such as is given above. The main purpose of these companies is to furnish these messenger boys, but the telegraphic system is used as a means of obtaining these messengers. It is not necessary to enumerate the many and different services which may be rendered by these messengers; but suffice it to say that almost any commission or service may be performed by them.

§ 768. *Same continued—duties and liabilities of.*—The duties and liabilities of district telegraph companies are the same as those imposed upon ordinary telegraph companies, except in so far as both may be affected by the difference in the nature of their respective businesses as in particular cases.<sup>1</sup> Thus such a company is

<sup>1</sup> *Feiber v. Manhattan Dist. Tel. Co.* (Com. Pl. Gen. T.) 22 Abb. N. C. 121, 3 N. Y. Supp. 116. See, also, *West. U. Tel. Co. v. Toledo* (C. C.) 103 Fed. 746; *Id.*, 121 Fed. 734, 58 C. C. A. 16.

*Municipal control of.*—Under a charter authority to regulate occupations within its limits, a municipal corporation may require one undertaking to transact a messenger business within the city to secure a license and furnish a bond for the faithful performance of duties incident to such business. *Portland v. W. U.*, 75 Or. 37, 146 Pac. 148, L. R. A. 1915D, 260.

*What constitutes undertaking.*—A telegraph company which has, incident to its business, undertaken to furnish messengers to carry notes, packages, and



liable for the loss of a package caused by one of its messengers delivering it contrary to the instructions of the sender.<sup>2</sup> In a case against one of these companies plaintiff hired a buggy and horses and on returning stopped at the office of the district telegraph company and asked for a boy who could drive the horses back to the livery stable. A boy was sent out who took charge of the horses, but owing to his negligence and incompetence, the horses ran away and injured themselves and the vehicle. It was shown in proof that the company had performed similar services for the plaintiff. It was held that the company was liable for the damages thus occasioned, also that, though they were only bailees for hire, the plaintiff could maintain the action to recover such damages.<sup>3</sup>

§ 769. **Company furnishing "tickers."**—We have had an occasion to speak of this subject elsewhere;<sup>4</sup> therefore it shall only be lightly considered at this place. As seen, the ordinary business of a telegraph company is to transmit and deliver all proper news tendered it, after the charges have been paid, but these companies may assume greater duties, and, of course, the liabilities imposed for assuming this extra business is greater. Thus, in many instances, these companies are expressly organized for the purpose of collecting and distributing news, such as market reports and other news. When these extra duties are assumed, the company is not only under obligations to transmit correctly and deliver promptly all news, but it must also collect and distribute accurately and correctly all of such news. For instance, in collecting the market report, the same must be distributed exactly as it is reported on the market, and any deviation therefrom whereby a subscriber suffers loss will be a loss for which the company will be liable. The business of these companies is to furnish each subscriber with an instrument, commonly called a "ticker," by means of which the report is received.

§ 770. **Same continued—duties and liabilities.**—These companies have the same general powers and are subject to the same liabilities as ordinary telegraph companies, the difference between the two being merely the method of doing business.<sup>5</sup> While the measure of the liability of these companies is the same as that of the

similar matter for patrons, transacts a messenger business within the meaning of a municipal ordinance requiring the procurement of a license therefor, although its offer to transact such business states that its sole undertaking is to furnish messengers, and not to deliver the packages. *Portland v. W. U.*, supra.

<sup>2</sup> *American Dist. Tel. Co. v. Walker*, 72 Md. 454, 20 Atl. 1, 20 Am. St. Rep. 479.

<sup>3</sup> *Id.*

<sup>4</sup> See § 429.

<sup>5</sup> *Id.*

ordinary telegraph companies, so far as the nature of the business of the two is the same, yet when the additional assumption of collecting and distributing is undertaken, the liabilities of the former to this extent are greater. In other words, as stated, these companies must exercise the same care and diligence in transmitting the messages as is imposed upon ordinary telegraph companies, and in addition to this duty, they must also collect the news accurately. These companies may also make and enforce reasonable regulations with respect to the use of their "tickers" or "stock indicators" by their subscribers. One of their requirements is, that the subscribers shall not furnish the market reports to non-subscribers. It has been held that this requirement was reasonable and therefore enforceable.<sup>6</sup> In the case cited it was held that the report could not be furnished to a firm of which the subscriber was a member.

§ 771. **Cannot discriminate.**—As it has been elsewhere discussed, an ordinary telegraph company cannot discriminate among those who engage or attempt to engage its services, but it must show the same favors to all who apply to it, after complying with all reasonable regulations.<sup>7</sup> As has also been seen, telephone companies cannot discriminate among their subscribers, but the same privileges must be enjoyed by all alike.<sup>8</sup> The same rule applies to these companies. They are engaged in a public employment, and must therefore treat all their subscribers alike, and not discriminate among them.<sup>9</sup> They may, however, refuse to furnish their instruments to parties who are carrying on, through this means, a gambling house.<sup>10</sup> The law will not force these companies to perform an act which is for an illegal purpose; and should they have contracted to furnish a gambling house with the market report, they may refuse to perform their part of the contract.<sup>11</sup> When the plaintiffs are conducting a gambling house, equity will

<sup>6</sup> *Shepard v. Gold & Stock Tel. Co.*, 38 Hun (N. Y.) 338.

<sup>7</sup> See chapter XI.

<sup>8</sup> See chapter XI.

<sup>9</sup> *Friedman v. Gold, etc., Tel. Co.*, 32 Hun (N. Y.) 4; *Smith v. Gold, etc., Tel. Co.*, 42 Hun (N. Y.) 454; *Metropolitan Grain, etc., Exch. v. Mutual U. Tel. Co.* (C. C.) 11 Biss. 531, 15 Fed. 847; *Bradley v. West. U. Tel. Co.*, 27 Alb. Law J. 363.

<sup>10</sup> See *Cullen v. New York Tel. Co.*, 106 App. Div. 250, 94 N. Y. Supp. 290, pool rooms. See *Ives v. Boyce*, 85 Neb. 324, 123 N. W. 318, 25 L. R. A. (N. S.) 157, not a gambling device.

<sup>11</sup> *Smith v. West. U. Tel. Co.*, 84 Ky. 664, 2 S. W. 483. Compare *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95. Cannot be mandamusd or enjoined. *Bryant v. West. U. Tel. Co.* (C. C.) 17 Fed. 825. See, also, *West. U. Tel. Co. v. State*, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. (N. S.) 153, 6 Am. Cas. 880; *Smith v. West. U. Tel. Co.*, 84 Ky. 664, 2 S. W. 483, 8 Ky. Law Rep. 672.

not compel these companies to furnish them with a "ticker," giving the quotations of prices ruling on the Chicago board of trade, although they are members of that board.<sup>12</sup> If, however, the company is merely the agent of an exchange to communicate the market quotations, the rule would be otherwise. Under these circumstances, the exchange would only be the sender of the reports, with the right to name the addressee, and under no duty to furnish its quotations to the public.<sup>13</sup>

§ 772. **Unreasonable stipulations—unenforceable.**—These, as well as ordinary telegraph or telephone companies, cannot enforce an unreasonable stipulation. Any regulation or stipulation which would be against public policy, or in conflict with the law of the land, or which would give the company an advantage over its subscribers, could not be enforced. If there is a stipulation incorporated in the contract made with the subscriber, which provides that the company may discontinue its services or the furnishing of its instruments to the subscriber without notice, whenever, in its judgment, he has violated the contract, it cannot be enforced on account of its unreasonableness. The company, under such a stipulation, would be sole judge in its own case, and this could never be the case; since the subscriber would be deprived of his rights without due process of law.<sup>14</sup>

§ 773. **Protection against unfair competition.**—The market quotations and other similar news collected by these companies and distributed or disseminated among their subscribers are not within the protection of the copyright laws, yet such news constitute property, and the company will be protected in a court of equity against rival companies which seek to obtain such news of the company without proper authority, and to sell to their customers to the injury or detriment of the former company's services.<sup>15</sup> While the news, before it has been collected by the company, may be free to all who may desire to obtain it, yet, as the company has worked to gather, compile or collect the same, it has a right to the exclusive use of it while in the company's possession.

<sup>12</sup> *Bryant v. West. U. Tel. Co.* (C. C.) 77 Fed. 825. *West. U. Tel. Co. v. State*, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. (N. S.) 153, 6 Ann. Cas. 880.

<sup>13</sup> *Matter of Renville*, 46 App. Div. 37, 61 N. Y. Supp. 549. See, also, *Christie Grain, etc., Co. v. Board of Trade*, 125 Fed. 161, 61 C. C. A. 11, reversing (C. C.) 121 Fed. 608.

<sup>14</sup> *Smith v. Gold & Stock Tel. Co.*, 42 Hun (N. Y.) 454.

<sup>15</sup> *National Tel. News Co. v. West. U. Tel. Co.*, 56 C. C. A. 198, 119 Fed. 294, 60 L. R. A. 805; *Illinois Com. Co. v. Cleveland Tel. Co.*, 56 C. C. A. 205, 119 Fed. 301. See *West. U. v. State*, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. (N. S.) 153, 6 Ann. Cas. 880.



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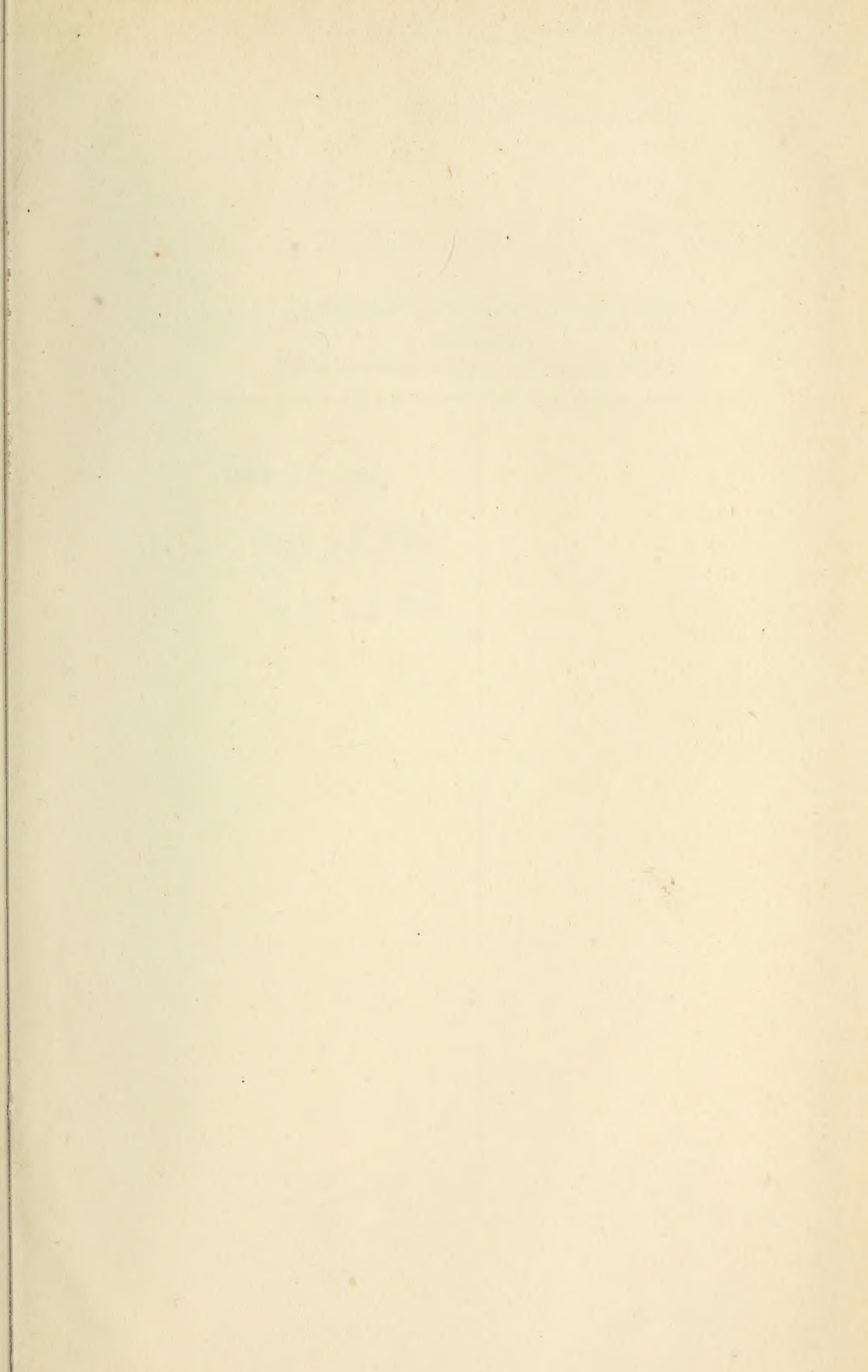
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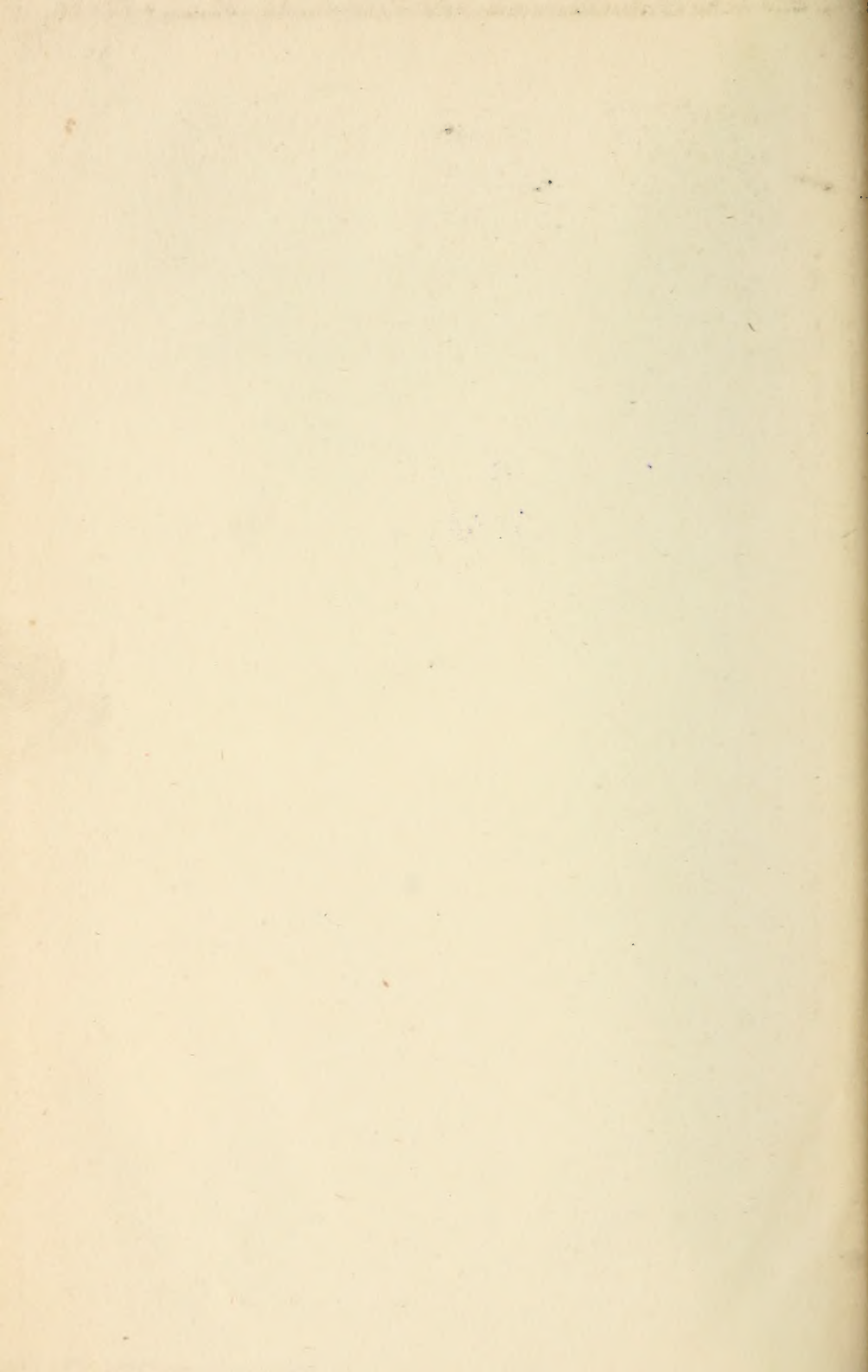
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